

## Still on Patrol: An Argument for Greater Protections for Sunken American State Vessels in International and Foreign Coastal Waters

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## NOTES

# STILL ON PATROL: AN ARGUMENT FOR GREATER PROTECTIONS FOR SUNKEN AMERICAN STATE VESSELS IN INTERNATIONAL AND FOREIGN COASTAL WATERS

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### I. AN INTRODUCTION TO SUNKEN AMERICAN STATE CRAFT

Japanese submarine slammed two torpedoes into her side, Chief. We was comin' back from the island of Tinian to Leyte. We'd just delivered the bomb. The Hiroshima bomb. Eleven hundred men went into the water. Vessel went down in twelve minutes.<sup>1</sup>

Quint, the surly captain from Steven Spielberg's *Jaws*, is perhaps most famous for his soliloquy recounting the *Indianapolis* tragedy. The *Indy*, as she was called, sunk just under fifteen minutes after being hit by Japanese torpedoes in 1945 following her delivery of the components for the Hiroshima atomic bomb to the Pacific island of Tinian.<sup>2</sup> It took the Navy five days to realize she was missing, by which point 600 of the 800 survivors had died from exposure or shark attacks.<sup>3</sup> The

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<sup>1</sup> *JAWS* (Universal Pictures 1975).

<sup>2</sup> Glenn Hodges, *Warship's Last Survivors Recall Sinking in Shark-Infested Waters*, *NAT'L GEOGRAPHIC* (July 27, 2015), <https://www.nationalgeographic.com/news/2015/07/150727-uss-indianapolis-reunion-survivors-sharks-jaws> [<https://perma.cc/YZQ3-FJBQ>].

<sup>3</sup> Lisa Rein, *Researchers Find Wreckage of Lost WWII Warship USS Indianapolis*, *WASH. POST* (Aug. 19, 2017), <https://www.washingtonpost.com/politics/researchers-find->

*Indy* remained missing until she was found seventy-two years later by the *Petrel*, a research vessel outfitted and funded by the late Paul Allen of Microsoft fame.<sup>4</sup>

The *Indy* is only one of the many World War II ships that Allen's team has found on the ocean floor. In March 2018, the *Petrel* found the remains of the USS *Juneau*.<sup>5</sup> The *Juneau* was hit by torpedoes during the Battle of Guadalcanal in 1942.<sup>6</sup> She is perhaps most famous for the tragic story of the five Sullivan brothers, all of whom died aboard the *Juneau* when she sank.<sup>7</sup> On September 15, 1942, the USS *Wasp* was scuttled by American ships following a devastating torpedo attack by a Japanese submarine in the Coral Sea.<sup>8</sup> The *Wasp* was found sitting just over two and a half miles down on the ocean floor seventy-seven years later by the *Petrel*.<sup>9</sup> Just one month after the scuttling of the USS *Wasp*, the USS *Hornet* was sunk by Japanese torpedo bombers off the southern Solomon Islands.<sup>10</sup> Famous for launching the Doolittle Raid and for surviving the Battle of Midway, the *Hornet* was effectively lost until she was also found seventy-seven years later by the *Petrel*.<sup>11</sup>

Allen's team and project are unique. They do not attempt to salvage these ships, nor do they seek salvage awards for finding them. Rather, the entire expedition is funded from Allen's estate and stems from Allen's deep personal interest in Navy wrecks.<sup>12</sup> Additionally, Allen's team does not publicly report the exact

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wreckage-of-lost-wwii-warship-uss-indianapolis/2017/08/19/9b432b1c-8520-11e7-ab27-1a21a8e006ab\_story.html.

<sup>4</sup> *Paul's Biography*, PAUL ALLEN (Mar. 4, 2015), <https://paulallen.com/about-paul/pauls-biography> [<https://perma.cc/43FH-PSSN>]; see also Christina Nunez, *Wreckage of WWII-Era Warship U.S.S. Indianapolis Found After 72 Years*, NAT'L GEOGRAPHIC (Oct. 16, 2018), <https://www.nationalgeographic.com/news/2017/08/uss-indianapolis-wreckage-found.html> [<https://perma.cc/77VW-ZYK8>].

<sup>5</sup> *Sunken USS Juneau Famous for the Sullivan Brothers Discovered on St. Patrick's Day*, PAUL ALLEN (Mar. 18, 2018) [hereinafter *Sunken USS Juneau*], <https://paulallen.com/rv-petrel/uss-juneau-wreck-located-famous-for-sullivan-brothers> [<https://perma.cc/67P8-3LAF>].

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Ed Caesar, *The Epic Hunt for a Lost World War II Aircraft Carrier*, N.Y. TIMES MAG. (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/magazine/uss-wasp-lost-world-war-ii-aircraft-carrier.html?module=inline>.

<sup>9</sup> *Id.*

<sup>10</sup> *The Hunt for the USS Hornet*, PAUL ALLEN (Feb. 20, 2019) [hereinafter *Hunt for the USS Hornet*], <https://www.paulallen.com/rv-petrel/the-hunt-for-the-uss-hornet> [<https://perma.cc/VBK3-X3MU>].

<sup>11</sup> *Id.*

<sup>12</sup> Caesar, *supra* note 8.

location of the wrecks it discovers.<sup>13</sup> The locations are reported to the United States Navy, which then contacts the families of the sailors who died aboard those ships to inform them that the ships have been found.<sup>14</sup>

The *Indy*, *Wasp*, *Juneau*, *Hornet*, and other similar ships exist in what has been called a “legal lacuna,” or a legal no-man’s-land in which there is limited governing law surrounding the discovery and salvage of sunken state vessels in foreign coastal and international waters.<sup>15</sup> Unfortunately, this means that most of these vessels are vulnerable to salvage and destruction while the legal world debates how to address these concerns.<sup>16</sup>

A case in point is the 2016 survey by a team of divers of two sunken World War II ships that had been lost during the Battle of the Java Sea in 1942.<sup>17</sup> While the divers had the correct coordinates from when the ships had been discovered in 2001, they found only the impressions of the hulls on the ocean floor.<sup>18</sup> The same team also struggled to locate the hull of the *USS Perch*, an American submarine that was sunk during the same engagement.<sup>19</sup> The ships did not simply disappear from the ocean floor, and while ocean currents are particularly strong in the Java Sea, the currents alone could not have swept away a submarine the length of a football field weighing 1,900 tons.<sup>20</sup>

Rather, the vessels had likely been illegally salvaged for their metal. In the world of metal salvage, tonnage is the key factor for profit. One author has posited that “[a] recovered destroyer can easily result in a profit of \$100,000,” which amounts to a significant sum in many of the “developing nation[s]” in the Pacific rim.<sup>21</sup> Additionally, many of the vessels

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<sup>13</sup> *See id.*

<sup>14</sup> *Id.*

<sup>15</sup> EKE BOESTEN, *ARCHAEOLOGICAL AND/OR HISTORICAL VALUABLE SHIPWRECKS IN INTERNATIONAL WATERS: PUBLIC INTERNATIONAL LAW AND WHAT IT OFFERS* 3 (2002).

