Protecting Sunken Warships as Objects Entitled to Sovereign Immunity

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ARTICLE

PROTECTING SUNKEN WARSHIPS AS OBJECTS ENTITLED TO SOVEREIGN IMMUNITY

JASON R. HARRIS*

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The primary purpose of this article is to provide a sufficient legal basis upon which the United States may base its recently reaffirmed policy of protecting sunken warships. This article will illustrate international practices recognizing the important obligation to attach preferential protection to warships using the concept of sovereign immunity.¹

In the closing hours of his presidency, William J. Clinton issued the following Statement entitled “United States Policy for the Protection of Sunken Warships”²:

Thousands of United States government vessels, aircraft and spacecraft (“State craft”), as well as similar State craft of foreign nations, lie within and in waters beyond, the territorial sea and contiguous zone. Because of 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. I believe that the United States policy should be clearly stated to meet this growing concern. Pursuant to the property clause of Article IV of the Constitution, the

¹ For a discussion of protecting sunken warships based on the presence of deceased soldiers and sailors, see Jason R. Harris, The Protection of Sunken Warships as Gravesites at Sea, 7 OCEAN AND COASTAL L.J. (forthcoming 2001).
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 recognizes 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 recognizes 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.

International law encourages nations to preserve objects of maritime heritage wherever located for the benefit of the public. Those who would engage in unauthorized activities directed at sunken State craft are advised that disturbance or recovery of such craft should not occur without the express permission of the sovereign, and should only be conducted in accordance with professional scientific standards and with the utmost respect for any human remains. The United States will use its authority to protect and preserve sunken State craft of the United States and other nations, whether located in the waters of the United States, a foreign nation, or in international waters.

The Statement seeks to protect state craft only, thereby inherently making a distinction between state and non-state craft. Although there are particular reasons to protect warships, some of which are addressed by the Statement, not all of the rationales offered in the Statement justify the distinction between State and non-State vessels.

Furthermore, the Statement attempts to protect sunken warships by stating they should be given “deserving treatment as gravesites,” as objects of “archaeological or historical nature” and to encourage the protection of “maritime heritage.” These explanations alone are not unique to warships.

The Statement apparently affirms Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, where the Fourth Circuit held that Spain did not abandon (either expressly or by implication)

3. Although the difference between state vessels, non-state vessels and the mixed use of state vessels is a challenging issue, it is beyond the scope of this article. This article will assume that “State vessels” include warships.

4. Such as unexploded ordnance and technology secrets, arguments that likely diminish in strength over time as technologies and secrets become outdated and less valuable.

5. 221 F.3d 634 (4th Cir. 2000), cert. denied, (pending at the time the statement was issued), Sea Hunt, Inc. v. Kingdom of Spain, 121 S.Ct. 1079 (2001).
title to two warships, La Galga and the Juno, which sank in U.S. waters in 1750 and 1802, respectively.6

Following the holding of Sea Hunt and the issuance of the Statement, both of which attempt to prevent salvage attempts on sunken warships, the need arises for a well-grounded explanation as to why there is a unique interest in protecting warships not abandoned by the nation of origin. The concepts of sovereign immunity offer such an explanation.

II. SOVEREIGN IMMUNITY

This article addresses one justification for the protection of sunken warships. Specifically, the warship and its contents should retain the privileges of sovereign immunity. These privileges may be asserted against domestic intruders via the assertion of property rights, and against international would-be finders, salvors, and looters based on international law and practice.

While some authors note that U.S. courts have failed to adequately examine why sunken warships are accorded special treatment from a policy perspective,7 there is a moderately well developed body of customary international law that governs the treatment of sunken warships and military aircraft.8 Nonetheless, since “[t]he policy of the United States concerning abandonment of its sunken vessels has not always been consistent,”9 it is necessary to examine past practices by states to determine if any trends or customs have developed regarding the treatment of warships.

A. Domestic Protection of Sunken Warships - Property Versus Sovereignty

1. United States v. California

Although the two are related, protection based on property

6. Id. at 639
7. See, e.g., Jerry E. Walker, A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations, 12 U.S.F Mar. L.J. 311, 312, apparently discarding the cases discussed supra in section IV, B, 3. In United States v. Steinmetz, 763 F. Supp. 1293, 1299 (D.N.J. 1991), aff’d, 973 F.2d 212, 222 (3d Cir. 1992), cert. denied, 507 U.S. 984, the District Court held that “clearly warships are to be treated uniquely. . . and their remains which are clearly identifiable as to the flag State of origin are clothed with sovereign immunity and therefore entitled to a presumption against abandonment”.
rights must be distinguished from protection based on sovereign immunity. Justice Frankfurter's dissent in U.S. v. California\(^{10}\) criticizes the majority for abandoning the distinction between "dominium" and "imperium".\(^{11}\) "Dominium" is the notion of ownership comparable to the law of property. "Imperium," however, invokes the superior rights of the federal government to act as a sovereign in international affairs. These two concepts create an inherent tension or, at least an alternative basis of domestic protection over sunken warships. The two concepts have been applied to sunken warships inconsistently, yet often successfully as demonstrated below.

2. Department Of State Practices

In 1980, James H. Michel, Deputy Legal Adviser of the Department of State, was asked to express the Department's views on the ownership of Japanese vessels that were sunk by United States forces during World War II.\(^{12}\) His response essentially denies any transfer of property rights in U.S. sunken warships due to their resting in foreign waters.

However, Michel's memorandum creates a presumption of non-abandonment for nineteenth and twentieth century vessels but acknowledges that abandonment may be implied in some circumstances.\(^{13}\) This has been interpreted in U.S. v. Steinmetz\(^{14}\) to reflect an inconsistent treatment regarding sunken warships.


The Navy bases its protection of wrecks on the Property Clause,\(^{15}\) Articles 95 and 96 of United Nations Convention on the Law of the Sea\(^{16}\), and established principles of international mari-

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11. See id. The distinction is utilized here to organize the materials that follow in a conceptual manner rather than to affirm a distinction made in the dissent to a landmark case.
13. Id.
15. U.S. Const. art IV, § 3, cl. 2.
time law. The Navy is obligated to protect and maintain historic properties such as shipwrecks under the National Historic Preservation Act. Yet it has been said that sovereign immunity is the *raison d'etre* for the Navy's policy of protection over its ship and aircraft wrecks.

