Sunken Warships and Cultural Heritage

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1 Introduction

Confrère Djamchid Momtaz was President of the Programme Committee of the Institut de droit international (IDI) for several years. I was given the task of rapporteur dealing with sunken warships (9th Commission) in Santiago, Chile during Professor Momtaz’ Presidency. This essay, which draws on the work I did for the IDI as Rapporteur, is a tribute to him for his 75th birthday.

Sunken war vessels have attracted the attention of several people. First, treasure hunters seek them because often vessels have on board valuable cargo such as bullion or other gold artefacts and coins. Progress in marine exploration over the past 30 years has permitted the recovery of wrecks and their cargo in very deep waters. The second category of persons interested in the recovery and conservation of sunken vessels is marine archaeologists who are concerned about the commercial exploitation of the wrecks that are testimony of ancient civilisations. The third category is represented by international lawyers, who have tried to regulate an issue previously almost unregulated. The literature is now flourishing and more writing is to be expected with the centenary of World War I, a conflict that saw wide recourse to submarine warfare and the sinking of a huge number of ships. The final factor prompting interest in sunken vessels is the IDI Resolution adopted at the Tallinn session (22–29 August 2015) and the set of articles on ‘The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law’. The principle aim of the Resolution is the preservation and protection of cultural heritage as stated in the Preamble.

Not every relic constitutes cultural heritage. This is intuitive. The notion of cultural heritage (rectius archaeological and historical objects) is referred to in Articles 149 and 303 of the United Nations Convention on the Law of the Sea (LOSC)\(^1\) without giving any definition. The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage,\(^2\) however, gives—as we shall see—a definition of cultural heritage indicating which vessels fall under it.

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1 1833 UNTS 3.
2 http://unesdoc.unesco.org/images/0012/001246/124687e.pdf#page=56.
**Immunity/Property of Sunken Warships**

LOSC dictates a set of provisions on the status of warships. The most relevant, for our discourse, are those connected with the immunity of warships, as set forth in Article 32. Also relevant is the UN Convention on Jurisdictional Immunities of States and their Property, not yet in force but containing a number of provisions declaratory of customary international law. One such is Article 16 (2), which outlines the immunity of warships from foreign jurisdiction. The problem is that these provisions refer to warships in exercise and do not encompass vessels that have lost their buoyancy. Sunken warships are thus not regulated either by LOSC or by the Convention on Jurisdictional Immunities. Some provisions can be found in the 2007 Nairobi International Convention on the Removal of Wrecks. This Convention excludes from its field of application ‘any warship or other ship owned and operated by a State and used, for the time being, only on Government non-commercial service’ (Article 4, para. 2), even though the flag State may decide otherwise. One can presume that the exclusion of wrecked warships is due to the presumption that such wrecks still enjoy sovereign immunity. More than a decade ago Derek Bowett introduced the subject of wrecks, including the wrecks of warships, before the International Law Commission (ILC). He noted that it was a topic unregulated and worthy of being codified. However the subject was not immediately taken up by the Commission. It was first included in the ‘long-term programme’ of the work of the ILC in 2001 and again quoted as part of the long-term programme in 2011.

Both the practice of States and the jurisprudence of domestic tribunals are in favour of sovereign immunity for sunken warships. A discussion of State practice and relevant domestic jurisprudence was given in my preliminary report on ‘The Legal Regime of Wrecks of Warships and Other State-International Law’ for the IDI (Rhodes Session), in the Addendum prepared for the IDI Tokyo Session and in the final document submitted to the Tallinn Session. Here the case of *Nuestra Señora de las Mercedes* is worth mentioning, a Spanish vessel recovered by the Odyssey Marine Exploration and the object of litigation.