<sup>16</sup> This author recognizes that other “state craft,” such as aircraft, are also vulnerable to salvage operations, but is limiting the focus of this Note to just warships and submarines.

<sup>17</sup> Kathryn Miles, *The Thieves Who Steal Sunken Warships, Right Down to the Bolts*, *OUTSIDE* (May 2, 2017), <https://www.outsideonline.com/2168646/how-does-entire-shipwreck-disappear-bolts-and-all> [<https://perma.cc/7QPL-DQ8B>].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

that sank in the early years of World War II were made from pre-nuclear age steel, which is particularly valuable in industries that develop nuclear energy and weapons.<sup>22</sup> While wreck divers generally adhere to a code of conduct that respects the remains of the sailors who died on board these ships, illegal salvors are less scrupulous.<sup>23</sup> Often, illegal salvors disguise themselves as fishermen on barges or fishing vessels and drag up anything that might be valuable.<sup>24</sup> It is not unusual for them to drag up human remains, clothes, and the personal effects of sailors with the metal.<sup>25</sup>

Perhaps the question that remains is why any of this matters. After all, these ships have been deteriorating on the ocean floor for at least the last seventy years. The problem of illegal salvage, though, is a modern one. Prior to the 1960s, most deep-sea wrecks were safe from salvage attempts since technology that could reach the depths at which many of these ships sat was limited.<sup>26</sup> Additionally, recreational divers did not yet have the technology to reach the vessels that sank in shallower coastal waters.<sup>27</sup> Now, though, both deep-sea and coastal wrecks are being found and salvaged. The *Indy*, *Wasp*, *Hornet*, and *Juneau* sank with a combined 1,904 crew members still on board.<sup>28</sup> These ships are the *de facto* ocean floor cemeteries in which these servicemen have been interred. It is not a stretch to find that the illegal salvaging of these ships is akin to the desecration of gravesites. Additionally, these ships represent a snapshot in history that belongs to humanity collectively, rather than to one person or corporation. The legal community needs to create a legal framework that protects these ships as markers of history and, more importantly, as the final resting place of the crew members that went down with their ships.

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Oliver Holmes et al., *The World's Biggest Grave Robbery: Asia's Disappearing WWII Shipwrecks*, THE GUARDIAN (Nov. 2, 2017, 9:22 PM), <https://www.theguardian.com/world/ng-interactive/2017/nov/03/worlds-biggest-grave-robbery-asias-disappearing-ww2-shipwrecks>.

<sup>25</sup> *Id.*

<sup>26</sup> See discussion *infra* Section II.B.

<sup>27</sup> See discussion *infra* Section II.B.

<sup>28</sup> See Nunez, *supra* note 4 (883 dead); Caesar, *supra* note 8 (194 dead); Hunt for USS *Hornet*, *supra* note 10 (140 dead); *Sunken USS Juneau*, *supra* note 5 (687 dead).

This Note proposes a theoretical legal structure that affords greater protections for sunken American state vessels in international and foreign coastal waters. It draws on American legal precedent that has consistently favored law of salvage claims over law of finds claims. American courts have employed the law of salvage to prevent the transfer of ownership of state vessels to private individuals and salvage corporations. The American position on ownership stands in stark contrast to that of the international legal community.<sup>29</sup> In fact, the 2001 UNESCO Convention on Underwater Cultural Heritage<sup>30</sup> fails to offer any workable protections for sunken state vessels and refuses to address claims of ownership, a key issue in the debate over protections for sunken state vessels. Therefore, the 2001 Convention as it stands now is particularly unsuited to the protection of sunken state vessels.<sup>31</sup>

In 2004, Congress passed the Sunken Military Craft Act in an attempt to protect sunken American state vessels.<sup>32</sup> The Sunken Military Craft Act codifies existing American case law to declare that the United States retains ownership in perpetuity of its sunken state vessels. However, the Sunken Military Craft Act does not bind non-citizens.<sup>33</sup> Additionally, its prohibition on the law of salvage claims for sunken state vessels is only relevant to those claims that are litigated in American courts. The real problems arise far from American jurisdiction.

Therefore, this Note proposes two possible solutions. The first solution is for the United States to enter into a treaty to declare the sunken vessel a gravesite. This treaty could be with the coastal state in whose waters the American vessel sank, or, in the case of international waters, with the United Nations. The United States already has dozens of terrestrial cemeteries on foreign soil, all of which are created via treaty and managed by the American Battle Monuments Commission.<sup>34</sup> The benefit of this solution is that treaties are malleable, and can be written to account for the parties' individual requirements. In this scenario, the treaty would need to have enforcement provisions

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<sup>29</sup> See discussion *infra* Sections II.A, II.B.

<sup>30</sup> UNESCO Convention on the Protection of the Underwater Cultural Heritage, Nov. 6, 2001, 41 I.L.M. 40 [hereinafter 2001 UNESCO Convention].

<sup>31</sup> See discussion *infra* notes 118–20 and accompanying text.

<sup>32</sup> See discussion *infra* Section IV.C.

<sup>33</sup> See discussion *infra* note 125.

<sup>34</sup> See discussion *infra* Section V.A.

that allow for fines or prosecution by either the United States or the coastal country to deter and punish the illegal salvage of these ships.

The second solution is for UNESCO to embrace the American position that the flag country retains title in perpetuity to its sunken state vessels, and to recognize that sunken state vessels are gravesites. If UNESCO were to do that, the next step would be to issue rules regarding access to sunken vessels akin to how it regulates access to underwater cultural heritage sites in its 2001 Convention. An example of this type of legislation would be the 1986 RMS Titanic Maritime Memorial Act, which was passed in 1986 by the Senate in cooperation with other countries that wished to declare the Titanic a memorial site.<sup>35</sup> Under the Act, the National Oceanic and Atmospheric Administration ("NOAA") was tasked with promulgating rules regulating access to the site.<sup>36</sup> NOAA used the 2001 Convention's guidelines for the exploration, research, and salvage of underwater cultural heritage sites as its starting point.<sup>37</sup> Thus, a legal framework modeled on the 1986 Act that uses UNESCO's regulations concerning access to underwater cultural heritage sites would offer greater protections for sunken state vessels. The benefit to this solution is that a UNESCO provision would bind a large number of countries who sign onto the act, instead of only the signatories to the treaty as in the previous solution.