The Navy's view is that the terms "commissioned", "decommissioned", and "stricken" have no relevance to title. A ship without commission is still government property, but is not allocated to particular duties. Striking a ship from Naval records refers to removing the craft from active duty status. A decommissioned or stricken vessel may later be put back into service. Therefore, the distinction while acknowledged, will not be discussed in this article.

4. Property Assertions: Public Versus Private Interests

It is easier and more efficient for a large, economically-sound interest to voice its opinion as to the treatment of its property than it would be for individual citizen-claimants to do so based on their interest in the remains and effects of their relatives aboard. The U.S. Navy is an immense operation with massive resources. Such an organization is more readily able to assert its desire for domestic and international lawmakers to recognize a property right over its sunken vessels. This "highly organized and financially backed" theory of protection helps explain why states are more readily able to assert and retain a property interest in their sunken warships.

Critics have stated that a state owner should retain an interest so as not to impliedly abandon a vessel for a longer time period than a commercial vessel since it is more likely to have the physical, financial, and political means to assert such rights. A counter-argument to the property assertions is that the public owns the property as "taxpayers" and thus should be entitled to

20. Id. at 5.
21. Id. at 6.
the salvage. Such arguments are, however, generally ineffective absent some individualized aim or effect.

English common law provides that title to abandoned property found at sea by British citizens vests in the Crown. The history and development of the state's rights to unclaimed wrecks has been traced to early Roman law. Initially, when goods were cast ashore after shipwreck they were considered to belong to the original owner and any other persons taking possession of the goods were considered thieves. During the Dark Ages, it became customary for lords to seize wreckage of ships that washed ashore and the rights of the owners were defeated by the local feudal lord. This "feudal right of shipwreck" flourished during the Middle Ages.

Over time a distinction developed between types of wreckage. Henry III set out a rule enacted in 1275 by Edward I in the Statute of Westminster that if a man or animal escaped from a shipwreck alive, the vessel and its contents would be held for him for a year and a day. After such time, the property would vest in the Crown. The negative effect of this was that finds were being concealed. As a result, the Crown began to take only one-half of the find to encourage the finder to declare the riches. But by 1836 the finder's rights were reduced to one-third. In conclusion, the roots of U.S. law regarding the assertions to property rights over sunken warships can be traced to a long standing tradition of exercising property rights over its own belongings and those of others when items rested upon its shores or ocean floors.

5. U.S. Vessels in U.S. Waters – The Assertion of the Property Clause in Action

The domestic law surrounding sovereignty of U.S. warships in U.S. waters is well established. "It is well settled that title to property of the United States cannot be divested by negligence, delay, laches, mistake or unauthorized actions by subordinate officials." Yet some inconsistency is apparent. The issue of aban-

25. Id.
26. *Adventusae maris versus wreccum maris*.
27. See Dromgoole & Gaskell, *supra* note 22, at 241-42.
28. Id. at 242-43.
donment, while inexorably tied to the concepts in this section is left for more detailed discussion in other forums.

Early cases holding that the government had abandoned its interests were not uncommon and courts failed to address the special warship status of the vessel. In *Baltimore, Crisfield & Onancock Line Incl. v. United States* and *Somerset Seafood Co. v. United States*, the court held that the U.S.S. Texas was abandoned despite any affirmative act by the government. Subsequent cases further addressed and developed the inaction doctrine. In *Ervin v. Massachusetts Co.*, the court held that the U.S.S. Massachusetts had been abandoned by inaction. Moreover, in *Chance v. Certain Artifacts Found and Salvaged from The Nashville*, the court held that a Confederate warship embedded in Georgia's submerged lands was abandoned in favor of the state. Finally, in *State ex. rel Bruton v. Flying "W" Enterprises, Inc.*, the court held several Confederate blockade-runners (and a Spanish privateer) were abandoned in favor of North Carolina.

Over time the judiciary departed from its reliance on the inaction doctrine. Increasingly, or at least occasionally, courts have found ways to hold that sunken U.S. military property was not abandoned. On January 11, 1863 the U.S.S. Hatteras was sunk after a thirteen-minute battle against the C.S.S. Alabama approximately twenty miles south of Galveston, Texas. The Navy did not attempt to salvage the vessel. On March 25, 1976, the Secretary of the Navy made a formal declaration of abandonment. Pursuant to this declaration, Hatteras, Inc. salvaged items from the vessel. The *Hatteras* Court ruled that the Secretary of the Navy failed to comply with the requirements of the Property Act. The Act requires the Navy to determine if the property has any commercial value, and if so, whether the estimated cost of care would exceed the estimated proceeds from the sale. The court held that there was never a written determination as to the commercial

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30. 140 F.2d 230, 235 (4th Cir. 1944).
31. 193 F.2d 631 (4th Cir. 1951).
32. 95 So.2d 902, 908 (Fla. 1957).
34. 273 N.C. 399, 414 (1968).
35. See *Hatteras*, 1984 AMC at 1098; *International Aircraft Recovery, LLC v. Unidentified Wrecked and Abandoned Aircraft*, 218 F. 3d 1255 (11th Cir. 2000).
37. Id. at 1095.
38. 40 U.S.C. 512 (1949); see also The Property Clause, U.S. Const. art. IV, § 3, cl. 2.
value of the Hatteras prior to declaring the vessel to be abandoned, therefore, the property was inappropriately deemed abandoned.  

The effect of such an unauthorized abandonment of U.S. property is ineffective since such property cannot be divested by negligence, delay, laches, mistake, or unauthorized actions by subordinate officials.

In a recent case, a war plane was “stricken” from the inventory of active aircraft in 1943 but was held to not necessarily have been abandoned. The term “stricken” instead implies a removal from the maintenance and reporting requirements, but does not indicate a final disposition of the aircraft. This case also reaffirms the government’s right to decline salvage.

