

CAN'T TOUCH THAT? POSSIBLE SOLUTIONS TO THE PROBLEMS OF SOVEREIGN IMMUNITY ATTACHING TO THE SUNKEN WARSHIPS OF CHUUK LAGOON

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The wrecks of 52 World War II era warships are corroding on the floor of a pristine lagoon in the Federated States of Micronesia ('the wrecks'). The corrosion is slowly causing the hulls of the wrecks to lose their structural integrity. The inevitable conclusion is that the wrecks will eventually break up. Inside these wrecks are millions of litres of heavy bunker oil, meaning that when the oil spills the pristine marine environment and the local economy will be devastated.

Until now, no action has been taken by the Federated States of Micronesia due both to legal uncertainties as to whether the Federated States of Micronesia had legal authority to interfere with the wrecks and a lack of financial resources to undertake the very costly removal process. The process has undoubtedly been complicated by the fact that Japan claims ownership over the wrecks but has not provided assistance in dealing with the environmental problems that have stemmed from them. This paper attempts, first, to suggest a solution that is both legally defensible and financially feasible for the Federated States of Micronesia and, second, to explain why Japan may have been unwilling to assist the Federated States of Micronesia to solve a certain environmental problem. I will argue that there are two options available to the Federated States of Micronesia: first, the oil can be salvaged from the wrecks or, second, the rights to the oil can be sold in exchange for its removal. The Federated States of Micronesia is entitled to deal with the wrecks because preventing an oil spill that will cause significant damage to the coastline and marine environment within its territory is consistent with territorial sovereignty and the rights of the coastal State. I will also show that Japan is unwilling to remove the oil because it may not be cost efficient for them to do so.

This paper will be developed in three parts. The first part will examine the current context, demonstrating how the ships were lost and the extent of the environmental problem. By way of background, I will consider why Japan has not sought to assist the Federated States of Micronesia despite continuing to assert title to the wrecks. In the second part, I will explain the law that surrounds sunken warships and the role played by sovereign immunity in preventing interference with warships. This section will also demonstrate that the salvage of the cargo to prevent damage to the marine environment is consistent with rights found in treaty and customary law and that a state of necessity could be invoked to ensure that salvage operations could be undertaken. The third part will explain how an operation to remove the oil could be carried out and the obstacles posed by modern salvage law.

This research has implications for the rights of coastal States to salvage sunken warships, the laws of environmental salvage, immunity and state responsibility. It should also be noted that whilst I have made every attempt to accurately represent the legal and factual matrix in the Federated States of Micronesia, the small and developing nature of the State meant that recent data and primary legal sources were often difficult to obtain.

1 Background

The Federated States of Micronesia is an archipelagic nation made up of four groups of islands spread over more than two million square kilometres of the Pacific Ocean. It is also one of the world's poorest nations with a population of just over 102,000 people.¹ The Japanese navy militarily took possession of the islands that now make up the Federated States of Micronesia and other surrounding island nations in 1914. Japan was granted a League of Nations mandate over the islands at the end of World War I. After the defeat of Japan in World War II, the islands that now comprise the Federated States of Micronesia became part of the Trust Territory of the Pacific Islands under the administration of the United States.²

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¹ World Bank, *Gross Domestic Product 2012* (1 July 2013) <<http://databank.worldbank.org/data/download/GDP.pdf>>; Officer of Statistics, Budget and Economic Management, Government of the Federated States of Micronesia, *Census 2010 – Population* (14 February 2013) <<http://www.sboc.fm/index.php?id1=Vm0xMFlXRlVWGHUYmtwT1ZrVTFVbFpyVWtKUfVUMDk>>.

² John Richard Steincipher (ed), *Code of the Trust Territory of the Pacific Islands* (Book Publishing Company, 1970) preface 11; *Trust Territory of the Pacific Islands* 48 USC § 1681.

One of the local regions of the Federated States of Micronesia is Chuuk. Chuuk is an atoll: a ring-shaped reef that encloses a lagoon and is surrounded by open sea.³ The lagoon Chuuk encloses is approximately 63 kilometres across.⁴ From 1939 Chuuk Lagoon (then known as Truk Lagoon) was used as a base for the Imperial Japanese Navy.⁵ On the 17th and 18th of February 1944 the United States attacked the Japanese naval base at Chuuk with hundreds of aircraft; 45 Japanese ships were sunk and another 27 were damaged in two days.⁶ The Japanese military base was subject to continuous bombing raids throughout the war to ensure that the base was unable to be utilised by Japanese forces for offensive purposes.⁷ Another seven ships were sunk during the later American and British bombing campaigns of Chuuk in April and June 1944.⁸ The 52 sunken Japanese war-wrecks all lie within the lagoon.

The Japanese ships sunk by the bombing raids have now been corroding on the floor of the lagoon for almost 70 years. In 2002, a corrosion expert from the Western Australian Museum, Dr Ian MacLeod, predicted that the ships would start to break up in approximately 10 – 15 years.⁹ Whether the ships have started to break up yet is unclear, but it is well known that some of the ships have started to leak oil.¹⁰ If Dr MacLeod is correct, there is a short period of time available in which to remove the oil from the wrecks. This is compounded by two factors. The first is that the rate of corrosion increases with time. The second factor is that the oil cannot be removed if the corrosion is too advanced.¹¹

It is imperative that the oil is removed if an environmental disaster is to be avoided. It is possible that the wrecks contain up to 32 million litres of heavy crude and bunker oil.¹² At that rate, experts say that a comparison with the *Exxon Valdez* oil spill or the *Deepwater Horizon* disaster in the Gulf of Mexico is not unreasonable, as the confined nature of the lagoon will magnify the effects of any spill.¹³ Maritime casualties elsewhere in the Federated States of Micronesia have highlighted the potential for harm. In 2002, the *M/V Kyowa Violet* struck a reef upon entering Colonia Harbor, Yap State.¹⁴ Although the *Kyowa Violet* was only within the harbour for thirty to forty-five minutes, the resulting oil spill did extensive damage to the mangroves and other marine resources.¹⁵ The Supreme Court of the Federated States of Micronesia assessed the damage at almost USD 3 million.¹⁶ This means that any oil spill will certainly cause an environmental disaster that will most likely kill many marine species that live within the lagoon. Any spill that does occur will have at least two significant ramifications for the islanders that live around Chuuk Lagoon: first, as many of them are subsistence fishermen, an oil spill would quickly contaminate their food supply; and second, the economy will suffer as dive tourism, which forms a large part of the economy, declines.¹⁷

1.1 Why Has Japan Not Rendered Assistance?

In 2009, the President of the Federated States of Micronesia, on resolution of the Congress, requested the assistance of the Governments of Japan and the United States to ‘abate and remedy the environmental damages

³ Myron H Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 1993) vol 2, 93.

⁴ Bill Jeffery, ‘Federated States of Micronesia’ in Sarah Dromgoole (ed), *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (Martinus Nijhoff, 2006) 7.