Ultimately, the international legal community needs to address the disappearance of sunken state vessels. These ships are gravesites for crewmembers who sank with their ships, and they deserve to be protected as such.

## II. GENERAL BACKGROUND: THE EVOLUTION OF SALVAGE LAW IN AMERICAN JURISPRUDENCE

### A. *A Brief History of the Law of Finds and the Law of Salvage in American Courts*

The first step to articulating a legal framework for the protection of sunken state vessels must start with an understanding of the evolution of principles of salvage law. There is an important divergence in how courts apply the law of

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<sup>35</sup> See discussion *infra* Section V.B.

<sup>36</sup> See discussion *infra* Section V.B.

<sup>37</sup> See discussion *infra* Section V.B.

salvage to sunken commercial vessels versus state vessels. This difference has both influenced and been influenced by international and American attempts to regulate the salvage of sunken state vessels and protect them from illegal salvage attempts.

American courts have recognized two primary legal principles that govern the rights of parties seeking to exert a claim against a sunken ship: (1) the law of finds and (2) the law of salvage.<sup>38</sup>

The law of finds is most often invoked when a salvaging party wants to claim ownership of a wreck.<sup>39</sup> Law of finds claims are successful in cases in which the court finds that the vessel has been abandoned by its true owner. Abandonment can be express—the owner has publicly disclaimed ownership—or implied, such as when no party appears to challenge the salvor's ownership claim.<sup>40</sup> For purposes of this Note, the ownership component of the law of finds claims is critical. Once the court finds that the true owner has abandoned the vessel, the salvor is awarded title to the vessel and all of its contents. The salvor becomes the owner of the vessel and is free to do with it what it will.

Most American courts are hesitant to find that a sunken vessel has actually been abandoned by its true owner. Therefore, most courts favor the law of salvage over the law of finds. In law of salvage claims, title to the vessel remains vested in the original owner, and the salvor is entitled only to an award from the owner or the court based upon his salvage of the sunken vessel. Salvors seeking such an award must demonstrate that the vessel was facing “a marine peril,”<sup>41</sup> that the salvor performed a “voluntary service . . . not required as an existing

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<sup>38</sup> Cory T. Stuart, *The Wake of Discovery—A Primer on Legal, Historical, and Practical Shipwreck Salvage Dynamics*, 9 LOY. MAR. L.J. 45, 45–46 (2011).

<sup>39</sup> *Id.* at 46.

<sup>40</sup> *Id.* at 46–47. Parties seeking to assert a law of finds claim must establish the following elements: “intent to secure possession over the property, actual or constructive possession, and that the property in question has no owner or the owner has abandoned the property.” *Id.*

<sup>41</sup> Marine peril can include events such as fire, piracy, or sinking. See Stuart, *supra* note 38, at 48; see also Rob Regan, *When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters with Some Proposals for Change*, 29 TUL. MAR. L.J. 313, 322 (2005). “[T]he test is the reasonable apprehension of danger.” *Id.*



duty or from a special contract"<sup>42</sup> in attempting to salvage the vessel, and that the salvor had "success in whole or in part, or contribution to, the success of the [salvage] operation."<sup>43</sup>

Once a court has decided that the law of salvage applies, it will have to decide what award the salvor is entitled to. The Supreme Court of the United States, in the 1869 case *The Blackwall*, articulated the six factors that have become the standard test for courts deciding whether to grant a salvage award.<sup>44</sup> These factors are:

- (1) the labor expended by the salvors in rendering the salvage service;
- (2) the promptitude, skill, and energy displayed in rendering the service and saving the property;
- (3) the value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed;
- (4) the risk incurred by the salvors in securing the property from the impending peril;
- (5) the value of the property salvaged; and
- (6) the degree of danger from which the property was rescued.<sup>45</sup>

The court will weigh all of the above factors and determine what award, if any, the salvor is entitled to.

There is, however, one legal dilemma that sometimes arises in relation to law of salvage claims: the principle of salvor-in-possession. Generally, this designation is used to protect the legal rights of salvors during litigation.<sup>46</sup> Often, a salvor-in-possession appears when salvors have made law of finds claims that courts are hesitant to grant.<sup>47</sup> The salvor-in-possession designation prevents other salvors from interfering with the original salvor's efforts to salvage the wreck. However, the name can be a misnomer. Courts can award the salvor-in-possession a salvage award *and title to the salvaged chattels* following the termination of litigation.<sup>48</sup> In other words, instead of receiving just a salvage award, as it would if a court applied the law of salvage, a salvor-in-possession also receives title to the artifacts

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<sup>42</sup> Stuart, *supra* note 38, at 48. Existing duties would include contractual or statutory duties. See Regan, *supra* note 41, at 322.

<sup>43</sup> Stuart, *supra* note 38, at 48 (quoting Smith v. The Abandoned Vessel, 610 F.Supp. 2d 739, 756 (S.D. Tex. 2009)).

<sup>44</sup> See *The Blackwall*, 77 U.S. 1, 9 (1869).

<sup>45</sup> Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 56 F.3d 556, 569 n.17 (4th Cir. 1995). The Fourth Circuit also directed the district court to consider a seventh factor: "the degree to which the salvors have worked to protect the historical and archaeological value of the wreck and items salvaged." *Id.* at 569.

<sup>46</sup> See Stuart, *supra* note 38, at 48.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 48–49 (emphasis added).

it recovers from the wreck. Thus, salvor-in-possession status combines law of salvage and law of finds principles in what appears to function as a judicial hedge that allows courts to waffle between applying the law of finds or the law of salvage.<sup>49</sup>

### B. *The Influence of Modern Technology on Deep Sea Salvage*

Before the 1960s, the salvage of most deep-sea wrecks was simply not feasible. Neither governments nor independent research organizations had the technology to explore the two- or three-plus mile depths at which these deep-sea wrecks sat. Therefore, the final resting places of many sunken ships were not legally important. These ships, and their associated treasures and artifacts, became part of seafaring lore.

However, the last fifty years have seen a dramatic transformation in researchers', and salvors', abilities to map the ocean floor. The *Petrel* provides a snapshot of this technology in action. "The *Petrel* is perhaps the best-equipped, and certainly the most successful, private vessel on Earth for finding deepwater wrecks."<sup>50</sup> The *Petrel* has two key components that enable it to find wrecks miles below on the ocean floor: an autonomous underwater vehicle ("AUV") and a remotely operated vehicle ("ROV").<sup>51</sup> The AUV is a side scan sonar device, which searches for anomalies on the ocean floor, while the ROV has lamps and cameras, and remains connected to the ship via a 6,000 foot cable.<sup>52</sup> The *Petrel* used this technology to find wrecks over three miles down, a feat that was virtually impossible fifty years ago.<sup>53</sup> However, the technology needed to find these wrecks is extremely expensive.<sup>54</sup> Therefore, most of these discoveries come from private salvage groups, not governments or private owners.

