FOREIGN STATE IMMUNITY AND MARINE WRECKS

Richard Garnett*

An important issue in maritime law is the right of a salvor to retrieve cargo from a sunken foreign state-owned vessel. Specifically, can a foreign state ship or cargo owner rely on the defence of foreign state immunity to resist a claim for a salvage reward? A plea of immunity can arise at various stages of litigation: at the time of establishing initial jurisdiction to adjudicate the claim, at the time of enforcement of any judgment and when a court seeks to apply its laws of salvage to the foreign state (prescriptive jurisdiction). In the case of adjudicatory and enforcement jurisdiction it is well accepted that a foreign state only enjoys immunity when the vessel or cargo was found not to have been used for commercial purposes. In the case of prescriptive jurisdiction there is a strong body of state practice and commentary supporting immunity from national salvage laws on a similar basis but the position is less clear in the case of marine conservation laws.

The very recent decision of the English Admiralty Court in *Argentum Exploration Ltd v The Silver; The SS Tilawa*[1] has shone light on an important issue in maritime law: the rights of salvors who retrieve cargo from sunken foreign state-owned ships. Specifically, can a foreign state defendant resist a claim for a salvage reward on the basis that it is entitled to foreign state immunity?

This article aims to provide a conceptual framework for immunity questions that arise in wreck salvage cases and also an assessment of how the existing law on immunity balances the interests of salvors, foreign state ship and cargo owners and coastal states. For the purposes of this article the term 'salvage' is used in the narrow sense of 'recovery of a wreck for commercial (or profit) reasons'[2] by a private entity rather than measures taken by a coastal state for motives of historical or archaeological conservation.

The International Law Framework

Salvage is an ancient right, known to both common law and civil law systems, whereby a person who rescues a ship or cargo in peril at sea is entitled to remuneration, known as a 'salvage reward'. A key question that has arisen is whether a successful salvor may bring a claim against a foreign state owner of a wreck or sunken vessel or whether such suit would be barred by principles of foreign state (or sovereign) immunity. Before considering the principles of immunity that may apply to wreck salvage cases, some general points should be made about the concept of jurisdiction in public international law.

Under international law principles, there are three distinct types of jurisdiction: (a) adjudicatory jurisdiction, which refers to the authority of a nation state to determine disputes involving persons or things and is normally exercised by the courts; (b) prescriptive (legislative) jurisdiction, which refers to the authority of a nation state to make laws with respect to persons or events; and (iii) enforcement jurisdiction, which refers to the authority of a nation state to compel compliance with its laws or judgments.[3]

Public international law principles further provide that in the case of adjudicatory and enforcement jurisdiction, principles of *immunity* operate to limit the powers of national courts to resolve matters in which a foreign state is impleaded as a defendant.[4] Specifically, a court of state A may only exercise jurisdiction over state B or enforce a judgment against state B in certain circumstances. By contrast, public international law has traditionally not recognized any foreign state immunity from another state's prescriptive/legislative jurisdiction, that is, from the application of that country's laws. Foreign state immunity is 'a procedural plea'[5] and limited to the question of

* Professor at Melbourne Law School, the University of Melbourne; Consultant and counsel (international disputes), Corrs Chambers Westgarth.
[1] [2020] EWHC 3434.
[2] Craig Forrest, *Maritime Legacies and the Law* (Edward Elgar Press, 2019) 120.
[3] See generally Restatement (Fourth) of US Foreign Relations Law s 401 and William S Dodge, 'Jurisdiction, State Immunity and Judgments in the Restatement (Fourth) of US Foreign Relations Law' (2020) 19 *Chinese Journal of International Law* 101.
[4] The distinction between immunity from adjudicatory and enforcement jurisdiction is discussed in *The SS Tilawa* [2020] EWHC 3434 [97]-[101].
[5] Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd ed, 2013) 21.

'whether or not the courts of one state may exercise jurisdiction in respect of another'.[6] Immunity does not confer 'exemption from national [substantive] laws'[7] whose application is distinct from any plea of immunity.[8]

Consequently, in terms of general principles of public international law, the question of whether legislation of a state applies to a foreign sovereign is entirely a matter for the domestic law of the enacting state. This observation is confirmed by both national immunity legislation and international instruments, such as the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* (UNCSI),[9] where no reference is made to immunity from prescriptive/legislative jurisdiction. The only immunities mentioned are from adjudicatory and enforcement jurisdiction.