⁵ *Ibid.*

⁶ Dan E Bailey, *The World War II Wrecks of the Truk Lagoon* (North Valley Diver, 2000) 107, 165.

⁷ *Ibid.* 174-253.

⁸ *Ibid.*

⁹ Australian Broadcasting Corporation, ‘The Blue and the Black’ *Foreign Correspondent*, 12 April 2011 (Ian McLeod)

<<http://www.abc.net.au/foreign/content/2011/s3189254.htm>>.

¹⁰ Emanuel Mori, ‘Address by President Emanuel Mori before 66th United Nations General Assembly’ (Speech delivered at United Nations General Assembly, New York, 23 September 2013) <http://www.fsmgov.org/fsmun/ga66_main.htm>; Resolutions of the 15th Federated States of Micronesia Congress, Seventh Special Session (March 16 – 25 2009), ‘Requesting the President of the Federated States of Micronesia to request assistance from the United States and Japan to deal with fuel leaks from World War II wrecks in Chuuk Lagoon’, Resolution *Committee Reports* 15-204 (adopted March 25 2009); Australian Broadcasting Corporation, above n 9, (Mark Willacy); Anthony Talouli, Trevor Gilbert and Rean Monfils Gilbert, ‘Strategic Environmental Assessment and Potential Future Shoreline Impacts of the Oil Spill from WWII Shipwreck *Hoyo Maru* Chuuk Lagoon – Federated States of Micronesia’ (Report, Secretariat of the Pacific Regional Environmental Programme, 2012) 10.

¹¹ Katherine Idaas, ‘Norwegian Pollution Control Authority Work on Shipwrecks’ [1995] 1 International Oil Spill Conference Proceedings 733, 734-735.

¹² Australian Broadcasting Corporation, above n 9 (Ian McLeod); Mori, above n 10.

¹³ *Ibid.*

¹⁴ *M/V Kyowa Violet* 14 FSM Intrm. 403 (Yap 2006) (Findings of Fact and Law – Trial), 409 (Supreme Court of the Federated States of Micronesia) <<http://www.fsmlaw.org/fsm/decisions/vol14/14FSMintrm.403-425.htm>>.

¹⁵ *Ibid.* 409 – 412.

¹⁶ *Ibid.* 424.

¹⁷ Australian Broadcasting Corporation, above n 9 (Ian McLeod).

[sic] to Chuuk Lagoon, including but not limited to the fuel leakage'.¹⁸ The United States was invited for two reasons: first, the *Compact of Free Association* between the United States and the Federated States of Micronesia places responsibilities on the United States with respect to environmental protection;¹⁹ second, the United States lost a number of aircraft during the February 1944 bombing raids of Chuuk that may be contributing to the environmental problem.²⁰

The President of the Federated States of Micronesia wrote to request assistance from the United States and Japanese embassies again in 2011.²¹ Japan's Parliamentary Senior Vice-Minister For Foreign Affairs, Dr Tsuyoshi Yamaguchi replied to this request stating that '[t]he Government of Japan is now considering what assistance we can do [sic]'.²² No other assistance has been forthcoming. It is possible that diplomatic options are still being worked through and evaluated. However, if there continues to be no response from the Japanese authorities, it invites the question: why?

The answer seems to lie in economic feasibility. In 2005 there were news reports that an American salvor had been given permission by the Japanese Government to salvage the *I-52* submarine.²³ An American bomber sank the *I-52* submarine in June 1944, approximately 1000 miles from the French coast.²⁴ The *I-52* submarine is a war grave, however, it is notable for allegedly containing nearly USD 30 million in gold bullion.²⁵ The agreement between the salvor and the Japanese Government has not been disclosed. The reports also indicated that the salvors may have been allowed to work unsupervised.²⁶

The approval to salvage the *I-52* submarine demonstrates that Japan has no principled opposition to the salvage of World War II wrecks. This is significant because it means that there are conditions under which the Japanese Government will permit salvage; it is just a matter of satisfying those conditions. As the *I-52* submarine was carrying valuable cargo, it may be surmised that the possible economic advantage assisted in the decision to permit the salvage. It would seem that the highly costly nature of an operation to remove oil from up to 52 ships, with little possibility of a benefit to Japan, would lead to the conclusion that such an undertaking was deemed not to be economically beneficial or in Japan's interests.

2 The Governance Regime

International law applies to the salvage of the sunken warships as the interests of more than one State are involved. There are four sources of international law: international conventions; international customs that evidence a general practice that are accepted as law; the general principles of law recognised by 'civilised nations'; and judicial or scholarly works that may assist in interpreting the rules of law.²⁷

There is no international treaty that deals with sunken warships specifically. The conventions that apply to sunken ships, the *International Convention on Salvage, 1989*, the *1910 International Convention for the Unification of Certain Rules of Law related to Assistance and Salvage at Sea and Protocol of Signature* and the *International Convention for the Removal of Wrecks* have all had warships and ships on government non-commercial service excluded from their application.²⁸ This means that the ordinary laws of maritime salvage do not apply to sunken warships, unless the flag State provides otherwise. In this case, Japan, the flag State, has not made such provisions. The only exception to this general exclusion is found in Article 5 of the *International*

¹⁸ Resolutions of the 15th Federated States of Micronesia Congress, Seventh Special Session (March 16 – 25 2009), 'Requesting the President of the Federated States of Micronesia to request assistance from the United States and Japan to deal with fuel leaks from World War II wrecks in Chuuk Lagoon', Resolution *Committee Reports* 15-204 (adopted March 25 2009).

¹⁹ *Compact of Free Association*, Federated States of Micronesia-United States of America, signed 1 October 1982, TIAS 04-625 (entered into force with amendments 25 June 2004) s 161.

²⁰ The United States lost 25 aircraft: Bailey, above n 6, 165.

²¹ 'Underwater time bombs: Oil leaks from wartime shipwrecks', *Islands Business* (online), February 2012, <<http://www.islandsbusiness.com/2012/2/cover-story/underwater-time-bombs/>>.

²² *Ibid.*

²³ Eric Talmadge, 'American to salvage Japanese sub full of gold, opium sunk in Atlantic in '44', *The Japan Times* (online), 19 April 2005 <<http://www.japantimes.co.jp/news/2005/04/19/national/american-to-salvage-japanese-sub-full-of-gold-opium-sunk-in-atlantic-in-44/#.Ulqh0haBJhA>>; Julian Ryall, 'Salvage Expert sets eyes on Japanese warship', *Aljazeera English* (online), 21 April 2005 <<http://www.aljazeera.com/archive/2005/04/200841013165777249.html>>

²⁴ Ryall, above n 23.

²⁵ The submarine is supposed to contain 146 gold bars: *Ibid.*

²⁶ Talmadge, above n 23; Ryall, above n 23.

²⁷ *Statute of the International Court of Justice* art 38(1).