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<sup>49</sup> See *infra* notes 62–66 and accompanying text for a more detailed explanation of "salvor-in-possession."

<sup>50</sup> Caesar, *supra* note 8.

<sup>51</sup> See *About Petrel*, R/V PETREL, <https://rvpetrel.com/#about> (last visited Apr. 6, 2021) [<https://perma.cc/42GE-AMXS>].

<sup>52</sup> See Caesar, *supra* note 8.

<sup>53</sup> See Neil Vigdor, *U.S. Navy Destroyer Sunk in World War II Is Found 20,000 Feet Under the Sea*, N.Y. TIMES (Nov. 5, 2019), <https://www.nytimes.com/2019/11/05/us/uss-johnston.html>. In 2019, the *Petrel* located the deepest WWII wreck ever discovered in the Philippine Sea. *Id.*

<sup>54</sup> For instance, the *Petrel* is worth \$15 million on its own, the AUV and ROV each cost \$5 million, it costs \$650 thousand to fill *Petrel's* tanks, and it costs \$80 thousand a day to run the ship with a full crew. Caesar, *supra* note 8. The entire expedition is funded from Allen's estate. *Id.*

In addition to technological advances like the AUV and ROV, developments in recreational diving technology brought within reach wrecks that were previously unreachable by divers. During the 1990s, divers began experimenting with different types of gases to extend the depths to which they could dive and the length of time they could stay underwater.<sup>55</sup> For example, Trimix, a mixture of specific ratios of helium, oxygen, and nitrogen, that is adjusted depending on the depth of the dive allows divers to dive much deeper with a lower risk of nitrogen narcosis and oxygen toxicity.<sup>56</sup> Thus, wreck divers set their sights on areas like Guadalcanal and the Java Sea—locations with high concentrations of sunken WWII vessels that had previously been untouchable by divers, but were not so deep as to attract the interest of deep-sea wreck hunters.<sup>57</sup>

The discovery of these ships raised questions about who owned them and what award salvors could claim for their discovery. It also raised an ethical question as to whether these ships should be salvaged.<sup>58</sup>

### C. *Salvage Law in the Modern Age: A Commercial Ship Case Study*

American courts in the last twenty years have been hesitant to find that vessels have been abandoned, and often disfavor applying the law of finds regarding the salvage of commercial ships. There are two particularly helpful examples of this in recent jurisprudential history.

First, and most famous, is the 1985 discovery of the *RMS Titanic* by Robert Ballard. While the discovery of the (in)famous ship spurred headlines around the world, the legal drama that played out behind the scenes was less newsworthy, although no less significant.

In 1985, Ballard and his crew were not, in fact, searching for the *Titanic*. Rather, Ballard negotiated a trade-off with the United States Navy. In exchange for the funding to develop

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<sup>55</sup> See Miles, *supra* note 17.

<sup>56</sup> *What Is Trimix Diving?—The Perfect Gas Mix for Scuba?*, DEEP BLUE DIVING, <https://www.deepbluediving.org/what-is-trimix> (last visited Apr. 6, 2021) [<https://perma.cc/L4EA-9TDP>].

<sup>57</sup> See Miles, *supra* note 17.

<sup>58</sup> This concern may have been the basis of the Fourth Circuit's addition of a seventh factor to *The Blackwall* test when considering how much to award a salvor under the law of salvage. See *supra* note 45.

submersible technology, the Navy required Ballard to survey two Cold War-era nuclear submarines, the *USS Thresher* and the *USS Scorpion*.<sup>59</sup> If Ballard found the submarines with extra time left in his expedition, he could use the new technology to search for the *Titanic*.<sup>60</sup> That is exactly what happened. Ballard used his newly developed submersible technology to scan the ocean floor for *Titanic*'s massive debris field, a result of her hull rupturing at the surface, before finding the hull of the ship.<sup>61</sup> This discovery kicked off a legal maelstrom as interested parties came forward to claim ownership rights to the ship.

In 1993, RMS Titanic, Inc. ("RMSTI") filed an in rem action against the *Titanic* to become a salvor-in-possession of the wreck.<sup>62</sup> Here, RMSTI requested that it be awarded "true, sole and exclusive owner[ship] of any items salvaged from the wreck," or that "it be 'awarded a liberal salvage award.'"<sup>63</sup> The court granted RMSTI salvor-in-possession status in 1994, and declared in an order that RMSTI was "the true, sole and exclusive owner of any items salvaged from the wreck of the defendant vessel."<sup>64</sup> RMSTI was not granted ownership rights over the wreck itself, something that would have occurred had the court applied the law of finds.<sup>65</sup> Between 1986 and 2004, over 5,500 artifacts were recovered from the *Titanic* and displayed in exhibitions across the country.<sup>66</sup>

However, in 2016, RMSTI and its parent company filed for bankruptcy and the fate of the artifacts RMSTI salvaged has been in question.<sup>67</sup> Multiple museums have bid for the artifacts in an effort to prevent them from "disappear[ing] from the public

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<sup>59</sup> See John Roach, *Titanic Was Found During Secret Cold War Navy Mission*, NAT'L GEOGRAPHIC (Nov. 21, 2017), <https://www.nationalgeographic.com/news/2017/11/titanic-nuclear-submarine-scorpion-thresher-ballard> [<https://perma.cc/S8PM-TDCN>].

<sup>60</sup> See *id.*

<sup>61</sup> *Undercover History: Titanic*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.org/media/undercover-history-titanic> (last visited Apr. 8, 2021) [<https://perma.cc/UP6Y-SWAZ>].

<sup>62</sup> *R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel*, 286 F.3d 194, 196 (4th Cir. 2002).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 197.

<sup>65</sup> *Id.* at 207.

<sup>66</sup> Kate Abbott, *A Brief History of the Titanic Discovery*, TIME (Sept. 1, 2010), <http://content.time.com/time/nation/article/0,8599,2015271,00.html> [<https://perma.cc/T7EV-5Z6F>].

<sup>67</sup> Michael Greshko, *Titanic Artifacts Caught in International Tug-of-War*, NAT'L GEOGRAPHIC (July 2, 2018), <https://www.nationalgeographic.com/science/2018/07/news-rms-titanic-artifacts-shipwrecks-bankruptcy-archaeology> [<https://perma.cc/UP6J-TL7V>].

domain.”<sup>68</sup> There are also concerns over who will attempt to salvage the wreck, either legally or illegally, in the absence of RMSTI.<sup>69</sup> Additionally, the repeated salvage missions to the *Titanic*, including an unsuccessful attempt to salvage part of the hull, have resulted in serious damage to the wreck.<sup>70</sup> All of these concerns inform the approaches that both international law and American law have taken with respect to the protection of wrecks.

