

Legal Status of Sunken State Vessels and Sovereign Immunity

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Abstract

The entry into force in 2009 of the UNESCO Convention on the Protection of Underwater Cultural Heritage (hereinafter referred to as 'UCH Convention') adopted in 2001 could be regarded as a welcome development to elaborate or clarify any ambiguity of only two marginal provisions as Article 149 and 303 with regard to underwater cultural heritage in United Nations Convention on the Law of the Sea in 1982 (hereinafter referred to as 'UNCLOS'). Some texts of the UCH Convention, however, give controversy in fact to the comprehensive international order of the seas in relation to the other provisions of UNCLOS and customary international law, e.g., the definition of underwater cultural heritage, the 'creeping' expansion of coastal states' jurisdiction especially in the EEZ and on the continental shelf, and the sovereign immunity of sunken state vessels [The paper primarily follows to the terminology of the UCH Convention which uses 'state vessels'. It is defined as 'warships, and other vessels...that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes' in Article 1(8).] This presentation will especially focus on the issue of sovereign immunity of sunken state vessels amongst them. International law in relation to warships is complex and uncertain and the issue has high political sensitivity as Article 2(8) of the UCH Convention reflects such a circumstance. The purpose of the presentation, therefore, is to explore the legal status of sunken state vessels. It examines the related provisions and their drafting process of the UCH Convention, the legal status of warships which UNCLOS provides and in the rules of customary international law. It will also observe some cases including notable States practices.

Key words: UNESCO, UNCLOS, UCH

Introduction

The entry into force in 2009 of the UNESCO Convention on the Protection of Underwater Cultural Heritage (hereinafter referred to as 'the UCH Convention') adopted in 2001 could be regarded as a welcome development to elaborate or clarify any ambiguity of only two marginal provisions as Article 149 and 303 with regard to the protection of underwater cultural heritage in United Nations Convention on the Law of the Sea in 1982 (hereinafter referred to as 'UNCLOS'), though it is called as 'A Constitution for the Oceans' with 320 Articles and 9 Annexes. Some texts of the UCH Convention, however, give controversy in fact to the comprehensive international order of the seas in relation to the other provisions of UNCLOS and general rules of international law.

The treatment of sunken state vessels¹ is also one of the most controversial and challenging issues which the drafters of the UCH Convention faced. International law in relation to warships is complex, uncertain, and politically highly sensitive. The key provisions of the UCH Convention regarding this issue, the legal status of sunken State vessels, are Article 2(8), 7(3), and 10(7) and, due to them, most of maritime States do not have wish to ratify the Convention².

This article will focus on the reason and background of such controversy. First, it examines the existing international law and related State practices in order to evaluate the legal status of sunken State vessels under customary international law. Second, it reviews mainly Article 2(8), 7(3), and 10(7) of the UCH Convention. The purpose of this article is to clarify the gap between the UCH Convention and customary international law in relation to the legal status of sunken State vessels and, thereafter, try to explore a key to resolve the gap.

Sunken State Vessels in General International Law

Definition of Warships in UNCLOS

According to Article 29 in UNCLOS, 'warship' means 'a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline'.

Warships had enjoyed specific right for centuries under customary international law and it codified in Article 95 that they 'have complete immunity from the jurisdiction of any State other than the flag State' on the high seas. Also Article 96 provides that '[s]hips 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'.

This principle also extends in Article 58(2) to the vessels navigates in the EEZ of coastal States 'in so far as they are not incompatible' with the provisions relating to the EEZ set out in Part V of UNCLOS. Also in Article 32 which provides as below, the rules of innocent passage (Migliorino, 1985) are respected in the territorial sea of the coastal states:

'With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.'

Sovereign Immunity

Until early nineteenth century, the immunity of foreign States was absolute (absolute doctrine). Then, towards the end of the nineteenth century, a restrictive view gradually took place (restrictive doctrine). An exception was envisaged for acts performed *jure gestionis* or *jure privatorum* that is, performed by a foreign State in a private capacity as a legal person subject to private law (Cassese, 2005).

In the line with the restrictive doctrine, whereby immunity is confined to circumstances in which a State acts as a State, immunity extends only to State craft that are engaged in non-commercial service. Government-owned ships operated for commercial purposes are subject to the same treatment as privately owned merchant ships (Dromgoole, 2013).

The question is that whether or not the principle of sovereign immunity continues to apply to a State vessel even after it has sunk. There are two streams; first, immunity does *not* apply after a warship sunk on ground of that a warship is not a warship any longer once it sunk, and a ship is not a ship any longer. Sunken vessel is not the object which can meet the definition of vessel. With regard to warships particularly, as Article 29 provides a ship must be 'under command' and 'manned' and the conditions which are only possible while it is operational (Caflisch, 1983; Strati, 2005). Sunken warships are not the objects to meet the definition of warship. As such, they are not subject to flag state jurisdiction any longer and therefore not retain their immunity any longer. This position leads to the conclusion that the flag State, *qua* flag State, cannot prohibit a salvage attempted by another State or private operator.