In Klein v. Unidentified, Wrecked and abandoned Sailing Vessel, a vessel found in Biscayne National Park in 1978 was not entitled to be salvaged since the United States owned the submerged lands in a National Park. A similar result was declared in Lathrop v. Unidentified, Wrecked and abandoned Sailing Vessel, this time in the waters of the National Park at Cape Canaveral. The court noted that possession of abandoned property alone is not sufficient. Instead, a salvor must acquire possession lawfully.

In conclusion, there are a relatively large amount of U.S. statutes and case law dealing with sunken warships, many of which point to the protection of such objects by either property or sovereign immunity concepts. Yet this domestic law alone is not a suffi-

41. International Aircraft Recovery, LLC v. Unidentified Wrecked and Abandoned Aircraft, 218 F.3d 1255, 1257-9 (11th Cir. 2000).
42. Id. at 1259 (quoting Dr. William Dudley, Dir. of Naval History for the U.S. Navy); Kern Copters, Inc. v. Allied Helicopter Serv., Inc., 277 F.2d 308 (9th Cir. 1960).
43. Id. at 1262.
44. 758 F. 2d 1511,1515 (11th Cir. 1985) (involving an English vessel).
46. Id. at 963 (citing to Martha's Vineyard Scuba HQ v. Wrecked and Abandoned Steam Vessel, 833 F. 2d 1059 (1st Cir. 1987)). The doctrine of rejection says that salvors do not have the inherent right to save a distressed vessel (citing to Jupiter Wreck, Inc. v. Abandoned Sailing Vessel, 691 F. Supp 1377 (S.D. Fla. 1988)). In addition, a salvage award may be denied if a salvor forces its services on a vessel despite a rejection of the services (citing to Platoro Ltd., Inc. v. Unidentified Remains, 695 F. 2d 893(5th Cir. 1983)). Id. at 964. Furthermore, the doctrine of constructive rejection that allows a state to reject a salvor's services. See Platoro, 695 F. 2d at 902.
cient basis to assert the broad protection afforded by the Statement which would apply internationally. Instead, due to the traveling nature of a warship, international case law and practice must be examined.

B. Sovereign Immunity as Against Other Nations

1. UNCLOS – Generally

The doctrine of warship immunity was first codified internationally in the 1910 Brussels Salvage Convention.47 Warships are entitled to immunity from non-flag states via UNCLOS Article 32 entitled “Immunities of warships and other government ships operated for non-commercial purposes.”48 Article 95 states that “[w]arships on the high seas have complete immunity from the jurisdiction of any state other than the flag states.”49 Article 96 states that “ships owned or operated by a state and used only on government noncommercial service shall, on the high seas, have complete immunity from the jurisdiction of any state other than the flag state.”50

2. Is a Sunken Warship Entitled to Sovereign Immunity?

A “warship” is defined in 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.”51

It has been argued that a sunken warship loses its immunities upon sinking as it is no longer under the command of an officer, nor does a disciplined crew man it; warships may only be

48. UNCLOS, supra note 16, 21 I.L.M. at 1276.
49. UNCLOS, supra note 16, 21 I.L.M. at 1288.
50. Id. Warships are singled out in various other parts of UNCLOS: complete immunity on the high seas (95), may seize pirate vessels (107), may exercise the right to visit on the high seas (110), may exercise the right of hot pursuit (111), are exempt from compliance with protection and preservation of the marine environment (236). There is a distinction between a “warship” as defined in Art. 29 versus a vessel owned and operated by the state using it for non-commercial purposes. This distinction, although an important one, is beyond the scope of this paper.
51. UNCLOS, supra note 16, 21 I.L.M. at 1275-76.
state organs while they are manned, are under the command of a responsible officer, and are in service of the state; and a shipwrecked warship, abandoned by her crew, can no longer be a state organ.

A domestic case consistent with the view of loss of sovereign immunity is Baltimore, Crisfield & Onancock Line, Inc. v. United States. In holding that a battleship was no longer U.S. property, the court reasoned that sunken vessels cannot legally be classified as vessels since they are not capable of navigation. Some authors have concluded that this means a warship could thus lose its immunity. These opinions, however, do not account for alternative rationales unique to the protection of warships, such as sovereign immunity and the aspects regarding the proper burial of soldiers.

Other authors have taken the opposite view arguing that the U.S.'s international practice and policy regarding its sunken warships has been one of non-abandonment. While the question of coverage under current international codified law is debatable, it is nonetheless clear that there are other more universal and deeply rooted fundamental reasons to protect sunken warships because of human remains that may exist therein.

52. 1 Oppenheim's Int'l Law §560 at 1165 (9th ed. 1996). A subsequent footnote indicates, however, that a warship wreck nonetheless remains government property. Id. at n. 2.

53. Luigi Migliorino, The Recovery of Sunken Warships in International Law, in Essays on the New Law of the Sea 244, 251 (Budislav Vakas ed., 1985) (citing a speculation and other contrary opinions in Lucius Caffi, Submarine Antiquities and the International Law of the Sea, 13 Neth. Y.B. Int'l L. 3, at 22 n. 74(1982)). However, Migliorino hedges from the initial statement about losing immunity to a fall-back position that creates a distinction between the right to recover a warship and the right to dispose of the warship. This right to dispose of the warship includes the right to convert ownership or pass title to a warship. Id. at 254.

54. 140 F.2d at 230 (4th Cir. 1944).

55. Id.

56. Walker, supra note 7, at 352; Anastasia Strati, The Protection of Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea, 221 (Shigeru Oda, ed. 1995). A vessel ceases to be a ship regardless of its status as state-owned, once it is sunken, thus it is subject to flag state jurisdiction and has lost immunity. Caffi, supra note 52, at 22 n. 74. A floating "assemblage" in the form of a boat abandoned on the high seas is not recognized internationally as a ship unless there is evidence that the state intends to continue to use the assemblage for navigation. See Caffi, supra note 52, at 25 n.81.

57. State vessels and aircraft are entitled to sovereign immunity whether or not they are sunken. Roach, supra note 8, at 351.

58. See Harris, supra note 1.
3. The Travelling Sovereign Entity – Heralds, Ambassadors, Marching Armies, and Bank Accounts

This section will explore a basis of protecting sunken warships by comparing the status of heralds, ambassadors, marching armies, and certain international bank accounts to sunken warships.