Another example of the law of salvage comes from the 1987 discovery by the Columbus-American salvage group of the *SS Central America*, a nineteenth century ferry that sunk in a hurricane in 1857 off the coast of Charleston, South Carolina.<sup>71</sup> While less sensational than the discovery of the *Titanic*, the legal fight that ensued following this discovery provides an example of how courts are reluctant to apply the law of finds.<sup>72</sup>

In 1989, Columbus-America filed an in rem action seeking ownership rights over the one million dollars worth of gold and other artifacts scattered in and around the wreck.<sup>73</sup> The insurance agencies that had underwritten the loss came forward to challenge Columbus-America's action.<sup>74</sup> The district court awarded Columbus-America ownership rights over the gold, finding that the insurance underwriters had abandoned their interest in the ship.<sup>75</sup> On appeal, a divided Fourth Circuit panel found “that the district court erred in applying the law of finds, rather than the law of salvage” and remanded the case.<sup>76</sup> Specifically, the Fourth Circuit was convinced by the underwriters' arguments that they had not abandoned the ship. The district court, on remand, awarded Columbus-America a ninety percent salvage award.<sup>77</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> See Sam Smith, *Stop Plundering of the Titanic, Says Expert Who Found Wreck*, INDEPENDENT (Apr. 16, 2012, 10:10 AM), <https://www.independent.co.uk/life-style/history/stop-plundering-of-the-titanic-says-expert-who-found-wreck-7646731.html>.

<sup>70</sup> See Abbott, *supra* note 66.

<sup>71</sup> See *Columbus-Am. Discovery Grp. v. Atlantic Mut. Ins. Co.*, 56 F.3d 556, 561 (4th Cir. 1995).

<sup>72</sup> See *id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See *id.* at 561–62.

<sup>77</sup> *Id.* at 562.

In remanding the Columbus-America case to the district court for a determination under the law of salvage, the Fourth Circuit intentionally favored the law of salvage over the law of finds. In fact, the Fourth Circuit, in the *Central America* litigation, noted that the district court had found “that the underwriters did insure the treasure and that they received ownership interests in the gold once the claims were paid.”<sup>78</sup> The *Central America* litigation was resolved in a much neater fashion than the *Titanic* litigation, which stretched well into the 2000s. But the Fourth Circuit’s resounding rejection of Columbus-America’s law of finds claim indicated a clear preference of American courts for the law of salvage.<sup>79</sup>

These two examples of deep sea wreck discovery and subsequent litigation relate solely to commercial vessels. State vessels that sank in international waters or the coastal waters of foreign nations, far from the reach of American courts, implicate the same legal principles but present different legal questions relating to ownership and salvage rights.

### III. BACKGROUND: MILITARY SHIPS

#### A. *We Can Neither Confirm Nor Deny: Project Azorian and the Salvage of Sunken State Vessels*

The *Titanic*, perhaps the preeminent example of deep sea salvage, was only found because Ballard had been tasked by the Navy to find two nuclear submarines—the *USS Thresher* and the *USS Scorpion*—and determine whether their nuclear reactors were negatively impacting the surrounding environment as they sat on the ocean floor.<sup>80</sup> The *Thresher* essentially disappeared in April 1961 during a nuclear submarine test involving a deep-dive.<sup>81</sup> She reached depth, communicated once to indicate she was experiencing difficulties, and then never surfaced.<sup>82</sup> The *Scorpion* was expected to return to her base at Norfolk, Virginia

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<sup>78</sup> *Id.* at 575.

<sup>79</sup> See Stuart, *supra* note 38, at 60.

<sup>80</sup> See Roach, *supra* note 59.

<sup>81</sup> *USS Thresher (SSN-593)*, NAT’L MUSEUM U.S. NAVY, <https://www.history.navy.mil/content/history/museums/nmusn/explore/photography/ships-us/ships-usn-t/uss-thresher-ssn-593.html> (last visited Apr. 6, 2021) [<https://perma.cc/RX65-PST5>].

<sup>82</sup> *Id.*

on May 27, 1968, but never appeared.<sup>83</sup> In October 1968, the Navy located the wreck of the *Scorpion* in over 10,000 feet of water, but it did not have the technology to determine the cause of her sinking.<sup>84</sup> The loss of these two submarines preoccupied the upper echelons of the United States military and intelligence apparatus as America was embroiled in the increasingly hot Cold War.<sup>85</sup> The United States, perhaps concerned that the Soviets would find sunken American submarines, decided to preempt them by searching for sunken Soviet submarines. *Project Azorian*, a top-secret CIA mission to find and salvage K-129, a sunken Soviet Golf II-class submarine, was hatched.<sup>86</sup> K-129 was carrying three ballistic missiles when she sank in over 16,000 feet of water roughly 1,500 miles off the coast of Hawaii.<sup>87</sup> The United States hoped she would be a trove of intelligence materials.<sup>88</sup>

Here begins the story of how modern technology made the salvage of deep-sea state vessels an important legal question. More specifically, the CIA salvage operation of K-129 raised questions about the appropriate way to treat sunken state vessels, many of which sank with crew members still on board.<sup>89</sup>

The Navy contacted the Air Force, whose sonar listening devices had picked up the death wails of K-129 as it sank.<sup>90</sup> With the location of the K-129 pinpointed, the CIA needed a ship that could recover it. Ultimately, the eccentric billionaire Howard Hughes became the cover. Over the next five years, he built the *Glomar Explorer* and disguised it as a research vessel.<sup>91</sup> The

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<sup>83</sup> See Courtney Mabeus, *50 Years Ago, Navy Sub USS Scorpion Sank with 99 Crewmen*, MILITARY.COM (May 28, 2018), <https://www.military.com/daily-news/2018/05/28/navy-submarine-uss-scorpion-mysteriously-disappeared-50-years-ago.html> [<https://perma.cc/4K72-HWXR>].

<sup>84</sup> *Id.*

<sup>85</sup> See generally Matthew Aid, *Project Azorian: The CIA's Declassified History of the Glomar Explorer*, NAT'L SEC. ARCHIVE (Feb. 12, 2010), <https://nsarchive2.gwu.edu/nukevault/ebb305/index.htm> [<https://perma.cc/9AW8-RQCA>].

<sup>86</sup> See CENT. INTEL. AGENCY, PROJECT AZORIAN: THE STORY OF THE HUGHES GLOMAR EXPLORER 1 (Jan. 4, 2010), <https://nsarchive2.gwu.edu/nukevault/ebb305/doc01.pdf> [<https://perma.cc/G4G6-QXPY>].