Second position is more promising that sunken State vessel retains immunity because the argument for immunity is on the fact that such craft are state property. States have reasons for maintaining an interest in State vessels after their sinking and these interests are not confined merely to casualties. There are therefore legitimate basis for affording such property indefinite immunity (Rubin, 1975).

A number of maritime States defend the second position and according to general rules of international law the title of the sunken warships may be only lost or transferred by: express abandonment; or capture or surrender under the law of war (Yamamoto, 1981).

International Conventions and State Practices

International legislation and State practices show that the legal status implies that sunken State vessels, such as warships and vessels on government service, regardless of location or of the time elapsed since their wreckage, remain the property of the State owning them at the time of their sinking, unless it explicitly and formally abandon its ownership. Such sunken vessels should be respected as maritime graves or reservoir of classified information of the flag State. Thus, it is applied sovereign immunity to sunken State vessels and they shall not be salvaged without the express consent of the flag State (Aznar-Gómez, 2003).

This position is confirmed by several international instruments, *e.g.*, Article 14 of 1910 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea³, Article 4 (1) of the 1989 International Convention on Salvage⁴, 2007 International Convention on the Removal of Wrecks⁵. There are also some representative cases where State have recognized the sovereign immunity and title of sunken State vessels; the Exchange of Note Constituting an Agreement between UK and Italy

Regarding the Salvage of *HMS Spartan* in 1952⁶; Italy recognized the British title to the wreck; Australia recognized the Dutch title to the Old Dutch Shipwrecks belonging to the Dutch East India Company, covered by 1972 Agreement⁷; France recognized US title to the *CSS Alabama* in 1989⁸; US recognized the French title with *La Belle*⁹ in 2003.

There are remarkable cases in the US, the *Juno* and *La Galga* case in 2000 and the *Mercedes* case in 2011. It should be noted that after these cases, some particularly concerned States, including US, Germany, Japan, Russia, Spain, UK, clarified their position in their unilateral declaration on the legal status of sunken State vessels by stating that sunken state vessels continue to enjoy sovereign immunity after sinking, wherever they are located¹⁰.

The Juno and La Galga Case

In 1990s, a commercial salvage company, Sea Hunt Inc., submitted an *in rem* claim respectively against two Spanish frigates, *La Galga de Andalucia* and the *Juno*, which were sunk in 1750 and 1802 in the US contiguous zone (Vierucci, 2001). The Sea Hunt was issued with a permit by the State of Virginia to search for the wrecks and, when they were found, Virginia claimed title to them under the Abandoned Shipwreck Act of 1987 (ASA). When the Spanish government knew that a permit for commercial exploitation had been awarded, it issued a diplomatic note of protest and expressed its wish to protect the sanctity of its maritime gravesites. Despite the protest, intervention at the site went ahead and Sea Hunt initiated an *in rem* salvage action in the District Court in Norfolk. Although the District Court partially supported Sea Hunt Inc.¹¹, the Court of Appeal of the 4th Circuit fully supported Spanish claims to the two

wrecks¹². The US Supreme Court then finally confirmed this legal position in 2001¹³.

The salvor insisted that the vessels had been abandoned by their owner and that it was entitled to recover artefacts by the permit issued by the state of Virginia. It concluded that vessel had not been expressly abandoned by Spain, by reversing a finding of the District Court that Spain had expressly abandoned *La Galga* when it entered into the 1763 Definitive Treaty of Peace between France, Great Britain and Spain. Spain had transferred most of its New World territories to Great Britain in the Treaty. Court of Appeal noted that the terms of the treaty did not provide the 'clear and convincing evidence' of express abandonment that was required, because of the absence of specific reference to vessels or shipwrecks in the Treaty. It continued that '[i]t is the right of the owner of any vessel to refuse unwanted salvage'¹⁴

This case shows some important points; first, it gave the opportunity to several States to explicitly state their position regarding the legal status of sunken State vessels including warships. It was confirmed in US Presidential Statement in 2001 that 'title to foreign sunken State craft may be transferred or abandoned only in accordance with the law of the foreign flag State'¹⁵ and US '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'.

Second, the Court of Appeals held that sovereign vessels must be treated differently from privately owned ones. The so-called 'implied abandonment standard' would seem therefore to be least defensible where a nation has stepped forward to assert ownership of its sovereign shipwrecks¹⁶.

Third, unauthorized salvage of sunken State vessels is legally precluded, the salvor is denied any kind of reward, and artifacts removed from the bottom of the sea must be returned to the sovereign owner (Aznar-Gómez, 2010).