During medieval warfare, heralds played an important role as evidenced in Shakespeare’s Henry V. The heralds were experts in the code of chivalry who served as national representatives by carrying messages between warring states. The special role of ambassadors was acknowledged in Shakespeare’s Henry V and Henry VI. Because ambassadors were responsible for negotiating between nations, their safe passage was essential. Ambassadors, like heralds, have traditionally been entitled to immunity.

In The Schooner Exchange v. McFaddon, the French, acting under the order of Napoleon, seized and converted John McFaddon’s vessel. During a voyage, in order to avoid poor weather conditions, the now-French vessel entered the port of Philadelphia. While in port, the vessel was arrested by McFaddon. The United States, through Attorney General Pinkney, sided with France to argue that a U.S. citizen cannot successfully ask the court to order the arrest of a foreign warship. Chief Justice Marshall agreed.

Pinkney’s most convincing argument related to the parallels drawn between a warship and an ambassador. An ambassador is generally exempt from ordinary jurisdiction. In many instances, problems or violations would result in the ambassador being asked to leave the state with a referral to the courts of his home country. The immunities afforded to ambassadors, claimed Pinkney, stem from the implied assent that Grotius deemed conventional and Rutherford deemed to be the natural law of nations. Pinkney then argued that a warship is not ordinary property of a nation, but is national property, comparable to an

59. THEODOR MERON, HENRY’S WARS AND SHAKESPEARE’S LAWS 173-4 (1993) (noting the herald was protected through an ancient tradition). Heralds would carry white wands to signify one of the only recognized immunities in warfare. Id.
60. Id.
61. Id.
62. 11 U.S. 116 (1812).
63. Id. at 117-18.
64. Id. at 118.
65. Id. at 132.
66. Id. at 133.
army passing through another territory. 67

Marshall determined that although generally a sovereign never cedes its jurisdiction, there are limited exceptions based on the voluntary restraint of the exercise of the state’s jurisdiction. 68

First, there is no immunity when an individual voluntarily enters another jurisdiction. At that point, the individual is generally subject to the foreign nations’ laws. 69 Here, the waiver of immunity appears to be by the home state. Second, a sovereign cedes jurisdiction if it permits foreign troops to pass through the sovereign state. 70 Such grants of permission imply a waiver or temporary license of the jurisdiction, the revocation of which would result in serious detriment to further communications and trusts between the States.

Finally there is ‘the immunity which all civilized nations allow to foreign ministers.” 71 Marshall offers two rationales as to why a foreign minister is given immunity. First, a foreign minister is considered “in the place of the sovereign he represents or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose Court he resides.” 72 Marshall reasoned that without such an exemption or restraint on the exercise of sovereignty, nations would fear sending foreign ministers to other nations in an attempt to maintain peaceful relations. In addition, the minister would “owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission.” 73

In rejecting McFaddon’s claim, the Court afforded immunity on the basis that warships affect the “power and dignity” of the flag state. 74 To allow arrest of a foreign warship then constitutes a challenge to the nation. Such unfriendly attitudes are impractical, particularly here when the French warship was in port due to poor sailing conditions. The same rationale can easily be applied to imperiled or sunken warships. Marshall concluded that warships entering the port of another state are exempt from the

67. Id. at 134.
68. This restrictive action is comparable to the restraints in warfare and the allegiances of soldiers. See Harris supra note 1.
69. The Schooner Exchange, supra note 62, at 137.
70. Id. at 139.
71. Id. at 138.
72. Id.
73. Id. at 139.
74. Id. at 144.
power of its jurisdiction. This case represents an example of an international limitation on the exercise of sovereignty.

Other nations have followed the reasoning from *The Schooner Exchange*. In *The Prins Frederick*, an English court denied a salvage award for services provided to a Dutch warship. The court cites *The Schooner Exchange* in support of its argument, but fails to cite any English precedent. Comparable cases had arisen regarding Spanish warships, but the Spanish voluntarily relinquished title. The court held that salvage only applies to commercial vessels. The root of treating sovereign vessels differently stems from Roman law, which distinguished from commercial articles and those connected with the public service of the state. Roman law only permitted a lien to attach to commercial goods.

The court justified the differential treatment of sovereign vessels on the basis that the militaries of different nations are subject to different regulations. "[T]he relations between commanders and seamen of ships of war are very distinct from those of persons composing the crews of merchant vessels." The same analogy may be drawn in modern times relating to differences between the order and methods of command in the U.S. Navy and the U.S. Merchant Marines. The missions are different (though related) and many differences exist between the two that illustrate the distinct goals of each organization.

The court drew the same analogy to foreign principles such as ambassadors or other figures exercising public functions in a foreign state. A similar privilege was noted for military forces passing through a foreign nation by consent. The court notes that there is a "transient connection" of the flag state to the foreign state. The rationale was offered that a mutual preservation of rights is essential to the defense and independence of sovereign

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75. *Id.* at 145-46. The immunity only applies to warships or vessels "engaged in national pursuits." *Id.* at 144. Thus there is a "clear distinction" between the rights of private trading vessels and public armed ships that make up the military force of a nation. *Id.* at 143.

76. 2 Dods. 451, 482 (1820).

77. *Id.* at 463.

78. *Id.* at 473.

79. *Id.* at 455.

80. *Id.*

81. *Id.* at 457.

82. One example is that a merchant vessel pays by tonnage and a warship pays by length overall so as not to give away what the warship is carrying.

83. *The Prins Frederick*, supra note 76, at 458.

84. *Id.* at 459.
states.\textsuperscript{85} The court acknowledged that warships are essential to the very security of the state and if their service could be interrupted by the arrest of a foreign nation, their purpose would be defeated.\textsuperscript{86} Every sovereign has an "interest and duty...to maintain unimpeached its honor and dignity; and no attack upon these can be suffered with any due regard even to its safety."\textsuperscript{87} If this exception of coastal state sovereignty were not made, it would be necessary for the warship (or, in the case of a sunken warship, other warships) to engage in hostile measures to prevent the salvage of the vessel to avoid jeopardizing the nation's integrity. Such unnecessary hostility should not be tolerated on today's relatively more heavily regulated seas. Instead, the court seems to hint that a better way to earn money from salvage efforts is to petition the flag state for a salvage award.