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 4.

<sup>89</sup> See generally *id.*

<sup>90</sup> See Greg Myre, *How the CIA Found a Soviet Sub—Without the Soviets Knowing*, NPR (Sept. 28, 2017, 1:41 PM), <https://www.npr.org/sections/parallels/2017/09/18/549535352/how-the-cia-found-a-soviet-sub-without-the-soviets-knowing> [<https://perma.cc/8QVC-GDW5>].

<sup>91</sup> *Id.*

operation was a partial success, as only a portion of K-129 was recovered.<sup>92</sup> The submarine broke apart two miles from the surface as it was being winched up, sending most of K-129 and its contents careening back to the ocean floor.<sup>93</sup> The forty-foot section that the CIA did recover contained, amongst some intelligence material, the bodies of six Soviet submariners.<sup>94</sup> The submariners were given a burial at sea, but the episode still raises legal and ethical questions about the proper treatment of sunken state vessels.

*B. Principles of Sovereign Immunity*

Unlike commercial vessels such as freighters and ferries, state vessels are afforded special protection under the concept of sovereign immunity.<sup>95</sup> Sovereign immunity protects state craft and its crew from being claimed by another state. In effect, “[a] warship or [ ] vessel took on the legal persona of a visiting army passing through the host state and was considered an extension of the sovereignty and system of laws of its flag state.”<sup>96</sup> There have been questions in recent years as to whether sovereign immunity applies to sunken state vessels, or whether, as a result of sinking, these vessels are no longer in service to the flag state and thus not protected by sovereign immunity.<sup>97</sup> While the United States has publicly endorsed the view that, absent express abandonment, state vessels remain the property of the flag state indefinitely, there is not always a clear consensus.<sup>98</sup> Principles of sovereign immunity also implicate the American salvage of K-129 because she sank while in service to the Soviet Union.

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<sup>92</sup> *See id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Regan, *supra* note 41, at 334.

<sup>96</sup> *Id.*

<sup>97</sup> *See* BOESTEN, *supra* note 15, at 144–45.

<sup>98</sup> *See infra* notes 103–108 and accompanying text.



## IV. AMERICAN ATTEMPTS TO PROTECT STATE VESSELS

A. *The American Approach to Sunken State Vessels in Its Coastal Waters*

In the 1990s, a Virginia based salvage company, Sea Hunt, made a law of finds claim, or alternatively, a law of salvage claim, to two sunken Spanish frigates, *La Galga de Andaluca* and the *Juno*, in American coastal waters.<sup>99</sup> “Sea Hunt sought a declaratory judgment that the shipwrecked vessels ‘have never been subject to the sovereign prerogative of the Kingdom of Spain,’” and had been abandoned.<sup>100</sup> In response, Spain asserted ownership of the two wrecks as belonging to the Spanish Navy: *La Galga* was a Spanish fifty-gun frigate when she sank off the coast of Virginia in 1750 after encountering a hurricane, and *Juno* was a thirty-four gun Spanish frigate when she sank in a storm off the coast of Virginia in 1790.<sup>101</sup> The district court granted Sea Hunt exclusive salvage rights to the two ships.<sup>102</sup>

The Fourth Circuit noted that this case was governed by the Abandoned Shipwreck Act, which provides that the United States “asserts title to any abandoned shipwreck that is on or embedded in the submerged lands of a State.”<sup>103</sup> The majority’s discussion of principles of “abandonment” is particularly important in understanding how cases involving sunken state vessels should be handled differently than those involving sunken commercial vessels.<sup>104</sup>

In reversing the order of the district court, the Fourth Circuit looked to the Act’s legislative history to find that “sovereign vessels must be treated differently from privately owned ones.”<sup>105</sup> Further, the court quoted a State Department letter that read, “the U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are

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<sup>99</sup> Mariano J. Aznar-Gómez, *Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage*, 25 INT’L J. MARINE & COASTAL L. 209, 212 (2010).

<sup>100</sup> *Sea Hunt v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 639 (4th Cir. 2000).

<sup>101</sup> *Id.* at 638–640.

<sup>102</sup> *Id.* at 639.

<sup>103</sup> *Id.* at 640.

<sup>104</sup> The Abandoned Shipwreck Act pertains solely to vessels that sank in American coastal waters and is beyond the scope of this paper.

<sup>105</sup> *Sea Hunt*, 221 F.3d at 641.

insufficient to establish such abandonment.”<sup>106</sup> Additionally, the letter extended the same presumption to those vessels “that, at the time of their sinking, were on the non-commercial service of another State.”<sup>107</sup> The court concluded that implied abandonment would be “least defensible where, as here, a nation has stepped forward to assert ownership over its sovereign shipwrecks.”<sup>108</sup>

Thus, the Fourth Circuit provided a concise explanation of the American approach to sunken state vessels. This understanding informed the American participation in the United Nations Educational, Scientific, and Cultural Organization’s 2001 Convention on Under Water Cultural Heritage.

*B. A Brief Overview: The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*

In 2001, UNESCO adopted a treaty providing for the protection of underwater cultural heritage sites.<sup>109</sup> In defining “underwater cultural heritage,” the commission heard extensive discussion on whether sunken warships should be included or whether a separate framework should be established to govern sunken state vessels.<sup>110</sup> Ultimately, it was decided that the Convention would not apply to sunken state vessels, and the definition was limited to “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.”<sup>111</sup>

The Convention was contested by states that felt “that war wrecks should be included under the scope of the Convention but that the flag State should have a determinative say” in the preservation or salvage of the wreck “in co-operation with the coastal State.”<sup>112</sup> Specifically, states disagreed over how much influence a flag state could exert over a coastal state attempting

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> 2001 UNESCO Convention, *supra* note 30. This author recognizes that the UNESCO draft provides a framework for the protection of commercial vessels and vessels over 100 years old, but a detailed discussion of those guidelines is beyond the scope of this paper.

<sup>110</sup> *See* BOESTEN, *supra* note 15, at 142–143.

<sup>111</sup> 2001 UNESCO Convention, *supra* note 30, art. 1(a).