²⁸ *International Convention on Salvage, 1989*, 1953 UNTS 193, art 4; *1910 International Convention for the Unification of Certain Rules of Law related to Assistance and Salvage at Sea and Protocol of Signature*, 1910, 212 ConTS 187, art 14; *International Convention for the Removal of Wrecks, 2007*, 2007, 46 ILM 697, art 4(2).

Convention on Salvage, 1989.²⁹ This exception provides that the *International Convention on Salvage, 1989* does not affect salvage operations 'by or under the control of' public authorities.³⁰ However, the Federated States of Micronesia has not signed the *International Convention on Salvage, 1989*. Therefore, the only treaty law that applies to the sunken warships is the *United Nations Convention on the Law of the Sea* insofar as it sets out the rights and obligations of the flag and coastal States.³¹

The 1982 *United Nations Convention on the Law of the Sea* is the starting point for modern maritime law.³² Under the *United Nations Convention on the Law of the Sea*, different rights are conferred on the flag State and the coastal State in different maritime zones. There are four maritime zones: high seas, exclusive economic zone, contiguous zone and the territorial sea.³³ These maritime zones constitute a sliding scale of degrees of control over the ship, from the exclusive jurisdiction of the flag State on the high seas to the exclusive jurisdiction of the coastal State in the territorial sea.³⁴ Internal waters are not generally considered to be a maritime zone. Instead, they are deemed to be the sovereign territory of the coastal State where the exclusive jurisdiction of the coastal State applies.³⁵ Article 6 of the *United Nations Convention on the Law of the Sea* permits the baseline of an atoll to be measured from the seaward low-water line of the fringing reef.³⁶ In this case, the waters of Chuuk Lagoon are deemed to be internal waters because the lagoon is on the landward side of the reef and the baseline.³⁷ As the ships have been sunk in internal waters, the Federated States of Micronesia possesses exclusive jurisdiction over the wrecks.

Whilst there is no specific international treaty law that concerns historic sunken warships, customary international law on the topic should be considered. To establish customary international law there must be a majority of States that consistently engage in a practice and that practice must be undertaken because States believe it to be lawfully required.³⁸ To date, there has been no consistent State practice concerning the treatment of sunken warships.

There are two main theories that underpin national judicial jurisprudence on the topic: express abandonment and implied abandonment. The theory of implied abandonment holds that abandonment by a State can be implied either through conduct or the passage of time.³⁹ If the ship is abandoned, the State surrenders title to the wreck. The express abandonment theory posits that the State owns all sunken warships in perpetuity and that title to a warship can only be altered by an express act of abandonment by the State, such as executive or legislative action. States that adhere to the express abandonment theory include the United States, France, Germany, Russian Federation, Spain and the United Kingdom.⁴⁰ Few other States have had to deal with abandonment of sunken vessels so it is unclear what position they would take.

Most States adopt a theory of express abandonment with respect to their own warships, however, application of this theory seems to be ad hoc. The United States for example found that express abandonment was required in the case of the *CSS Alabama*, where the United States sought to recover a bell from a treasure hunter, but implied abandonment was found to be sufficient in the cases of the *USS Texas*.⁴¹ In the *USS Texas* case the United States Government were sued for damage caused to a vessel that struck the improperly marked wreck of the warship. These decisions do not purport to be based on international law but they do illustrate the different theories as applied to American warships.

Relevantly for this inquiry, Japanese policy adheres to the express abandonment theory. This means that Japan believes that the Federated States of Micronesia cannot interfere with the warships unless Japan expressly

²⁹ *International Convention on Salvage, 1989*, 1989, 1953 UNTS 193, art 5.

³⁰ *Ibid.*

³¹ *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3.

³² *Ibid.*

³³ For the High Seas see Part VII, for EEZ see Part V and for the Territorial Sea and Contiguous Zone see Part II of *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3.

³⁴ *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3; Craig Forrest, 'Culturally and Environmentally Sensitive Sunken Warships' (2012) 26 *Australia & New Zealand Maritime Law Journal* 80, 85.

³⁵ Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press, 2012) 78.

³⁶ *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3, art 6.

³⁷ *Ibid* art 8.

³⁸ Antonio Cassese, *International Law* (Oxford University Press, 2nd ed, 2005) 162; Malcolm N Shaw, *International Law* (Cambridge University Press, 5th ed, 2003) 82.

³⁹ Forrest, above n 34, 83.

⁴⁰ Protection of Sunken Warships, Military Aircraft and Other Sunken Government Property, 69 Fed. Reg. 24, 5647 (5 February 2004).

⁴¹ *United States v Steinmetz*, 973 F 2d 212 (3rd Cir, 1992) ('*CSS Alabama*'); *Baltimore, Crisfield & Onancock Line Inc v United States*, 140 F 2d 230 (4th Cir, 1944) ('*USS Texas*').

abandons the vessels. I have been unable to find any evidence that Japan has expressed an intention to abandon the ships in Chuuk Lagoon.⁴²

Perhaps the most relevant position would be that of the Federated States of Micronesia, as it would be the courts of the Federated States of Micronesia that would determine whether the ships could be salvaged. Despite an extensive review of the authorities, the position of the Federated States of Micronesia is unclear.⁴³ Where there is no local authority on point, the Supreme Court of the Federated States of Micronesia tends to rely on jurisprudence from the United States Supreme Court.⁴⁴ This could suggest that an express abandonment theory may be preferred. However, it has been my observation that some of the previous cases dealing with sunken warships have been decided in a manner that was convenient for the government of the forum state. For example, in the case of the *USS Texas* the finding that the vessels had been abandoned saved the government from having to pay the owners of ships that ran upon the wrecks. In the case of the *La Galga*, a Spanish frigate sunk in American territorial waters, Spain's involvement in the litigation and a US State Department amicus curiae brief prompted the Court to find that express abandonment should be preferred, thereby avoiding a diplomatic incident with Spain.⁴⁵ Therefore, the courts of the Federated States of Micronesia may defer to the position adopted by the government towards efforts to salvage the wrecks.

2.1 Competing Sovereignities

The lack of established customary international law requires reliance on other established principles of law, such as those found in the *United Nations Convention on the Law of the Sea*. As noted above, the Japanese wrecks concerned have all been sunk inside Chuuk Lagoon, which is surrounded by an atoll.⁴⁶ According to Articles 6 and 8 of the *United Nations Convention on the Law of the Sea*, the waters of the lagoon are internal waters as they are on the landward side of the baseline. Therefore, the Japanese ships were sunk in the internal waters of the Federated States of Micronesia.

It is important that the ships were sunk in internal waters because the coastal State possesses full sovereignty over its internal waters.⁴⁷ This means that without immunity warships would be subject to all laws of the coastal State. Floating warships are protected by sovereign immunity. The question is whether warships sunk in internal waters continue to enjoy that immunity or if they lose the immunity and become subject to the laws of the coastal State.