Interestingly however in the literature on marine wrecks and underwater cultural heritage, most authors use the term 'sovereign immunity' in relation to all three types of jurisdiction without distinguishing the category involved or acknowledging that international law has not traditionally recognized immunity from prescriptive/legislative jurisdiction.[10] Instead, the main focus of contention has been whether foreign states enjoy immunity from laws of the coastal (forum) state permitting salvage of historical wrecks or other laws of that state directed at conservation of underwater heritage.[11]

A key question therefore to be explored in this article is whether, despite there being no general international law principle of foreign state immunity from prescriptive jurisdiction, a 'particular customary norm' has arisen in the context of marine wrecks. Relevantly, international law does accept that *regional* customary norms may develop that depart from the general customary law position[12] and the question is whether an analogous exception may exist in individual areas of activity such as salvage of marine wrecks. Conceivably, if the practice of states is clear in support of a particular norm of immunity in this area and the practice is accompanied by *opinio juris* (acceptance as law), then a customary rule could be recognized. Such norm would thus be an exception to the general rule that no immunity exists from a forum state's legislative jurisdiction.

Possible support for this view comes the recent Draft Conclusions of the International Law Commission on Customary International Law.[13] Conclusion 16 provides:

> Particular customary international law
>
> 1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.
> 2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (opinio juris) among themselves.

In the commentary to this provision, the drafters further stated:[14]

> (5) While some geographical relationship usually exists between the States among which a rule of particular customary international law applies, that may not necessarily be the case. The expression "whether regional,

[6] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* [2012] ICJ Rep 99 [93].
[7] Fox and Webb (n 5) 21.
[8] For an argument that foreign state immunity should be abolished as a separate doctrine and actions against foreign states resolved by principles of conflict of laws, specifically *forum non conveniens*, see Richard Garnett, 'Should Foreign State Immunity Be Abolished?' (1999) 20 *Australian Yearbook of International Law* 175 and 'Foreign State Immunity: A Private International Law Analysis' in Alexander Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Edward Elgar 2015) 297.
[9] New York, 2 December 2004, not yet in force; A/59/508; see generally Roger O'Keefe and Christian J Tams (eds), *The United Nations Convention on the Jurisdictional Immunities of States and Their Property* (Oxford University Press, 2013).
[10] Exceptions are Ted L McDorman, 'Sovereign Immune Vessels: Immunities, Responsibilities and Exemptions' in Henrik Ringbom (ed), *Jurisdiction over Ships* (Brill Nijhoff, 2015) 82, 95; Natalino Ronzitti, 'The Legal Regime of Wrecks and Warships and Other State-Owned Ships in International Law' (2012) 74 *Yearbook of the Institute of International Law* 133 and Forrest (n 2) 139. These writers distinguish immunity from prescriptive and enforcement jurisdiction in the context of salvage and underwater cultural heritage claims but do not refer to immunity from adjudicatory jurisdiction as a separate category.
[11] See Section IV below.
[12] *Asylum Case (Colombia/Peru) (Judgment)* [1950] ICJ Rep 266.
[13] International Law Commission, *Draft conclusions on identification of customary international law, with commentaries* (2018) A/73/10, 154 https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.
[14] Ibid, Commentary para 5, 155 (emphasis added).

> local or other" is intended to acknowledge that although particular customary international law is mostly regional, subregional or local, there is no reason in principle why a rule of particular customary international *law could not also develop among States linked by a common cause, interest or activity other than their geographical position, or constituting a community of interest,* whether established by treaty or otherwise.

Consequently, if it could be shown that coastal states have accepted that foreign state-owned vessels or cargoes not used for commercial purposes are immune from the salvage or marine conservation laws of coastal states and the foreign states themselves have asserted immunity in such cases, then a 'particular customary rule' could emerge to that effect. Unlike general customary international law, however, such a rule would only apply to those states that accepted it in their practice among themselves,[15] which would seem to limit the rule's utility in the case of third states.

Before considering the complex issue of immunity from prescriptive jurisdiction, the more widely recognized immunities from adjudicatory and enforcement jurisdiction in the context of salvage of marine wrecks will first be examined.

Immunity from Adjudicatory Jurisdiction

The most common situation in which a foreign state invokes immunity is when it is sued in the courts of another country (the forum state). The foreign state claims immunity from the adjudicatory jurisdiction of the forum state on the basis that the forum has no power to adjudicate a matter in which a foreign state is named as defendant. Foreign state (or sovereign) immunity is a principle of public international law the rationale of which is that states are sovereign equals who should not be subjected to the jurisdiction of another country's courts.

Until the later part of the 20th Century foreign state immunity was absolute in nature, which meant that a foreign state could never be sued in another country's courts. While some countries such as China still follow the practice of absolute immunity, most nation states (including the United Kingdom, the United States and Australia) have adopted the principle of 'restrictive immunity' since the 1970s. According to the restrictive doctrine, a foreign state can generally only claim immunity from adjudication where it has engaged in 'sovereign' as opposed to 'commercial' activity. The rationale for the restrictive view is that where a state engages in international trade and commerce, in a manner akin to a private entity, then it should receive equivalent procedural treatment in litigation.