<sup>112</sup> BOESTEN, *supra* note 15, at 142.

to salvage the flag state's ship within coastal waters.<sup>113</sup> It only provided that a coastal state *should inform* the flag state of its intentions regarding a sunken state vessel.<sup>114</sup> Notably, “[t]he 2001 Convention does not regulate ownership questions, but focuses solely on heritage values.”<sup>115</sup> This is particularly important in the case of sunken state vessels because there has been significant debate over whether principles of sovereign immunity extend to sunken state vessels. UNESCO refused to take a stand on that issue by declaring that the Convention would not resolve ownership claims. The Convention faced criticism from multiple countries, and the United States did not support its final text.<sup>116</sup> American courts and the government had consistently articulated the view that flag states retain ownership rights in perpetuity to sunken state vessels anywhere in the world and salvage of those vessels requires the express consent of the flag state.<sup>117</sup>

Even if the Convention was developed to protect sunken state vessels, it is still particularly unsuited to doing so effectively for three key reasons: (1) it applies only to vessels at least 100 years old,<sup>118</sup> (2) it does not regulate claims of ownership,<sup>119</sup> and (3) it does not provide severe enough penalties for illegal salvaging of sunken vessels.<sup>120</sup>

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<sup>113</sup> *See id.*

<sup>114</sup> *Id.* (emphasis added).

<sup>115</sup> *Definition of Underwater Cultural Heritage*, UNESCO, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/underwater-cultural-heritage/definition-of-underwater-cultural-heritage> (last visited Apr. 7, 2021) [<https://perma.cc/UB94-HMEQ>].

<sup>116</sup> *See* Ole Varmer et al., *United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 5 J. MAR. ARCHAEOLOGY 129, 140 (2010).

<sup>117</sup> *See supra* Section IV.A.

<sup>118</sup> 2001 UNESCO Convention, *supra* note 30, art. 1(a). This provision is particularly key here. World War II littered the ocean floor with the remains of sunken state vessels, and the bodies of the crewmembers who sank with their ships. *See* Nunez, *supra* note 4.

<sup>119</sup> *Definition of Underwater Cultural Heritage*, *supra* note 115. This is also a significant shortcoming, as law of finds claims are entirely focused on whether the true owner of the vessels has expressly abandoned its claim to title such that a court can award the salvor title to the vessel. *See* Stuart, *supra* note 38, at 46–47.

<sup>120</sup> The Convention encourages member states to enforce sanctions against illegal salvors, but does not appear to create a system of enforcement. *See* 2001 UNESCO Convention, *supra* note 30, art. 17.

C. *American Response to the 2001 UNESCO Convention: The Sunken Military Craft Act*

Passed in 2004, the Sunken Military Craft Act (“SMCA”) appears to be the American response to the shortcomings of the Convention. It provides that American title to sunken military vessels “(1) shall not be extinguished except by an express divestiture of title by the United States; and (2) shall not be extinguished by the passage of time, regardless of when the sunken military craft sank.”<sup>121</sup> Additionally, the SMCA explicitly rejects the notion that sunken American state vessels can be subject to a law of finds claim, as the SMCA proclaims that the United States retains title to state vessels indefinitely.<sup>122</sup> In its most basic form, the SMCA simply codifies pre-existing American case law pertaining to sunken state vessels and expressly articulates the American position regarding sunken state vessels in international or foreign coastal waters. The SCMA further prohibits the salvage of sunken state vessels<sup>123</sup> and sets out a possibility of a civil penalty for those who do salvage these vessels.<sup>124</sup>

There are two key problems with the SMCA. First, it does not apply to actions by people who are not “citizen[s], national[s], or resident alien[s] of the United States,” except as provided by principles of international law or agreements between the United States and the person’s native country, among a handful of other exceptions.<sup>125</sup> Given that the 2001 UNESCO Convention does not provide a specialized protection for sunken state vessels, it is unlikely that the SMCA is enforceable against salvors in international waters, absent an agreement with the country of which the salvor is a citizen. Second, the SMCA does not comment on respecting these wrecks as gravesites for the servicemen and women who died on their vessels.

Therefore, the SMCA does little more than protect sunken state vessels from salvage as long as the salvage claims are litigated in American courts. It must be acknowledged that the SMCA does, importantly, put would-be salvors on notice that

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<sup>121</sup> Sunken Military Craft Act, Pub. L. No. 108-375, § 1401, 118 Stat. 2094 (2004).

<sup>122</sup> *Id.* § 1406(c).

<sup>123</sup> *Id.* § 1406(d).

<sup>124</sup> *Id.* § 1404(a).

<sup>125</sup> *Id.* § 1402(c)(2).

they are unlikely to prevail on salvage claims of state vessels.<sup>126</sup> However, because it is not binding on non-citizens, the SMCA does little to protect ships that are illegally salvaged in international waters, far from the jurisdiction of American courts.

## V. POTENTIAL SOLUTIONS

### A. *The American Battle Monuments Commission: American Cemeteries on Foreign Soil*

The American Battle Monuments Commission (“ABMC”) is a federal agency that was established by Congress in 1923 to oversee American cemeteries in foreign countries.<sup>127</sup> ABMC currently oversees the remains of 124,000 American dead across 26 permanent burial grounds on foreign soil.<sup>128</sup> ABMC has also commemorated the more than 94,000 servicemen and women who are missing in action, lost, or buried at sea, on plaques in the cemeteries and memorials.<sup>129</sup>

ABMC is the executive agency tasked with management of these gravesites, but the gravesites themselves are acquired via a treaty between the United States and the foreign nation. These treaties provide the use of the land free of charge in perpetuity to the United States, but the land itself does not belong to the United States.<sup>130</sup> In other words, investigation of crimes committed in these cemeteries is still vested in local law enforcement and governments.<sup>131</sup> For example, in 1956, the United States and France entered into a treaty in which France would grant the United States land to intern the bodies of the service men and women who had died during World War II.<sup>132</sup>

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<sup>126</sup> See *id.* § 1406(d).

<sup>127</sup> *About Us*, AM. BATTLE MONUMENTS COMM’N, <https://www.abmc.gov/about-us> (last visited Apr. 7, 2021) [<https://perma.cc/5H32-4XW7>].

<sup>128</sup> *Cemeteries and Memorials*, AM. BATTLE MONUMENTS COMM’N, <https://www.abmc.gov/cemeteries-memorials> (last visited Apr. 7, 2021) [<https://perma.cc/X7C9-UGGZ>].

<sup>129</sup> *Id.*

<sup>130</sup> *Frequently Asked Questions*, AM. BATTLE MONUMENTS COMM’N, <https://www.abmc.gov/node/534720> (last visited Apr. 7, 2021) [<https://perma.cc/GG96-N5D5>].

<sup>131</sup> *Id.*

<sup>132</sup> See *generally* Agreement Between the Government of the United States of America and the Government of the French Republic Relative to the Grant of Plots of Land Located in France for the Creation of Permanent Military Cemeteries or the Construction of War Memorials, Fr.-U.S., Mar. 19, 1956, 275 U.N.T.S. 38.