2.1.1 Sovereign Immunity of the Flag State

Sovereign immunity is 'a plea relating to the adjudicative and enforcement jurisdiction of national courts which bars the municipal courts of one State from adjudicating the disputes of another.'⁴⁸

Warships have historically been subjects of sovereign immunity. This is widely seen as having been established by the United States Supreme Court in the 1812 case *The Schooner Exchange v McFaddon*.⁴⁹ The *Exchange* was an American merchant ship that had been requisitioned on the high seas, in violation of international law, by agents of the French Emperor Napoleon. The ship was subsequently converted to an armed public vessel. The petitioners sought the return of the ship when the armed vessel entered an American port to seek shelter from poor weather. Three important principles from the judgment of Chief Justice Marshall have endured. Firstly, all sovereigns are equal – one sovereign should not be required to be subject to the jurisdiction of another.⁵⁰ Secondly, immunity from the laws of the sovereign is considered to derive from the consent of that sovereign;⁵¹ and thirdly, the capacity of warships to carry out acts of the State mean that they should enjoy

⁴² It should be noted that only English materials have been examined.

⁴³ The Supreme Court of the Federated States of Micronesia did not consider an abandonment case between 1981 and April 2010.

⁴⁴ See cases such as *Pan Oceania Maritime Services (Guam) Ltd v Micronesia Shipping Inc*, 7 FSM Intrm. 37 (Pohnpei 1995), 38 (Federated States of Micronesia Supreme Court) <http://fsmLaw.org/fsm/decisions/vol7/7fsm037_039.htm>; *M/V Kyowa Violet*, 14 FSM Intrm. 403 (Yap 2006) (Findings of Fact and Law – Trial), 418 (Federated States of Micronesia Supreme Court); *M C Jumbo Rock Carrier III*, 16 FSM Intrm. (Yap 2009) (Federated States of Micronesia Supreme Court) <<http://www.paclii.org/fm/cases/FMSC/2009/43.html>>.

⁴⁵ *Sea Hunt v Unidentified Vessel or Vessels*, 221 F.3d 634 (2000); Michael White, 'Sea Hunt v Unidentified Vessel or Vessels, 221 F.3d 634' (2001) 95 *American Journal of International Law* 678, 680.

⁴⁶ Bailey, above n 6, 265.

⁴⁷ *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3, art 2(1); Tanaka, above n 35, 78.

⁴⁸ Hazel Fox, *The Law of State Immunity* (Oxford University Press, 2nd ed, 2008) 1.

⁴⁹ Ibid 717; *The Schooner Exchange v McFaddon* 11 US (7 Cranch) 116 (1812), 145 ('*The Schooner Exchange*'); Curtis A Bradley and Laurence R Helfer, 'International law and the U.S. Common Law of Official Immunity' (2010) 2010(1) *The Supreme Court Review* 213, 216.

⁵⁰ *The Schooner Exchange* 11 US (7 Cranch) 116 (1812), 137.

⁵¹ Ibid 143.

immunity.⁵² The case was widely cited beyond the United States as a correct articulation of the law of sovereign immunity with respect to warships, including by the International Law Commission.⁵³

Today, a distinction is drawn between the theory of absolute immunity and the modern theory of restrictive immunity. The theory of absolute immunity posited that immunity was granted because the foreign and equal sovereign should not have to be subject to the jurisdiction of another. The modern restrictive doctrine recognises that States should not be entitled to sovereign immunity for purposes that have no connection to their public or governmental functions. The *United Nations Convention on Jurisdictional Immunities of States and Their Property*, which will come into force if two more states ratify the convention, is based on the restrictive doctrine.⁵⁴ This means that States can invoke immunity with respect to warships, naval auxiliaries or vessels owned or operated by a State for government non-commercial purposes, but not for commercial operations.⁵⁵ Warships are afforded immunity under the customary rule because it has been assumed that warships are held for a public purpose.⁵⁶ That is, warships have the capacity to carry out acts of the State.⁵⁷ The principle that warships that have the capacity to carry out public acts of the State and should be granted immunity whilst in port is widely accepted and has been recognised in cases in the United States, France and the United Kingdom.⁵⁸

For this reason there is no doubt that floating warships are protected by sovereign immunity in the ports they visit.⁵⁹ However, the question that needs to be answered is whether that immunity continues if the vessel is sunk within the confines of the internal waters. Whether sunken warships are entitled to immunity is highly contested. There are two schools of thought: the first supports perpetual title of the flag State to the wreck, whilst the second promotes a loss of immunity due to the invalidation of the basis for its conferral.

Rand Pixa strongly advocates in favour of perpetual title to sovereign wrecks.⁶⁰ The central pillar of Pixa's argument is that the State is perpetual and so is its interest in its property.⁶¹ Pixa seeks to justify the theory of express abandonment by arguing that the public of the State has an interest in the ship that is not extinguished by its sinking.⁶² Allowing the flag State to retain title until such time as the State decides to relinquish title to the wreck is appropriate on the high seas, where the flag State is the only State with a valid claim to the wreck of the warship. However, it is inappropriate in contexts where the warship threatens to impact upon the coastal State.

Dr Valentina Vadi recognises that sovereign immunity is afforded to warships because of their function.⁶³ The function of a warship is to have the capacity to carry out military activities. It is well accepted that military activities are *jure imperii* or the public acts of the State.⁶⁴ Therefore, at least theoretically, when the ship loses the capacity to carry out these public acts, the ship should also lose the immunity conferred upon it because it is no longer able to perform the function for which the immunity was conferred.⁶⁵ In this case, as the Japanese warships are no longer able to carry out the *jure imperii* of Japan they should no longer be entitled to enjoy any sovereign immunity that may have attached to them.

Pixa and Vadi represent the two competing abandonment theories. Pixa's is presently the more internationally dominant as it recognises the interests of the flag State and the unwillingness of States to surrender their interests in military wrecks. It is, however, inappropriate where the interests of more than one State are involved. Vadi's view is less popular with flag States but it is more consistent with the principles of sovereign immunity. The difficulty with Vadi's argument is recognising when the ship is no longer capable of carrying out

⁵² Ibid 144.

⁵³ International Law Commission, *Report of the International Law Commission on the work of its Thirty-Second Session*, Chapter IV (Jurisdictional Immunities of States and Their Property), UN Doc A/35/10 (1980) art 6, 145.

⁵⁴ *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2005, 44 ILM 803.

⁵⁵ Ibid art 16.

⁵⁶ Fox, above n 48, 636.

⁵⁷ Valentina Vadi, 'International Law and the Uncertain Fate of Military Sunken Vessels' (2009) 19 *Italian Yearbook of International Law* 253, 265.

⁵⁸ *The Schooner Exchange* 11 US (7 Cranch) 116 (1812), 145; *The Parlement Belge* (1879) 4 PD 129; *Littrell v United States* (No 2) [1994] 4 All ER 203; *Allianz Via Insurance v United States of America* Cour d'appel Aix en Provence [Aix en Provence Court of Appeal], 3 September 1999 reported in 127 ILR 148, cited in Fox, above n 48, 568.