The United Kingdom and Australian approaches

Accordingly, today in countries such as Australia, the United Kingdom and the United States, a foreign state is not immune in disputes concerning commercial transactions or commercial activity performed by the state. The 'commercial activity' exception is typically invoked by a claimant who sues the foreign state directly in an 'in personam' proceeding.

So, for example, section 11 of the *Australian Foreign States Immunities Act 1985* (Cth) (FSIA) provides that:

> (1) a foreign state is not immune in a proceeding in so far as the proceeding concerns a commercial transaction … (3) in this section 'commercial transaction' means a commercial, trading, business, professional or industrial or like transaction in which the foreign state has entered or like activity in which the foreign state has engaged and … includes (a) a contract for the supply of goods or services …

Section 3 of the *United Kingdom State Immunity Act 1978 (UK)* (SIA) is almost identical, providing that:

> (1) a [foreign] state is not immune as respects proceedings relating to—
> (a) a commercial transaction entered into by the state …
> (3) In this section "commercial transaction" means—
> (a) any contract for the supply of goods or services …
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority …

[15] Ibid, Commentary para 7, 156.

This discussion is relevant to the area of salvage of wrecks because it shows that a foreign state cannot simply plead immunity in all cases from the jurisdiction of another country's courts. Indeed, where salvage services have been performed by a commercial provider for the benefit of the state and such services form part of a commercial transaction entered into between the salvor and the state then it cannot claim immunity in an in personam suit brought by a salvor for a salvage reward.[16]

In *The Altair*,[17] the English Commercial Court had to consider a claim for compensation for salvage services against a foreign state entity. The court found that the state's entry into a salvage contract on the 'Lloyds Open Form' (LOF) with the salvor amounted to 'commercial activity' by the foreign state under section 3(3) of the SIA. The fact that the cargo (wheat) being carried on board the vessel was intended for public distribution in Iraq and so was not to be used 'for commercial purposes' was irrelevant.[18]

A problem however may arise where the salvor's services are not performed pursuant to a contract but on a '*negotiorum gestio'* basis, that is, where the salvor acts voluntarily, without the foreign state vessel or cargo owner's consent or knowledge. In such a case it may be hard to say that a commercial transaction has been entered into by the foreign state or that it has engaged in any 'commercial activity'. This conclusion does not deny that the act of salvage itself by the salvor would likely not be characterised as a sovereign act, as in conduct that only a state can perform.[19] The inquiry however under section 11 of the FSIA (and section 3 of the SIA) seems to focus on the act of *the state* itself rather than the salvor and so if the salvor has acted unilaterally then there is no relevant state act.[20] Consequently, a salvor may be unable to rely on section 11 of the FSIA to pierce immunity with an in personam action.

Another reason why salvors rarely commence in personam actions against foreign states may be that such claims (at least in the United Kingdom and Australia) require service of originating court process on the foreign state itself. A claimant in an Australian proceeding[21] must serve the foreign state through the 'diplomatic channel', by submitting the process to the Attorney General's Department who then forwards it to the Department of Foreign Affairs and Trade for submission to the equivalent department in the foreign state. Such an approach is not only slow but ineffective if the foreign state refuses to accept service. Service in an in rem proceeding, by contrast, is valid upon the salvor serving the vessel itself.

Consequently, a salvor will often prefer to proceed 'in rem' against the ship or cargo that it has salved, as occurred in *The SS Tilawa.* An in rem action is often used to support a maritime lien over the salved property and can be supported by an application to arrest the vessel or cargo. Where the ship or cargo is owned by a foreign state then it may again claim immunity under the FSIA and the SIA, subject to exceptions.

For example, section 18 of the FSIA provides:

> (1) A foreign state is not immune in a proceeding commenced as an action in rem against a ship concerning a claim in connection with the ship, if at the time when the cause of action arose, the ship was in use for commercial purposes…
> (3) A foreign state is not immune in a proceeding commenced as an action in rem against cargo that was at the time the cause of action arose, commercial cargo.
> (4) The preceding provisions of this section do not apply in relation to the arrest, detention or sale of a ship or cargo.
> (5) A reference to commercial cargo is to cargo that is 'commercial property' under section 32(3) of [the FSIA].

[16] David W Steel and Francis D Rose, *Kennedy's Law of Salvage* (Sweet & Maxwell, 5th ed, 1985) 532.
[17] [2008] EWHC 612 (Comm).
[18] Ibid [80].
[19] Forrest (n 2) 99.
[20] Note that the Australian Reform Commission, in their report on the *Australian Foreign States Immunities Act 1985* (Cth) (FSIA), described 'the basic principle upon which the commercial transaction exception to immunity rests' as 'when *a foreign state* acts in a commercial matter…': *Report on State Immunity* (Report No 24, 1984) [90] (emphasis added).
[21] FSIA s 24.