Subsequently, in \textit{The Constitution},\textsuperscript{88} the English Admiralty court ruled that the English steam-tug, the Admiral, was not entitled to a salvage award for services provided to the Constitution, a US frigate grounded near Swanage. The court decided that the Constitution was not subject to England's jurisdictional arrest powers. On January 28, 1879, John Welsh, Minister of the United States, stated in a letter to the British Foreign Office, that the United States would not recognize the jurisdiction of High Court of Justice in the case.\textsuperscript{89} Subsequently, the English court heard arguments by the U.S. government as a matter of courtesy. The U.S. position was that there should be no English jurisdiction in this case due to the doctrines pronounced in \textit{The Schooner Exchange}.\textsuperscript{90} In agreeing with the U.S. position, the court went on to clarify its prior ruling in \textit{The Charkieh},\textsuperscript{91} which involved a non-sovereign Egyptian vessel. Sir Robert Phillimore concluded that it would be improper to allow a warship to be subject to the jurisdiction of a foreign court.\textsuperscript{92}

More recently, in \textit{Weilamann v. Chase Manhattan Bank},\textsuperscript{93} a U.S. court ruled that foreign bank accounts held in the U.S. by a

\begin{itemize}
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.} at 468.
\item \textsuperscript{87} \textit{Id.} at 472.
\item \textsuperscript{88} \textit{The Constitution}, 48 P.D. at 13 (1879).
\item \textsuperscript{89} \textit{Id.} at 13.
\item \textsuperscript{90} \textit{See} 11 U.S. at 116.
\item \textsuperscript{91} 8 L.R.-Q.B. 201 (1873).
\item \textsuperscript{92} \textit{The Constitution}, 48 P.D. at 14.
\item \textsuperscript{93} \textit{Weilamann v. Chase Manhattan Bank}, 192 N.Y.S. 2d 469 (1959).
\end{itemize}
sovereign state are immune from attachment. In this case, Wielamann sought attachment of two USSR bank accounts held by Chase Manhattan Bank. The court deferred on such international interests to avoid embarrassing the executive branch. The court concerns itself solely with the position taken by the State Department. This position is to respect the immunity of the foreign nation’s bank accounts. The court held that it would not assume jurisdiction over a foreign country or its property in a manner antagonistic to U.S. policies.

Historic case law indicates that state property remains state property unless expressly relinquished or captured. If the property is identified as foreign state property, there is little doubt that the salvor has the responsibility to turn the items over to the proper owners.

The protection of warships based on sovereign immunity is inherently more deeply entrenched and deeply rooted than is protection for financial bank accounts. Therefore, the United States is justified in taking the position that its sunken warships are entitled to protection based on their retention of sovereign immunity.

4. Generally Recognized Ways to Lose Sovereign Immunity

It is appropriate to point out that there are certain generally recognized ways that sovereign immunity can be compromised under international law. First, under international law, sovereign immunity may be lost by the capture of a warship during battle but before actual sinking. Second, sovereign immunity may be relinquished by international agreement. Finally, sovereign

94. Id. at 471. Thus offering insight as to why the President may have issued the Statement - knowing of the tendency by the judicial branch to defer to the executive branch regarding matters of international concern, it was likely that the Supreme Court would defer to the executive’s international policy decision to affirm Sea Hunt.

95. Id. at 473.

96. Id. at 472. This judicial policy affords insight as to why the 4th Circuit opted to follow the U.S. Navy’s longstanding policy of granting sovereign immunity to warships.

97. The Constitution, 48 P.D. at 39; The Prins Frederik, 2 Dods. at 482.

98. THEODORE D. WOOLSEY, AN INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW 73 (1879).

99. An example involves the Russian vessel, the Admiral Nakimov discussed supra section II B-5(c). See also Neyland, supra note 17, at 4-5.

immunity may be lost by express abandonment, gift or sale.\textsuperscript{101} These specific methods imply that there is a need to recognize specific ways to prevent the loss of sovereign immunity.

5. Practices by Nations With Respect to Warships

The Department of State has asserted that non-abandonment by the mere passage of time for sunken warships has become a well-established international practice and that absent actual capture, there can be no loss of title to a warship.\textsuperscript{102} Although there is arguably no restriction on coastal state jurisdiction over sunken warships, in practice, coastal states frequently request flag state permission before recovering sunken warships. Such requests, however, are generally denied.\textsuperscript{103}

There has been an international distinction between the laws of "capture" as applied to warships versus non-warships. Once a warship is "captured,"\textsuperscript{104} the capturing state acquires physical possession plus an immediate transfer of title. Notably, one Attorney General Opinion [hereinafter "Opinion"] dated March 29, 1900 states the contrary view. The Opinion would allow the U.S. to claim title to Spanish wrecks on the coast of Cuba.\textsuperscript{105} The Opinion was prefaced as suggestive rather than being a formal opinion from which to guide subsequent action.\textsuperscript{106} However, the Opinion called for in that matter did not require a decision on ownership of the vessels and no authorities were cited for the Statement.\textsuperscript{107} Title to non-warships, however, is acquired only through a determination by a prize court.\textsuperscript{108} Therefore, sinking, absent capture of