⁵⁹ Tanaka, above n 35, 79; Fox, above n 48, 721.

⁶⁰ Rand R. Pixa, *In Defense Of Perpetual Title To Sovereign Wrecks* (28 March 2009) Department of The Navy - Naval History & Heritage Command, Underwater Archaeology Branch <<http://www.history.navy.mil/branches/org12-7m.htm>>.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Vadi, above n 57.

⁶⁴ Ibid.

⁶⁵ Ibid.

the acts of State. The fact that ships can be salvaged indicates that sinking alone may be insufficient to constitute incapacity. In any event, Japan is likely to continue to insist on express abandonment.

2.1.2 The Territorial Sovereignty of the Coastal State

The claim of the coastal State is based upon its territorial sovereignty. Possession of a defined territory is an essential component of statehood. Territorial sovereignty is the supreme power to make and enforce laws within that territory.⁶⁶ However, domestic sovereign power does not exist in a vacuum. States are still expected to adhere to the principles of international law.

International obligations imply both rights and responsibilities. There is an assumption that international actors that enjoy immunity will not cause disturbance or threaten other States. Where floating warships fail to follow the laws of the coastal State in the territorial sea (or internal waters) the host State has the right to ask the vessel to leave the territorial sea immediately.⁶⁷ Such a direction cannot be given to a wreck. In the case of the Chuuk Lagoon wrecks, Japan has been asked to remove the oil that poses a hazard to the environment. It does not follow that because the sunken vessel once enjoyed immunity it possesses an unfettered right to pollute the environment of the coastal State. Instead, the coastal State as the dominant power, with rights to make and enforce law within the territory, can exercise that power over the vessel to prevent imminent damage to the State.

2.2 Environmental Measures

Part XII of the *United Nations Convention on the Law of the Sea* concerns ‘Protection and Preservation of the Marine Environment’.⁶⁸ This part sets out the rights of the coastal State and the obligations of vessels to protect the marine environment.

2.2.1 Implications of Sovereign Immunity – Does Article 236 Apply?

Article 236 of the *United Nations Convention on the Law of the Sea* provides:⁶⁹

The provisions of this Convention regarding the protection and preservation of the marine environment *do not apply to any warship, naval auxiliary, other vessels... owned and operated by a State and used, for the time being, only on government non-commercial service...*

It is accepted that all of the ships sunk in Chuuk Lagoon fall within the scope of this article, as the ships were all either warships within the meaning of Article 29 of the *United Nations Convention on the Law of the Sea* or were ‘for the time being, on government non-commercial service’.⁷⁰ The implication of this is that any *United Nations Convention on the Law of the Sea* provision that concerns the marine environment is rendered inapplicable in this context. This deprives the coastal State of any legal basis to interfere with a warship based on the provisions of *United Nations Convention on the Law of the Sea* that concern the marine environment.

Article 235 of the *United Nations Convention on the Law of the Sea* provides that States are to provide ‘prompt and adequate compensation’ for any damage that is caused by their vessels to the natural marine environment.⁷¹ This would provide for a retroactive response to any oil spill and would therefore make it likely that Article 236 applies to sunken warships because Article 235 provides a remedy for any environmental damage caused by the warship. Should an oil spill occur, the Government of the Federated States of Micronesia may be able to use this provision to their advantage. However, it does not strengthen the Federated States of Micronesia’s hand in proactively dealing with the oil before it spills.

⁶⁶ John P Grant, *International Law* (Dundee University Press, 2010) 55.

⁶⁷ *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3, art 30.

⁶⁸ Ibid Pt XII.

⁶⁹ Ibid art 236 (emphasis added).

⁷⁰ For a comprehensive examination of the nature of the government service of each vessel see Bailey, above n 6, 265 – 494; *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3, art 236.

⁷¹ *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3, art 235.

2.2.2 The Case for Intervention in Part XII of the United Nations Convention on the Law of the Sea

There are a number of provisions that empower the coastal State to take actions to prevent damage to the marine environment. Article 194 of the *United Nations Convention on the Law of the Sea* requires States to take measures to ‘prevent, reduce and control pollution of the marine environment from any source’.⁷² Under Article 211(4) of the *United Nations Convention on the Law of the Sea*, coastal States are permitted to make laws within their territorial sea ‘in the exercise of their sovereignty’ to prevent pollution, provided those laws do not ‘hamper the innocent passage of foreign vessels’.⁷³

One of the Federated States of Micronesia’s stronger arguments in favour of intervention is that taking emergency action is consistent with the rights of the coastal State. Article 221 of the *United Nations Convention on the Law of the Sea* provides that:⁷⁴

1. *Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.*

2. For the purposes of this article, ‘maritime casualty’ means a collision of vessels, stranding or other incidence of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

There is a tension between this article and Article 236. The opening words of Article 221 provide that ‘nothing in this part’ shall prejudice the rights of States, yet Article 236 appears to prejudice the rights of States with respect to warships. One resolution to this tension is that Article 236 relates to ‘protection and preservation of the marine environment’ provisions of the convention whilst Article 221 is a re-codification of a position that was established in customary international law by the *Torrey Canyon* incident and codified in the *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*.⁷⁵

In March 1967 a super-tanker known as the *Torrey Canyon* hit a reef outside the territorial sea of the United Kingdom.⁷⁶ The pollution, if permitted to continue to leak, posed a major environmental problem to the coastline and environmental interests of the United Kingdom.⁷⁷ Other salvage options were not possible so Her Majesty’s Government ordered the Royal Navy and Royal Air Force to set fire to the wreck and sink it.⁷⁸ That was the first time that a State had intervened outside its own territory with a view to environmental protection. At that time it was unclear whether the United Kingdom had any jurisdiction to intervene, however, in response, the Government of the United Kingdom organised the International Legal Conference on Marine Pollution Damage of 1969.⁷⁹ That meeting confirmed that there was a right to intervene in customary international law.⁸⁰ However, that customary right does not extend to warships that are beyond the waters of the territory.⁸¹

In coastal waters the coastal State undoubtedly possesses exclusive jurisdiction.⁸² Therefore, if there is a right to take measures that are proportional to the threat beyond territorial waters it stands to reason that where the coastal State possesses greater control that the same right exists. Article 221 of the *United Nations Convention on the Law of the Sea* can be enlivened to deal with the Chuuk Lagoon wrecks as the measures taken will be proportional, the measures will follow maritime casualties and an oil spill could reasonably be expected to result in ‘major harmful consequences’.⁸³ The removal of the oil to avoid an environmental disaster, in circumstances that would only minimally interfere with the wrecks themselves would be a proportional measure. Whilst military action does not appear to have been considered as a possible form of ‘maritime casualty’ there is no

⁷² Ibid art 194.