The treaty provided that France would exempt the land “from all present and future taxes”<sup>133</sup> and the United States would use it “to bury therein the remains of members of the American Armed Forces or of American citizens who died while contributing to the pursuit of World War II, to build war memorials thereon, or for buildings and utilities needed to maintain these cemeteries.”<sup>134</sup>

One of the many arguments for protecting sunken state vessels is that they are the final resting place of the sailors who died on board. They are, essentially, underwater gravesites. It is therefore not a stretch to conclude that a potential solution would be to officially designate these vessels as gravesites in a manner similar to the foreign cemeteries the United States has scattered around the world.<sup>135</sup>

For ships in foreign coastal waters, the United States would enter into a treaty with the coastal state whose waters an American vessel rests in. The *Juneau*, for example, which lost roughly 687 of her almost 700-man crew when she sank, was found off the coast of the Solomon Islands.<sup>136</sup> The United States could enter into a treaty with the Solomon Islands to declare the *Juneau* a gravesite, and hand administration of the site over to the ABMC. In fact, the United States already has a treaty with the Solomon Islands, as there is an American cemetery at Guadalcanal.<sup>137</sup> Countries like the Solomon Islands, with which the United States already has a treaty for the creation of terrestrial cemeteries, may be more likely to enter into these types of treaties with the United States.

There is an essential difference between treaties that designate sunken vessels as gravesites and treaties designating a terrestrial cemetery. Specifically, treaties designating sunken vessels as gravesites would have to contain a provision for policing powers. In other words, for these treaties to effectively deter the illegal salvage of sunken vessels, there has to be a penalty for salvaging them. The SMCA dictates a civil penalty of

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<sup>133</sup> *Id.* art. 3.

<sup>134</sup> *Id.* art. 2.

<sup>135</sup> See generally *Cemeteries and Memorials*, AM. BATTLE MONUMENTS COMM'N, <https://www.abmc.gov/cemeteries-memorials> (last visited July 9, 2021) (providing an interactive list of all American military cemeteries on foreign soil).

<sup>136</sup> See *Sunken USS Juneau*, *supra* note 5.

<sup>137</sup> See *Guadalcanal Memorial*, AM. BATTLE MONUMENTS COMM'N, <https://www.abmc.gov/Guadalcanal> (last visited Apr. 8, 2021) [<https://perma.cc/N5PJ-325B>].

not more than \$100,000.00 for each violation.<sup>138</sup> Any treaties would have to outline a similar sanction that the host nation would be obligated to enforce.

*B. The 1986 RMS Titanic Maritime Memorial Act: An International Memorial Site*

Over 1,500 people from over a dozen countries lost their lives when the *Titanic* sank almost 400 miles off the coast of Newfoundland in April 1912.<sup>139</sup> Passed by the Senate one year after Ballard's 1985 discovery of the wreck, the 1986 RMS Titanic Maritime Memorial Act was intended "to encourage international efforts to designate the [shipwreck of the] R.M.S. Titanic as an international maritime memorial[.]" and to provide for research and exploration guidelines.<sup>140</sup> The Act dictated that the United States was to reach out to other countries such as the United Kingdom, France, and Canada to establish the *Titanic* wreck site as a memorial and to create a series of guidelines for future exploration of the site.<sup>141</sup> Subsequently, the National Oceanic Atmospheric Administration ("NOAA") established rules for accessing the site. NOAA modeled its rules on a series of rules annexed to the Convention. Both rules favor *in situ*<sup>142</sup> preservation of wreck sites as the primary way to preserve the vessel. NOAA was careful to note that it is not disallowing access to the *Titanic* wreck site; rather, it is seeking to limit disruption to the site that could expedite its destruction.<sup>143</sup>

The RMS Titanic Maritime Memorial Act provides a framework that UNESCO could use to protect sunken state vessels in international waters. By designating sunken state vessels as memorial sites to the sailors who died aboard them, UNESCO avoids the thorny ownership problem that it declined to address in the Convention. In other words, the designation of the sites as memorials does not require individual treaties with the flag state. Rather, UNESCO would declare that sunken state vessels in international waters are memorial sites. UNESCO

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<sup>138</sup> See Sunken Military Craft Act, Pub. L. No. 108-375, § 1404, 118 Stat. 2095–96 (2004).

<sup>139</sup> *Titanic Sinks*, HISTORY, <https://www.history.com/this-day-in-history/titanic-sinks> (last visited Apr. 8, 2021) [<https://perma.cc/4VCG-9TE6>].

<sup>140</sup> 16 U.S.C. § 450rr(b)(1) (1986).

<sup>141</sup> See Varmer, *supra* note 116, at 136.

<sup>142</sup> *Id.* at 136, 138.

<sup>143</sup> See *id.* at 136.

would seek the endorsement of other countries, just as the United States did with the RMS Titanic Maritime Memorial Act. Additionally, UNESCO could promulgate a series of guidelines for access to the site. Countries like the United States would likely seek stricter rules regarding access to the wreck sites of their sunken state craft. Therefore, UNESCO would have to create a series of guidelines for access to the sites that prioritizes the preservation of the wreck as a memorial instead of a research site.

## VI. CONCLUSION: STILL ON PATROL

It took the United States only one year after the discovery of the *Titanic* to garner support from the international community and designate the wreck site a memorial to the more than 1,500 passengers and crew who died when she sank. More than 1,800 crew members are still missing in the wrecks of the *Indy*, *Wasp*, *Juneau*, and *Hornet* but the international legal community has yet to address the fragile existence of these wrecks in an era of illegal salvage. The international legal community fails to recognize the need to protect these ships as gravesites, and the longer it waits to do so, the higher the risk that many of these ships will simply disappear.

Treaties between the United States and the country whose coastal waters the vessels sank in should designate the ships as gravesites as the only way to protect these ships. Additionally, this solution exemplifies the American position on sunken state vessels: that they should not be salvaged and they belong in perpetuity to the United States. UNESCO, on the other hand, must be tasked with the preservation of these vessels in international waters. Using the RMS Titanic Maritime Memorial Act as its framework, UNESCO should designate the wreck sites of sunken state vessels as memorial sites, with access subject to strict guidelines that prioritize the ships as gravesites.

Ultimately, the legal community must recognize these sunken state craft as gravesites deserving of increased protections. To this day, sunken submarines are not considered lost. Rather, the U.S. Navy refers to them as “still on patrol.”<sup>144</sup> The same could be said of the Navy’s other ships—specifically the four ships of which this Note takes particular notice. The Navy

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<sup>144</sup> Byron King, *Still on Patrol*, DAILY RECKONING (July 4, 2006), <https://dailyreckoning.com/still-on-patrol> [<https://perma.cc/53BD-HH6S>].



sent more than 1,800 telegrams with the words, "We regret to inform you that your husband is missing in action" to the families of the crew members who died aboard those ships.<sup>145</sup> Those are the people for whom these ships deserve greater protections than current legal frameworks afford.

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<sup>145</sup> *Id.*