\begin{footnotesize}
\begin{enumerate}
\item Atomic Bomb testing at Bikini and Kwajalein Atoll. \textit{See also} Neyland, \textit{supra} note 17, at 4-5.
\item For example, in the War of 1812, the United States relinquished title to the Hamilton and the Scourge. \textit{See} Neyland, \textit{supra} note 17, at 4-5; \textit{see} Roach, \textit{supra} note 8, at 351. There are many U.S. provisions regarding when it can divest itself of title. \textit{See}, e.g., 10 U.S.C. 7305-6, 7545; 40 U.S.C. 484(e); 32 C.F.R. 172, 736; 46 U.S.C.A.P.P. 1158.
\item Leich, \textit{supra} note 12, at 1005. This is, of course, subject to doubt. Others have argued that the custom that a sovereign never abandons their vessels is of recent origin. David J. Bederman, \textit{The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal}, 30 J. MAR. L. & COM. 331, 337 n. 33 (1999).
\item For greater discussion, \textit{see} Migliorino, \textit{supra} note 52, at 253.
\item Generally requiring physical possession plus intent. \textit{See} Leich, \textit{supra} note 12, at 1000 (citing \textit{The Grotius}, 13 U.S. (9 Cranch) 229 (1815)).
\item 23 Op. Att'y Gen. 76, 78 (1900).
\item \textit{Id.} at 77.
\item Leich, \textit{supra} note 12, at 1002.
\item \textit{Id.} at 1001 (citing 2 L. Oppenheim, \textit{INTERNATIONAL LAW: DISPUTES, WAR, AND NEUTRALITY} 474-75 (7\textsuperscript{th} ed. 1952)); 3 C. Hyde, \textit{INTERNATIONAL LAW CHIEFLY AS
a belligerent vessel, does not grant title to the enemy.\textsuperscript{109}

However, belligerents may salvage a vessel or its artifacts while hostilities continue.\textsuperscript{110} But following termination of hostilities, the sunken vessel and remains of the crew are entitled to special respect as war graves and should not be disturbed.\textsuperscript{111} Subsequently, the flag state is entitled to use all lawful means to prevent unauthorized disturbance of the sunken vessel.\textsuperscript{112} This section explores, though does not necessarily exhaust, incidents of international practice regarding the treatment of sunken warships.

\textbf{a. U.S. Vessels in Non-U.S. / Foreign Waters}

The United States has been fairly consistent in its response to foreign requests to salvage U.S. warships in foreign waters. Although the U.S. policy is one of non-abandonment, coastal states may, when a foreign vessel is sunk within its waters, nonetheless be entitled to restrict access to the site.\textsuperscript{113} Scholars argue that beyond coastal state waters, the only state that should be allowed to regulate access is the flag state.\textsuperscript{114} Because the coastal state policy may be unknown until an incident occurs, it becomes important to look at past practices by the United States and other nations.

United States policy has been exemplified in several situations. In 1908, the Cuban government asked the United States as to the status of if its rights to warships, including the Maine, sunk in Cuban waters during the Spanish-American War. The United States responded that it retained its proprietary rights over the vessels.\textsuperscript{115}

In a telegram from the Secretary of State to the Ambassador

\textsuperscript{109} See Roach, supra note 8, at 351-52.

\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{112} Id. at 352; see Steinmetz, 973 F.2d at 212; see also International Aircraft Recovery, L.L.C. v. Unidentified Wrecked and Abandoned Aircraft, 218 F. 3d 1255, 1261 (11th Cir. 2000).

\textsuperscript{113} Roach, supra note 8, at 352.

\textsuperscript{114} See id.

in Japan on May 6, 1938, the United States rejected an offer from the Japanese Foreign Office to salvage the U.S.S. Panay indicating that there is "no authority in law for acceding in any case to such a request".\textsuperscript{116} The United States Department of State informed the American Embassy at Port-of-Spain, Trinidad, that the United States retained title to vessels it owned at the time of their sinking and that salvage required consent.\textsuperscript{117} The Australian Government has also been denied its request to recover a U.S. submarine sunk in the Sydney Harbour during WWII.\textsuperscript{118}

\textbf{b. Foreign Vessels in U.S. Waters; Spain's Peculiar Practices}

In \textit{Sub-Sal, Inc. v. The Debraak},\textsuperscript{119} a Delaware court held that a British Brig-of-war had been abandoned despite no express renunciation. With the exception of this British-flag warship, most litigation involving foreign warships in U.S. waters have involved Spanish wrecks.

Spain's history of claiming sunken warships is inconsistent at best. Spain has generally been reserved about asserting title to its shipwrecks.\textsuperscript{120} For instance, Spain did not claim title to the Girona, found in 1967, nor another vessel thought to be part of the Spanish Armada, found in 1985 off of the Irish coast.\textsuperscript{121}

Spain has failed to claim numerous warships and commercial vessels lost in U.S. waters prior to \textit{Sea Hunt}. Among these non-claims is the Nuestra Señora de Atocha, which sank in 1622, during a hurricane off of Florida. The vessel's fate resulted in the legendary finds of Mel Fisher and large amounts of salvage litigation.\textsuperscript{122}


\textsuperscript{117} Leich, supra note 12, at 1004 (citing Secretary of State Rusk to American Embassy, Port-of-Spain, Trinidad, Airgram, No. A-27, April 29, 1965).


\textsuperscript{120} Dromgoole & Gaskell, supra note 22, at 229.

\textsuperscript{121} Walker, supra note 7, at 337-38.

\textsuperscript{122} Fla. Dept. of State v. Treasure Salvors, 621 F.2d 1340 (5th Cir. 1980). For examples of other abandoned Spanish warship wrecks, see, e.g., Marx v. Guam, 866 F. 2d 294 (9th Cir. 1989); Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 525 F. Supp. 186 (S.D. Fla. 1981); Platoro Ltd v. Unidentified Remains of a Vessel, 614 F.2d 1051 (5th Cir. 1980); Lathrop v. Abandoned, Wrecked and
On January 11, 1965, the Spanish Ambassador wrote a letter to the United States indicating that Spain may abandon its treasure ships of the 1715 Pate Fleet lost off of the Florida coast. The letter, however, did not address title to warships. Most recently, *Sea Hunt* held that Spain retained title to La Galga and the Juno, which sank off of the coast of Virginia. Spain’s argument for protection, however, was supported, if not initiated, by the U.S. Therefore, Spain’s practices regarding protecting its sunken warships have been peculiar and its actions with respect to future discoveries are unpredictable.

c. *Foreign Vessels in Non-U.S Waters*

Many foreign nations follow the U.S. policy against abandonment of warships. However, foreign nations do not give warships universal treatment.

The British torpedoed the German’s U-859 submarine in the Strait of Malacca and salvors subsequently fought for salvage rights. The Singapore High Court ruled that there was no abandonment by the German government. A Norwegian court faced a similar issue over the German submarine U-76 that sank in 1917 near Norway. The Court held that the rights of a state over its sunken warships do not lapse by mere passage of time.