⁷³ Ibid art 211(4).

⁷⁴ Ibid art 221 (emphasis added).

⁷⁵ *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, 1969, 970 UNTS 14049, arts I - VII.

⁷⁶ Myron H Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff, 1993) vol 4, 305.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, 1969, 970 UNTS 14049, art I(2).

⁸² Forrest, above n 34, 85.

⁸³ *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3, art 221.

doubt that it was an external factor that caused damage to the vessel. Also, given the volume of oil and the impending threat to the economy, I believe that the harmful consequences criterion would be satisfied. Therefore, intervention to remove the oil is consistent with the rights of the coastal State.

2.3 A State of Necessity

One branch of the law between States is the law of State Responsibility. The doctrine that is applicable here is the 'state of necessity'. A 'state of necessity' can be invoked to excuse the breach of international obligations when a State sees that it is 'necessary to protect an essential State interest'.⁸⁴ The law governing when a 'state of necessity' may be invoked is found in Article 25 of the Draft Articles on State Responsibility of States for Internationally Wrongful Acts that relevantly provides:⁸⁵

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless the act:

- (a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

Proposing the concept, Special Rapporteur Robert Ago outlined that a 'state of necessity' may only be invoked where there is a:⁸⁶

factual situation in which a State asserts the existence of an interest of *such vital importance* to it that the obligation it may have to respect a subjective right of another State must yield because respecting it would, in view of the circumstance, be incompatible with safeguarding the national interest in question.

In this case, the Federated States of Micronesia would not be required to observe Article 236 of the *United Nations Convention on the Law of the Sea* or Japan's sovereign immunity if it means that it could extract the oil and save the marine environment.

The environment is widely considered to be an 'essential interest of the State'.⁸⁷ This is expressly found in the International Law Commission Report as an example of a 'necessity of the State'.⁸⁸ There is also case law that supports this position. In the *Gabcikovo-Nagymaros* case the International Court of Justice found that an environmental catastrophe would be sufficient to found a 'state of necessity'.⁸⁹ In that case, the court also found that Article 25 of the Draft Articles on State Responsibility of States for Internationally Wrongful Acts reflected customary international law.⁹⁰

An oil spill would constitute a 'grave and imminent peril'. In the International Law Commission's Report, the Commission considered the case of the *Torrey Canyon*. The Commission noted that the British Government did not seem to advance any legal basis for its actions other than that all other possible courses of action had failed.⁹¹ Therefore the International Law Commission found that:⁹²

[E]ven if the shipowner had not abandoned the wreck and even if he had tried to oppose its destruction, the action taken by the British Government would have had to be recognized as internationally lawful because of a state of necessity.

⁸⁴ Roman Boed, 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 *Yale Human Rights and Development Law Journal* 1, 7.

⁸⁵ International Law Commission, *Report of the International Law Commission on the work of its Fifty-Third Session*, Chapter IV (State Responsibility), UN Doc A/56/10 (9 August 2001); James Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge University Press, 2002) 66.

⁸⁶ Robert Ago, 'State Responsibility: Addendum to the eighth report on State responsibility, by Mr Robert Ago', [1980] 2(1) *United Nations Yearbook of the International Law Commission* 13, 18 (emphasis added).

⁸⁷ International Law Commission, *Report of the International Law Commission on the work of its Thirty-Second Session, Supplement No 10*, Chapter III (State Responsibility), UN Doc A/35/10 (25 July 1980) arts 33, 35.

⁸⁸ *Ibid.*

⁸⁹ *Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 92, [52]-[53].

⁹⁰ The judgment considered the Draft Articles on State Responsibility art 33 that preceded the final text: *Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 92, [52]-[53].

⁹¹ International Law Commission, above n 87, art 33.

⁹² *Ibid.*

Furthermore, the International Law Commission opined that a 'state of necessity' could still be invoked in areas that were not covered by treaties.

The Federated States of Micronesia has similarly done everything that it reasonably can. Chuuk State has tried to protect the wrecks so they do not corrode further. The Federated States of Micronesia invited Japan to remove the oil. Given that the consequences for the Federated States of Micronesia are great and the detriment to Japan seems slight, this would seem to be exactly the type of circumstance for which the 'state of necessity' provision exists. Therefore, the Federated States of Micronesia should invoke a state of necessity and breach their international obligations with Japan, if necessary, to avoid this imminent peril.

3 Feasibility

3.1 Removing the Oil

The oil may be able to be removed from the ships through a process known as hot-tapping.⁹³ Hot-tapping involves drilling small holes into the tanks and heating the oil with a steam lance to make it more viscous; the oil is then removed.⁹⁴ This is not a process that can remove all of the oil but it can remove a significant part of it, dramatically reducing the impact when the remaining oil is released into the lagoon.⁹⁵ Hot-tapping has been employed to remove oil from at least two sunken warships, the *USS Mississinewa* and the German heavy cruiser *Blücher*.

The *USS Mississinewa* was an oil tanker with the United States Third Fleet during World War II. On 20 November 1944 the tanker was attacked by a suicide submarine and sank inside the Ulithi Lagoon in what is now Yap State, Federated States of Micronesia.⁹⁶ The wreck lay undiscovered until 2001. In August 2001, a typhoon damaged the *USS Mississinewa* causing it to leak oil. In two months it leaked between 70 000 and 90 000 litres of oil and caused a 'State of Emergency' to be declared.⁹⁷ The President of the Federated States of Micronesia requested the assistance of the United States to deal with the leak.⁹⁸ The United States' Chief of Naval Operations specifically authorised and funded a team to plug the leak and to remove approximately 4300 gallons of oil from the ship using hot-tapping.⁹⁹ Another crew returned in January 2003 to remove 1.8 million gallons of oil.¹⁰⁰ The United States Navy sold the recovered oil in Singapore to offset the cost of the oil removal operations.¹⁰¹ The operation cost USD 5 million dollars.¹⁰²

The removal of the oil from the *USS Mississinewa* demonstrates two factors. First, the salvage of oil from the *USS Mississinewa* shows that action can be swiftly taken if both the flag and coastal States are willing to cooperate. The second factor learnt from the American salvage is that the oil in the sunken warships can be salvaged and sold at a marketable rate. Another pertinent case in which the oil may have been sold is the case of the *Blücher*.¹⁰³

The *Blücher* was a German heavy cruiser assigned to lead the invasion of Oslo during World War II.¹⁰⁴ The *Blücher* was noticed by the Norwegians and was sunk in the Drøbak Sound by shore-based batteries and torpedoes.¹⁰⁵ Oil leaks from World War II wrecks in the early 1990s led the Norwegian Pollution Control Authority to conduct a comprehensive study of the wrecks and the risks they posed to the environment.¹⁰⁶ The

⁹³ Australian Broadcasting Corporation, above n 9, (Ian MacLeod).

⁹⁴ Ibid.

⁹⁵ Idaas, above n 11, 735.