The Mercedes Case

Odyssey Marine Exploration (OME) in the US discovered a shipwreck in international waters about 100miles west of the Straits of Gibraltar in 2007. A number of coins and small artefacts were recovered from the site and flown into the jurisdiction of the US District Court of Tampa, Florida, by OME¹⁷. Spain asserted; (a) the vessel was the *Nuestra Señora de las Mercedes*, a frigate of war of the Royal Spanish Navy that had exploded with great loss of life in 1804; (b) Spain had not abandoned its sovereign rights over the vessel; (c) under international and domestic US law, foreign State vessels should be afforded the same legal regime as those of the US; (d) the court lacked subject-matter jurisdiction over the *res* under the Foreign Sovereign Immunity Act of 1976 (FSIA).

In 2009, the Magistrate Judge Pizzo issued Report & Recommendations (R & R) in favour of the legal position of Spain. He concluded, on the balance of evidence, that the wreck was the Mercedes and 'unquestionably' the property of Spain¹⁸. Under the FSIA, which set out the basis for US court jurisdiction over foreign States, a foreign State and its property are presumptively immune from the jurisdiction of the US courts unless an exception applied¹⁹. Judge Pizzo concluded that none of the exceptions put forward by OME was applicable and consequently, the court was 'without jurisdiction to adjudicate the claims against Spain's property'²⁰. He recommended OME to return the recovered items to Spain²¹.

The Treatment of Sunken State Vessels in the UCH Convention

Drafting Process

The 1994 International Law Association (ILA) draft and 1998 UNESCO draft of the UCH Convention excluded warships and other state-owned or operated vessels and aircraft used for non-commercial purposes from the scope of application of the Convention by following the approach of many maritime treaties because of its high political sensitivities. It meant that most of the UCH in the world put outside of the protective framework of the Convention and that it would seriously undermine the object of the Convention.

One of the obstacles to removing the exclusion was the provision in the 1998 draft for abandonment “to be deemed” in certain cases. The application of such a provision to state vessels was unacceptable to many States that strongly insisted that their ownership rights could be lost only through an express abandonment (Dromgoole and Gaskell, 1999) and it was dropped.

The preferable outcome for the maritime States would have been for the Convention to codify their stance on express abandonment and immunity by providing that the express consent of the flag State would be required in all cases of proposed interference with sunken State vessels. However, a number of Latin American and Caribbean States refused to recognize the title of the flag State to colonial-era vessels in their coastal waters. They asserted that the UCH ‘is the property of the State in which it is found and through this it is the heritage of the humanity²²’. As a consequence, a specific regime for sunken state vessels set out in the final text proved to be unacceptable to most of maritime States.

Definition of “State Vessels and Aircraft” and General Principle

Article 1(8) of the UCH Convention defines ‘state vessels and aircraft’ to mean:

‘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.’

The definition is consistent with those in other Conventions, including UNCLOS and Salvage Convention in 1989 and it excludes state-owned vessels that were engaged in trade or other private service.

With regard to sovereign immunity, there were concerns about the extent to which any new convention would afford coastal State jurisdiction in respect of State vessels. The final text of the Convention draws a compromise between the interests of flag States and coastal States. In Article 2 (8), it is stated that:

‘(N)othing in this Convention shall be interpreted as 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.’

Control Mechanisms in each maritime zone

Despite of the Article 2(8), Maritime powers such as France, the UK, Russia and US voted against the adoption of the UCH Convention. One of the main reasons of this was that the Convention prepares some challenging provisions with regard to the control mechanisms in each maritime zone, especially in Article 7(3) and 10(7), and they understood

that the text did not cover all their legal expectation as flag States protecting their sunken State vessels, particularly their sunken warships.

One of the most controversial is the regime of the territorial waters. Article 7(3) states:

‘Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States 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 with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft. [Emphasis added.]’

In this Article, the problem is the use of term ‘should’ rather than ‘shall’ and it is highly contentious. It means the notice to the flag State is not legally obliged and no consent of the flag State is required to conduct activities directed at their sunken State vessels.

The mechanism in the EEZ and continental shelf is also highly contentious. Article 10(7) states:

‘Subject to the provisions of paragraphs 2 and 4 of this Article, no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State.’

It provides that no activity shall be conducted without the agreement of the flag State, however it made two exceptions in cases; first, emergency measures are required to prevent ‘immediate danger’ to UCH from ‘human activities or any other cause, including looting’, in which case the consent of the flag States does not have to be obtained first; second, the sovereign rights or jurisdiction of a State party in its EEZ or on its continental shelf

may be interfered with unless it takes action to prohibit or authorize activities directed at UCH located in that zone.