Additionally, in 1980, the Soviet Union protested Japanese salvage of the “Admiral Nakhimov.” On May 27, 1905, the warship sank in Japan’s territorial waters in the Battle of the Tsushima during Russo-Japanese War. The Japanese position was that the vessel had been captured before the vessel sank. The Director of Legal Affairs Division of the Treaties Bureau explained that the Japanese Naval warships, the S.S. Soadomaru

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124. *See generally Sea Hunt*, 221 F. 3d 634.
128. 29 *ANN. REV. OF JAP. PRACTICE* 185 (1986).
and the S.S. Shiranui, found the Russian ship hoisting a white flag and with no intention of fighting. The Sadomaru rescued the crew and boarded the vessel to raise the Japanese flag. Therefore, the Japanese were of the opinion that they had successfully captured the Admiral Nakhimov before it sank.\textsuperscript{129}

Russia took the position that international law granted complete immunity to sunken warships.\textsuperscript{130} Although the Russian position is quite clear, it was inapplicable in this case because the vessel had been “captured.” There does seem to remain the question of whether the vessel was sufficiently sunken at the time it was allegedly “captured,” such that the vessel could not truly be claimed in the name of Japan, particularly because the bow was water-logged and the crew was escaping the vessel.\textsuperscript{131}

Items recovered from the Japanese warship, Awa Maru, that sunk in Chinese territorial waters during WWII were deemed property of Japan.\textsuperscript{132} Japan maintains the position that state vessels and their associated artifacts, whether they are sunken or not, remain entitled to sovereign immunity.\textsuperscript{133}

England's Ministry of Defence claims title to all sunken vessels unless sold. The British warship H.M.S. Birkenhead sank in South Africa’s territorial sea in 1852 while transporting troops and possibly large amounts of gold.\textsuperscript{134} South Africa permitted salvage of the vessel over British opposition.\textsuperscript{135} The conflict was resolved through an agreement by the nations to share any gold found.\textsuperscript{136} A similar agreement was reached through a series of correspondences between Great Britain and Italy to resolve the salvage of the H.M.S. Spartan, which sank in Anzio Bay in 1944.\textsuperscript{137}

The British frigate Lutine (originally a French vessel claimed by Britain as a prize of war) sank off the coast of the Netherlands in 1799. The Dutch claimed title to the vessel over Lloyd's of London. In 1857, the dispute was settled and each party received

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\textsuperscript{129} \textit{Id.} at 186.
\textsuperscript{130} \textit{Id}.
\textsuperscript{131} \textit{Id.} at 187.
\textsuperscript{132} Walker, \textit{supra} note 7, at 338.
\textsuperscript{133} Roach, \textit{supra} note 8, at 351.
\textsuperscript{134} Walker, \textit{supra} note 7, at 336.
\textsuperscript{135} \textit{Id.} at 336.
\textsuperscript{136} See Exchange of Notes Constituting Britain and Northern Ireland and the Government of Italy regarding the Salvage of the H.M.S. Spartan, Rome, Nov. 6, 1952, 158 U.N.T.S. 432 (1952); see Dromgoole & Gaskell, \textit{supra} note 23, at 337 n. 100-01 (referring to War Graves and National Monuments Act (South Africa, 1969)).
\textsuperscript{137} Exchange of Notes Agreement Between U.K.-Italy, 158 U.N.T.S. 432 (Nov. 6, 1952); see Walker, \textit{supra} note 7, at 336.
\end{flushright}
half of the gold bullion found.¹³⁸

Finally, the Netherlands have agreed to transfer title of its vessels, sunk off the coast of Australia, in exchange for Australia's recognizing that the Netherlands has some interest in articles recovered from the vessel.¹³⁹ It appears that many nations, despite a lack of an official Statement such as that asserted by the U.S., have nonetheless adopted the same or similar provisions by practices involving sunken warships. As technological capabilities increase among other nations, it is likely that these practices will become more prevalent, and a more sufficient body of customary law may be established.

6. Incidental U.S. Misbehavior – Project Jennifer

The United States' own activities concerning foreign warships have not been entirely consistent with its newly declared Statement. In 1968 the United States received reports of a large Soviet convoy searching the Pacific Ocean.¹⁴⁰ It then examined tape recordings made by underwater sound sensors on the ultra-secret research ship Mizar and discovered a noise indicating an underwater explosion, apparently caused by a spark that ignited gasses trapped in the hull of the submarine.¹⁴¹ After the Soviets ended their two-month search for the vessel, and during the next seven years, the Soviets failed to search for the submarine.¹⁴² Meanwhile, the United States eventually discovered that the Soviet submarine was approximately 750 miles northwest of Hawaii.¹⁴³

The United States then began covert operations to recover the vessel in an operation that has been compared to “a fanciful blend of James Bond and Jules Verne.”¹⁴⁴ The efforts involved the Central Intelligence Agency (“CIA”) and the assistance of eccentric billionnaire Howard Hughes, who had various ties and interests in CIA operations.¹⁴⁵ A 618 foot long, 115.5 foot beam, 36,000 ton vessel was built with the aid of Global Marine Inc.¹⁴⁶ The Glomar Explorer, as she was known, had the publicized purpose of mining

¹³⁸ Dromgoole, supra note 22, at 337 n. 103.
¹³⁹ Agreement Concerning Old Dutch Shipwrecks, Netherlands-Australia, Aust. TS No. 18 (1972) (appended as Schedule 1 to Australia's Historic Shipwrecks Act (1976)); see Dromgoole, supra note 22, at 228-9, n. 102.
¹⁴⁰ Eustis, supra note 47, at 177 n. 1.
¹⁴¹ The Great Submarine Snatch, TIME, March 31, 1975, at 20.
¹⁴² Eustis, supra note 47, at 183.
¹⁴³ Id. at 177 n. 1.
¹⁴⁵ TIME, supra note 141, at 20.
¹⁴⁶ Id. at 21.
valuable manganese nodules. The true mission of the vessel somehow remained a secret despite the theft of Hughes' secret documents including a memo relating to his participation in Project Jennifer. Jacques Cousteau, however, remained suspicious of the activities since it was known that Hughes was not going to make a large profit from the operation, and that "Howard Hughes does not involve himself in uneconomic undertakings." It was speculated that Hughes' incentive in the operation was to become untouchable by the U.S. government in exchange for his assistance in the covert operation.