⁹⁶ Trevor Gilbert, Safania Nawadra, Andy Taffleichig and Leonard Yinug, 'Response to an Oil Spill From A Sunken WWII Oil Tanker in Yap State, Micronesia', (Paper No 186 presented at the International Oil Spill Conference, 2003) 175 <<http://ioscproceedings.org/doi/pdf/10.7901/2169-3358-2003-1-175>>.

⁹⁷ Ibid 176.

⁹⁸ Ibid.

⁹⁹ Supervisor of Salvage and Diving, 'United States Navy Salvage Report – USS Missiniewa – Oil Offloading Operations' (Report No S0300-B6-RPT-010, Naval Sea Systems Command, US Navy, May 2004) 1-3.2

<<http://www.supsalv.org/Salvreports/Mississinewa%20Oil%20Removal%20Operations.pdf>>.

¹⁰⁰ Ibid 1-6.

¹⁰¹ Ibid 5-5.

¹⁰² Craig Forrest, 'New Challenges for the Law of the Sea: Hazardous and Historic Sunken Warships' (Speech delivered at the Nippon Foundation of Japan Fellowship Programme, UN Headquarters, New York, 16 April 2013) <http://www.unfalumni.org/wp-content/uploads/2013/05/Craig_Forest_WW2Shipwrecks_April-2013.pdf>.

¹⁰³ There is anecdotal evidence that the oil from the *Blücher* was sold but I have been unable to verify this from any reliable source written in English.

¹⁰⁴ Eric W Osborne, *Cruisers and Battle Cruisers: An Illustrated History of Their Impact* (ABC-CLIO, 2004) 125.

¹⁰⁵ Ibid; Ian Oxley, 'Scapa Flow and the Protection of Scotland's Historic Military Shipwrecks' (2002) 76 *Antiquity* 862, 866.

¹⁰⁶ Idaas, above n 11, 733.

Blücher was one of the wrecks that posed the greatest threat to the environment and was therefore one of the first to have its tanks emptied. The Norwegian Pollution Control Authority hoped to remove approximately 1560 tons of oil from the ship.¹⁰⁷ The operation cost more than USD 7 million dollars.¹⁰⁸

Of course, the fact that the oil was removed from each vessel does not of itself prove that the extraction was lawful. The autonomous nature of the Norwegian wreck program, and the lack of any mention of negotiation with the German government also indicate that the removal of oil from the *Blücher* was not dependant upon the consent of the German government.¹⁰⁹ It seems most likely that these operations were undertaken under provisions similar to those found in Article 5 of the *International Convention on Salvage, 1989*.¹¹⁰ Article 5 of the *International Convention on Salvage, 1989* provides that the convention will not interfere with the ability of public authorities to conduct salvage programs.¹¹¹ Norway is not a party to the *International Convention on Salvage, 1989* and therefore its experience may prove to be instructive for the Federated States of Micronesia.

3.2 Payment Options

One of the most significant barriers to preventing this catastrophe is the Federated States of Micronesia's limited capacity to pay for the removal operation. The Federated States of Micronesia's economy is one of the weakest in the world. In 2012, the Federated States of Micronesia's Gross Domestic Product was only USD 327 million.¹¹² This made it the sixth smallest economy of the 190 countries surveyed by the World Bank.¹¹³ This means that the Federated States of Micronesia cannot pay a commercial party to extract the oil from the wrecks. Instead, the Federated States of Micronesia has two options: first, it could request a salvor to remove the oil ('salvage option'), or; second, it could sell or assign the rights to the oil in exchange for its removal ('sale option').

3.2.1 Salvaging the Oil

As noted above, neither the *1910 International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea and Protocol of Signature* or the *International Convention on Salvage, 1989* permit the salvage of warships.¹¹⁴ However, the Federated States of Micronesia is not a party to either convention. What law should then be used to fill the gap? As salvage law differs from State to State, the most applicable law would be the principles of salvage law as applied in the Federated States of Micronesia.

Where a ship or its cargo is in a place of danger, a salvor may attempt to salvage that property. If the salvor obtains a 'useful result' the salvor is entitled to a salvage reward.¹¹⁵ A salvage reward is secured by a maritime lien against the salvaged property. To ensure that the lien can be satisfied, the salvor may seek to arrest the vessel. In the Federated States of Micronesia, an arrest application involves the National Police serving notices on the property and with the owner of the property or the owner's agent.¹¹⁶ This provides the owner with notice and gives them the opportunity to defend the action.

In this case, there are many problems facing a prospective salvor. First, as noted above, the salvage conventions do not apply to warships. Second, the Supreme Court of the Federated States of Micronesia has been quite clear that Title 19 of the *Federated States of Micronesia Code* does not permit a maritime lien against 'any government vessel engaged in non-commercial service'.¹¹⁷ Where a foreign government owns the vessel, the law of the Federated States of Micronesia states that:¹¹⁸

(1) Unless a nation recognized by the Federated States of Micronesia owns a vessel *and the government of that nation consents*, nothing in this chapter shall be construed to provide for the seizure, arrest or detention

¹⁰⁷ Ibid 735.

¹⁰⁸ Forrest, above n 102.

¹⁰⁹ Despite searches I was unable to find anything written in English that would confirm or deny this position: Idaas, above n 11, 733.

¹¹⁰ *The Norwegian Maritime Code* (Norway) 24 June 1994, § 442 [Scandinavian Institute of Maritime Law trans, 2014] <<http://folk.uio.no/erikro/WWW/NMC.pdf>>.

¹¹¹ *International Convention on Salvage, 1989*, opened for signature 1 July 1989, 1953 UNTS 193, (entered into force 14 July 1996) art 5.

¹¹² World Bank, above n 1.

¹¹³ The Federated States of Micronesia was ranked 185th of 190 economies. It is interesting to note that five of the bottom six economies are in the Micronesian archipelago (Federated States of Micronesia, Palau, Marshall Islands, Kiribati and Tuvalu): Ibid.

¹¹⁴ *International Convention for the Unification of Certain Rules of Law related to Assistance and Salvage at Sea and Protocol of Signature*, 1910, 212 ConTS 187, art 14; *International Convention on Salvage, 1989*, 1989, 1953 UNTS 193, art 4.

¹¹⁵ 19 FSM § 918(1).

¹¹⁶ *FSM Supplemental Rules for Certain Admiralty and Maritime Claims*, r. E(4)(b).

¹¹⁷ *M/V Caroline Voyager*, 15 FSM Intrm. 97 (Pon. 2007), 70.

¹¹⁸ 19 FSM § 927 (emphasis added).

by any legal process of, nor any proceeding in rem against, non-commercial cargoes owned by a government *and entitled, at the time of the salvage operations, to sovereign immunity* under generally accepted and recognized principles of international law.

This means that the ship and its cargo cannot be arrested unless the ‘government of that nation consents’. There can also be no action in rem against the cargo if, at the time of the salvage operation, the cargo is entitled to sovereign immunity.