In such cases, a State party may prohibit or authorize those activities without first consulting the flag State. It seems that this is inconsistent with what Article 2(8) provides and gives rise to the confusion. Flag States are bound to see the possibility of a coastal State acting under one of these exceptions as an infringement of their sovereign rights, and therefore, by using Article 2(8), they may challenge the coastal State's right to act (Dromgoole, 2003).

Conclusion

The UCH Convention seems to attempt challenging the existing international law and State practices on the sovereign immunity issue in order to accomplish the purpose of this Convention. It must be said, however, the UCH Convention has failed to provide a satisfactory compromise between the interests of flag States and coastal States on the issue and it is the major obstacle to the ratification of the Convention by a number of States. In fact, when the UK abstained from voting on the final text of the Convention, it noted that the UK considers that 'the current text erodes the fundamental principles of customary international law, codified in [the UNCLOS], of Sovereign Immunity which is retained by a State's warships and vessels and aircraft.... 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 [the UNCLOS] in a way that is unacceptable' to the UK. It highlights a conflict between existing international law and the UCH Convention.

In order to resolve such a conflict, it is needed to interpret once again Article 2(8) which states 'nothing in this Convention shall be interpreted as modifying the rules of international law and *State practice*' (emphasis added) and observe the building process of customary international law which is crystalized through the accumulation of States practices. The UCH Convention has already entered into force with more than 50 State parties. The Article 2(8) leaves the elaboration of the argument of the legal status of sunken State vessels and their sovereign immunity in the future State practices for building of customary international law and the Convention itself might have the possibility of the evidence of them, although several maritime States attempt to stop such a stream by stating their position on the sovereign immunity of sunken State vessels as mentioned above after the *Juno* and *La Galga* case and the *Mercedes* case

In observation, in the favor of the UCH Convention, of the process of crystallization of customary international law on this issue, 'cooperation among States' which is the basic philosophy of the UCH Convention as it is stated in its Preamble could be any key element. Cooperation, in fact, can be seen in several bilateral agreements as introduced above and might lead a new stream. In this context, some special circumstances might give the wreck a particular status when it is considered to be either a human grave (Aznar-Gómez, 2010; Garabello, 2004) or/and a historical or cultural site.

When we consider thousands of military vessels and aircraft lost during the First and Second World Wars in the twentieth-century, they will have involved many human fatalities and the primary concern of States will be to preserve the sanctity of the site and to ensure that any human remains are afforded appropriate treatment (Dromgoole, 2013)²³. The debate of

this issue on sovereign immunity of sunken State vessels should keep re-opening among States and their practices are needed to be continued to observe carefully.

Endnotes

¹ The paper primarily follows to the terminology of the UCH Convention which uses “state vessels” in Article 1(8).

² France ratified the Convention in 2013.

³ Adopted on 23 September 1910, *US Treaty Series*, p. 576.

⁴ Adopted on 28 April 1989, *UN Treaty Series*, Vol. 1953, p. 165

⁵ Adopted on 23 May 2007, IMO Doc. LEG/CONF.16/19 (2007).

⁶ Concluded on 6 November 1952, *UN Treaty Series*, Vol. 158, p. 432.

⁷ Concluded on 6 November 1972, *Australian Treaty Series*, No.18 (1972).

⁸ Concluded on 3 October 1989, *UN Law of the Sea Bulletin*, Vol. 20 (1996) p. 26.

⁹ Signé à le 31 mars 2003, *Journal officiel de la République française*, No. 144, p. 10560.

¹⁰ These unilateral declarations can be found in *Federal Register*, Vol.69, No. 24 (2004) pp. 5647-5648.

¹¹ *Sea Hunt Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va. 1999).

¹² *Sea Hunt Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000).

¹³ *Sea Hunt Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000), cert. denied, 148 L.Ed. 2d 956, 121 C. Ct. 1079 (2001).

¹⁴ *Sea Hunt Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000), pp. 640-641.

¹⁵ Expressed on 19 January 2001, *Federal Register*, Vol.69, No.24 (2004), p. 5648.

¹⁶ *Sea Hunt Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000), p. 647.

¹⁷ *Odyssey Marine Exploration Inc. v. Unidentified, Shipwrecked Vessel*, 675 F Supp. 2nd P. 1126 (2009).

¹⁸ *Odyssey Marine Exploration Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp.2nd P. 1126, 1139 (2009).

¹⁹ FSIA, Section 1609.

²⁰ *Odyssey Marine Exploration Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2nd P. 1126, 1130 (2009).

²¹ There were other parties to file a claim against the *res*, such as Peru and 25 descendants of passengers transporting goods on the *Mercedes*.

²² Adopted on 16 June 1998, in UNESCO, *Background Materials on the Protection of the Underwater Cultural Heritage*, Vol.2 (2000), p. 341-342.

²³ One of the Japanese main concerns is recovering remains in the naval battle site in the Pacific War. See (Iwabuchi, 2012) p.88-90.

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Biography



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