The elaborate efforts to disguise the operation seem to indicate at least apprehension by the United States that the recovery project was in violation of international law. This indicates that the United States has never retreated from its position that warships remain the property of the flag state. Instead, it merely shows the United States, when it believes national security is a greater factor, is willing to bend international and its own stated policy.

In 1974 the United States attempted to raise the wreck from 17,000 feet. During the attempt, the cables rattled due partly to the water pressure while raising the vessel, which caused the vessel to break. The aft two-thirds of the vessel (including the conning tower, missiles, and the code room) fell back to the seabed.

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148. Time, supra note 141, at 26. It was speculated that the robbery was a set-up by either Hughes or the CIA. Id.
149. Id. at 26.
150. Id. at 27 (quoting former FBI agent Robert Maheu).
152. This is comparable to the principles in criminal justice that just because a law is occasionally broken (i.e. - murders do occur) does not mean that the law itself does not exist (i.e. - there are still laws that prohibit and likely effectively deter the act of murder) An incidental violation of the law should not necessarily be cited to prove that the law itself does not exist. The United States' conduct in Project Jennifer has been criticized by many authors as being in violation of international law and creating a loss in trustworthiness in the United States, (see generally Rubin, supra note 150, Collins, supra note 118), not as having created a new international law. Amidst Project Jennifer, the CIA came under investigation for various alleged violations including alleged involvement in political assassinations of foreign officials, unauthorized investigations of domestic figures and harassment of ideological leaders of factional groups within the United States. Collins, supra note 117, at 434 n. 12. Some expected President Ford to have contemplated revamping the CIA chain of command and expected CIA director William Colby to be replaced. Alpern, supra note 143, at 32.
153. Eustis, supra note 47, at 177 n. 1.
and the remaining one-third was successfully salvaged.\textsuperscript{154} Although no nuclear missiles or coding information were apparently discovered, several bodies were found in the wreckage.\textsuperscript{155} However, no official inventory was ever taken.\textsuperscript{156}

The United States was aware that it would raise several Soviet bodies from the wreck and prepared for what it deemed to be proper arrangements. The Glomar contained cooling facilities that could hold up to one hundred bodies. In what must have certainly been an odd site, the United States performed a "bizarre ceremony" consisting of a rendition of the Soviet national anthem over a loudspeaker while a funeral service was read in Russian and English.\textsuperscript{157} At the same time, a CIA cameraman filmed the burial at sea in a sound-and-color motion picture.\textsuperscript{158} Ten bodies were recovered. A source assisting in the peculiar operation stated that "it was simply our feeling that we should not be in a position of being accused of disrespect for the bodies of Russian seamen."\textsuperscript{159} The question remains as to why the cooling facilities were necessary if the bodies were to be buried at sea.

Project Jennifer was the first salvage attempt of a foreign military vessel sunk in international waters.\textsuperscript{160} This is likely due to the incapability prior to this incident to salvage a vessel in such extensive depths. Technology has clearly altered the possibilities opportune to violating what was once a clearly stated international rule of law. Project Jennifer has gone "largely ignored" due not only to Russia's lack of protest while the United States carried on the operation,\textsuperscript{161} but also because of the domestic scrutiny surrounding the CIA's alleged improprieties.

One interpretation is that the rules of sovereign immunity of warships do not apply in certain situations. Among these are removal when obstructing navigable waterways within their internal waters or territorial sea, and legitimate self-defense and espionage activities.\textsuperscript{162} A source in the French Foreign Ministry was quoted to say that the incident will have "no impact on inter-

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\textsuperscript{154} Time, \textit{supra} note 141, at 25.
\textsuperscript{155} Eustis, \textit{supra} note 47, at 177 n. 1.
\textsuperscript{156} Collins, \textit{supra} note 118, at 434 n. 9.
\textsuperscript{157} Alpern, \textit{supra} note 144, at 31.
\textsuperscript{158} Id.; Time, \textit{supra} note 141, at 25.
\textsuperscript{159} Alpern, \textit{supra} note 144, at 25.
\textsuperscript{160} Collins, \textit{supra} note 118, at 435 n. 18.
\textsuperscript{161} Likely due to embarrassment for not having the technology to conduct the operation. See Id. Though they later protested via proposals to the 1982 UNCLOS. See Harris, \textit{supra} note 1.
\textsuperscript{162} Leich, \textit{supra} note 12, at 1005, (citing various articles concerning Glomar,
national relations because the CIA was simply doing its job according to the rules of the game."  

State Department lawyers initially disagreed over whether a warship could only be recovered by its own State. Those favoring recovery by other states noted that the Soviet Union had recovered several warships belonging to other states. Navy lawyers protested the operation, but the State Department rebutted that the Russians had salvaged several military vessels belonging to other countries. The Soviets have taken a position similar to that of the United States, namely that there can be no abandonment of State property without explicit renunciation of title.  

III. CONCLUSION  

Due to modern technology, the likelihood that more sunken warships will be discovered has increased. This article attempts to demonstrate that the United States’ position has been that such vessels are entitled to protection.  

One theory that would allow a flag state such as the United States to protect its sunken warships is the assertion of sovereign immunity over the warship. As discussed, international state practice has occasionally varied, but has been generally consistent with the concept of protection. However, the occasional inconsistent treatment throughout history has been apparent, but criticized, as evidenced by domestic case law and Project Jennifer.  

In conclusion, the notions of sovereign immunity articulated in this article demonstrate why the Statement is justified in allowing the United States to assert protection over its sunken warships. Still, other more well-entrenched concepts of protection should be explored and asserted to reaffirm the United States’ position of protecting sunken warships as asserted in the Statement.

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163. Alpern, supra note 144, at 24.  
164. Id. at 25.  
165. Id. at 29.  
166. A. Volkov, Maritime Law, 33-34 (1969); see Eustis, supra note 47, at 185 n. 53.