As noted above, sovereign immunity is a plea of non-justiciability before the courts of another sovereign State.¹¹⁹ As a plea of immunity, it is possible to waive that immunity. Where a foreign government has notice of the arrest and fails to turn up to make its plea that the court does not have jurisdiction, can the failure to exercise the plea be taken as tacit consent to the exercise of jurisdiction by the court?

It is more likely than not that the above question will be resolved in the negative. Title 19 Chapter 9 of the *Federated States of Micronesia Code* that regulates ‘Wreck and Salvage’ states that the provisions of the chapter do not apply to ‘craft of defense forces or other non-commercial vessels entitled to sovereign immunity under generally recognised principles of international law, unless the flag states decide otherwise’.¹²⁰

Any successful argument will therefore need to demonstrate to the court that the ships are not entitled to ‘sovereign immunity under generally recognised principles of international law’. An argument invoking a doctrine of necessity may be used to defeat the claim to sovereign immunity.

Even if the Court arrested the ship, modern salvage law may make it difficult to make such an operation feasible. The ceiling for a salvage reward is one hundred per cent of the salvaged property.¹²¹ However, no one presently knows how much oil could potentially be recovered. The amount of oil held within the ships could be ascertained by an acoustic survey, the method used by the Norwegian Pollution Control Authority to assess the extent of their potential liability.¹²² Therefore, it is not possible to estimate whether any prospective salvage venture would be able to cover the cost of its operations. It is also not possible for the salvor to recover special compensation for minimising damage to the environment as the *International Convention on Salvage, 1989* does not apply.¹²³ However, the market devised contractual replacement for Article 14, the Special Compensation Protection & Indemnity Clause (SCOPIC) may be applicable if it was included in the relevant salvage contract.

3.2.2 The Sale Option

Under a sale option, the Federated States of Micronesia may be able to sell their rights to the oil to a third party in exchange for its recovery. The benefit of the sale option is that the recovering party could deal with the oil as they chose. This would be beneficial to the recovering party because it would mean that they could sell the oil on the open market to subsidise the cost of the recovery operation rather than trying to enforce a salvage reward by ordering judicial sale of the salvaged property. There are reports that the oil recovered from the *USS Mississinewa*¹²⁴ and the *Blücher*¹²⁵ were sold. It may also be more beneficial to the Federated States of Micronesia as they may be able to obtain some financial benefit from selling the oil. However, given the cost of any recovery effort, the amount obtained may be limited.

The sale option is available on one of two bases. The first is that the ability to deal with the oil, after its removal, falls within the ambit of the claim of necessity that invalidates sovereign immunity. Any recovery operation must, somehow, be paid for. As established above, the ‘state of necessity’ doctrine allows a State not to conform with an international obligation owed to another State. In this case, Article 236 of the *United Nations Convention on the Law of the Sea* and Japanese sovereign immunity need to be impaired for the recovery operation to take place at all. Therefore, if the essential State interest can only be protected if the operation is able to be funded, I would argue that the sale of the oil should be considered to be a necessary part of protecting the marine environment. If the funding is necessary to ensure removal of the oil, its removal and sale should be

¹¹⁹ Fox, above n 48, 9.

¹²⁰ 19 FSM § 901(2).

¹²¹ Francis D Rose, *Kennedy and Rose The Law of Salvage* (Sweet & Maxwell, 6th ed, 2002) 2.

¹²² Idaas, above n 11, 734.

¹²³ *International Convention on Salvage, 1989*, 1989, 1953 UNTS 193, art 14; 19 FSM § 901 also precludes 19 FSM § 920.

¹²⁴ Supervisor of Salvage and Diving, above n 99, 5-5.

¹²⁵ There is anecdotal evidence that the oil from the *Blücher* was sold but I have been unable to verify this from any reliable source written in English.

considered one act rather than two.¹²⁶ The sale option could also be exercised if diplomatic negotiations come to fruition and Japan abandons or fails to assert a claim of sovereign immunity.

4 Conclusion

As the wrecks corrode further, the Federated States of Micronesia must examine its options to mitigate the risk of an oil spill. Failure to do so is likely to end in considerable environmental and economic damage to Chuuk State and the Federated States of Micronesia more generally. There are sound economic and diplomatic reasons for the Federated States of Micronesia to avoid offending Japan. Japan pays the Federated States of Micronesia a considerable sum each year to extensively fish in its Exclusive Economic Zone.¹²⁷ The most recent and reliable evidence from the early 2000s, places Japan's contribution at 75% of the Federated States of Micronesia's fishing revenue.¹²⁸ However, that cannot be allowed to overshadow the risk to the marine environment.

The place of sunken warships in international law as objects of sovereign immunity complicates the task of removing the oil. The exclusion of warships from the salvage conventions and the prohibition on the salvage of warships without the consent of the flag State in the national law of the Federated States of Micronesia makes the task no easier. However, where the potential for damage is so great, legal solutions must be available.

In considering this case and the location of the vessels within the State's internal waters, a case can be made that the Federated States of Micronesia could intervene to prevent damage to the marine environment of its territory 'in the exercise of their sovereignty' under Article 221 of the *United Nations Convention on the Law of the Sea*.¹²⁹ Alternatively, given the extensive detriment that may befall the Federated States of Micronesia, they would be well within their rights to invoke a 'state of necessity' under Article 25 of the Draft Articles on State Responsibility of States for Internationally Wrongful Acts.¹³⁰ The environment is considered to be an 'essential State interest' and the Federated States of Micronesia has done everything else that it can reasonably do to prevent a major spill.¹³¹ The doctrine of necessity would seem to be available in international law for the very circumstances in which the Federated States of Micronesia now finds itself. The right should be exercised if there is a possibility that a spill could be avoided.

The ultimate question on the feasibility of any removal operation will be determined by the state of the vessels themselves. As noted above, the rate of corrosion increases with time. The vessels have now been on the bottom for 70 years. It is likely that there is still time to mount a salvage operation before the hulls become too fragile to puncture. However, if nothing is done and the hulls become too fragile to puncture, there may even more troubled times ahead for this archipelagic nation that already suffers disadvantage.

¹²⁶ This is only true though if the sale is necessary and no other method can be found.

¹²⁷ Sandra Tarte, 'Diplomatic Strategies: The Pacific Islands and Japan' (Working Paper No 269, Australia-Japan Research Centre, July 1997) 2.

¹²⁸ Susan Cassels, 'Overweight in the Pacific: links between foreign dependence, global food trade, and obesity in the Federated States of Micronesia' (2006) 2(10) *Globalisation and Health* 1, 6.

¹²⁹ *United Nations Convention on the Law of the Sea*, 1982, 1833 UNTS 3, art 221.

¹³⁰ International Law Commission, above n 85, art 25; James Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge University Press, 2002) 66.

¹³¹ *Gabcikovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 92, [52]-[53].