

## Note and Proposal on the Immunity of Wrecks of Warships and Other State-owned Ships

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1. I benefitted tremendously from the reports of the Rapporteur and the comments from the members of the Commission as well as the discussions in Tokyo. Still I believe the issue of immunity of wrecks of warships and other State-owned ships is shrouded in some uncertainty. Here I offer some observations and a proposal on this issue, without dealing with other issues addressed in the draft resolution circulated the other day by the Rapporteur.
2. In my view it is not completely clear that a State sunken ship would definitely enjoy immunity across the board in all maritime zones, if we carefully examine the provisions of the UNCLOS and take into consideration the interaction between what we have in the UNCLOS and other species of the law such as *jus ad bellum* and international criminal law.
3. First of all, I note that there is no provision in the UNCLOS that specifically deals with the issue.
4. Secondly, even the UNCLOS uses different phrasing to describe immunity in different provisions. See arts. 42(5) (“sovereign immunity”); 95 (“complete immunity”); 96 (“complete immunity”); 178 (“immunity from legal process”); 179 (“immunity from search and any form of seizure”); 181 (“inviolable”); 182 (complicated formulations); 183 (“exemption from taxes and customs duties”); and 236 (“sovereign immunity”). Such differences militate in favor of the view that the UNCLOS knows different sizes and shapes of immunity: complete immunity, immunity from judicial proceedings, and inviolability in the sense of immunity from search and seizure. These different sizes and shapes may apply to a State sunken ship. Of course, beyond the UNCLOS the situation is more uncertain probably.
5. In this connection, I note that the idea of inviolability as a form of immunity is now fully accepted for experts on mission under the regime relating to those experts working for the United Nations and the specialized agencies, although such experts on mission may not be immune from judicial proceedings (as a narrower part of judicial process). I suppose there is no need to belabor this point.
6. Furthermore, what has been said in the Rapporteur’s proposed articles (e.g., Article 7) may not have sufficiently addressed the issue of inviolability.

7. Thirdly, it seems that a governmental ship being used in the waters under the sovereignty of a foreign coastal State in violation of the law prohibiting the use of force against the latter State at least would not enjoy complete immunity, because self-defense or self-help measures can be employed by the coastal State to stop the violation; it would be strange to give the ship complete immunity simply because, and as soon as, it had sunk and become a wreck. Such a view would place a wreck in a better position than a ship. While some may assert that self-defense and self-help, on the one hand, and immunity, on the other hand, are on different tracks of international law—if I may so characterize the relevant points in the judgments in *Arrest Warrant* and *Germany v. Italy* in the International Court of Justice, the result of successful self-defense or self-help can have the same practical result of removing the inviolability of the vessel. As far as inviolability is concerned, practice does not support such a distinction between the two tracks.<sup>1</sup> Government planes that have flown into a foreign State in violation of the latter's sovereignty have not been granted inviolability, where sometimes a case for self-defence or even self-help need not be mounted as the planes have landed and are not moving; only police actions are in order. In any event, if indeed the rules were operating separately on such different tracks, a rule on immunity for the ship wreck should not prevent the continuation of the self-defense or self-help measures against the ship wreck after the ship has sunk, to the extent applicable. As to other aspects, the Court's judgment in *Germany v. Italy* is not without detractors and these issues can be left for the future.

8. Similarly, it seems clear these days that governmental crew aboard a ship would not enjoy immunity from prosecution for war crimes (and probably other international crimes) committed onboard the ship<sup>2</sup>; it would be difficult for one to accept that even though the ship was utilized as an instrument in the commission of these crimes, that ship itself still would enjoy immunity or even complete immunity, and that it would continue to enjoy immunity after it had sunk and become a wreck. Such a view would put the ship in a situation better than the crew members. If such a better position were to obtain during an armed conflict or in matters relating thereto, the narrow scope of the Court's decision in *Germany v. Italy* would militate in favor of a different rule in cases other than armed conflict situations.<sup>3</sup> The Court expressly said that “it is not called upon in the present proceedings to resolve the question whether there is in customary international law a ‘tort exception’ to State immunity applicable to *acta jure imperii* in general” and that “[t]he issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those

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<sup>1</sup> The special status of embassy premises may entitle them to special treatment, but that hinges on the special status. Since governmental ships are not so special as are embassy premises, they should not be given the same status.

<sup>2</sup> Cf., e.g., 1 Oppenheimer's International Law, 744-45; 1165-1174; Ingrid Delupis, Foreign Warships and Immunity for Espionage, 78 American JIL (1984), 53.

<sup>3</sup> Jurisdictional Immunities of the State (Germany/Italy: Greece intervening), Judgment, ICJ Reports 2012, 127, para. 65; cf. Diss. Op. Gaja, *ibid.*, 317, para. 9. Cf. Sienho Yee, The Discretionary Function Exception Under the Foreign Sovereign Immunities Act: When in America, Do the Romans Do as the Romans Wish?, 93 Columbia Law Review (1993), 744-82.

armed forces, in the course of conducting an armed conflict”. If a broader inquiry were conducted, the result may well be different.

9. In addition, the cases presented so far do not seem to have addressed many aspects of immunity in a focused manner. A careful reading of them will reveal that they do not really support complete immunity for a governmental sunken ship in all respects.

10. In light of the above considerations, particularly the uncertainties, I would propose that we not formulate a provision that would fix or freeze the immunity of a sunken ship in a static way once and for all. Rather, we should formulate a *general* rule that would cap the immunity of a State sunken ship to no greater than the quantum of immunity it enjoys immediately before sinking, allowing that quantum of immunity to mature in the fullness of time. One may note that to some extent the enjoyment of immunity by a certain type of ships may depend on their viability as such ships; once such a viability is lost, the immunity attaching to such a type is also lost (cf. UNCLOS, art.29). One may also note that the immunity that a wreck enjoys would not necessarily equal that enjoyed by the ship immediately before sinking. We need, and can only say, that the immunity that a wreck enjoys cannot be greater than that the ship enjoyed immediately before sinking.

11. Furthermore, we should also formulate some particular rules to reflect that the situations where no immunity is available, if we are reasonably certain of these situations.

12. In the light of the above considerations, a provision to the following effect is proposed (leaving language issues for the future):

Without prejudice to the applicability of other species of law, a State sunken vessel enjoys, while un-abandoned, immunity to no greater extent than the vessel has immediately before sinking, however:

- 1) A State sunken vessel being used immediately before sinking in the waters under the sovereignty of a foreign coastal State as an instrument in committing a serious international crime or a violation of the prohibition against the use of force does not enjoy inviolability;
- 2) Government cargo on board a State sunken vessel enjoys immunity to the same extent as the sunken vessel;
- 3) Private cargo on board a State sunken vessel enjoys immunity to the same extent as the sunken vessel except from judicial proceedings.

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