Section 32 provides:

> …
> (2) Where a foreign State is not immune in a proceeding against or in connection with a ship or cargo, section 30 does not prevent the arrest, detention or sale of the ship or cargo if, at the time of the arrest or detention:
> (a) the ship or cargo was commercial property; and
> (b) in the case of a cargo that was then being carried by a ship belonging to the same or to some other foreign State—the ship was commercial property.
> (3) For the purposes of this section:
> (a) commercial property is property, other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purposes; and
> (b) property that is apparently vacant or apparently not in use shall be taken to be being used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.

Section 3(1) provides that 'military property' includes a ship of war.

Section 10 of the SIA provides:

> A state is not immune as respects:
> (1) (a) an action in rem against a ship belonging to that state … if, at the time when the cause of action arose the ship was in use or intended for use, for commercial purposes…
> (4)(a) an action in rem against a cargo belonging to that state if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use, for commercial purposes;
> (b) an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

Under section 17(1), 'commercial purposes' means purposes of such transactions or activities as mentioned in section 3(3) of the SIA.

Considering claims against the ship itself first, both the Australian and UK provisions remove immunity where the claim is 'in connection with the ship [and] if at the time the cause of action arises, the ship was in use for commercial purposes'. 'Commercial purposes' is defined slightly differently in the Australian and UK legislation. Under the FSIA, a 'commercial purpose' is said to include 'a business, professional or industrial purpose'[22] while under the SIA 'commercial purposes' means 'purposes of such transactions mentioned in section 3(3) [of the SIA]', set out earlier. In practice, however, the effect of the provisions is likely to be the same as referring to a vessel whose purpose and function was business or trade.

An immediate problem with the above definitions in the context of salvage of historical shipwrecks is that the ship in question lies at the bottom of the sea and so, at the time of salvage, is not in use for any purpose. This issue was extensively considered in *The SS Tilawa* case, where the court found that the relevant time for assessing when the cause of action arose and the ship was in use, was at the time of sinking not salvage. This issue is discussed in detail below.[23]

Furthermore, even if the court takes a liberal approach to the time when the cause of action arose and allows a claimant to rely on the role and function of the ship at the time of its sinking, there remains a problem with warships and other vessels engaged in sovereign activity. Such ships could never be considered to have been 'in use for commercial purposes'. Such an interpretation would be consistent with the decisions of English courts prior to the enactment of the SIA.

In *The Constitution*,[24] the leading maritime judge, Sir Robert Phillimore, refused to permit the arrest of a vessel which had received salvage services off the coast of England on the basis of foreign state immunity. The ship was a war vessel, commissioned by the United States Government and engaged in the service of the government in shipping

[22] FSIA s 3(5).
[23] See text (nn 31-36).
[24] (1879) 4 PD 39.

machinery. While the machinery was owned by private individuals it had been exhibited at the Paris Convention and was being transported from France to the United States under the auspices and direction of the Government. It was therefore both a warship and in use for governmental purposes and so clearly immune. Sir Robert Phillimore did however suggest that a government-owned ship (other than a warship) may lose immunity where the 'ship had been treated as a vessel of commerce', consistent with his earlier judgment in *The Charkieh*.[25]

In the later decision of *The Parlement Belge*,[26] the Court of Appeal qualified Phillimore's remarks by stating that a government-owned vessel used substantially for public purposes, and only secondarily engaged in trading activity, was entitled to immunity from adjudication. So, the fact that the main function of the vessel was the carrying of mail—a sovereign purpose—was enough to confer immunity on the ship despite its having been previously engaged in business activity. Armed warships, according to the Court, were entitled to immunity in all cases. Finally, almost one hundred years later, the Privy Council in *The Philippine Admiral*[27] confirmed that a party may proceed against a state-owned vessel where the ship was used for trading and commercial purposes.

Treaty practice in the 20th Century is consistent with this approach. For example, article 8 of the 1958 Geneva Convention on the High Seas provides that warships on the high seas 'have complete immunity from the jurisdiction of any state other than the flag state'. This provision was repeated verbatim in article 95 of the 1982 *United Nations Convention on the Law of the Sea*, 1833 UNTS 3, (UNCLOS) with article 96 also providing that ships owned by a state and used only on government service shall, on the high seas, have complete immunity from the jurisdiction of any state other than the flag state.[28] Further, article 26 of the 1926 *Brussels Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships*, 176 LNTS 199, (the Brussels Convention) (to which the UK but not Australia is a party) provides that vessels owned by a foreign state and used at the time in government and non-commercial service are immune from in rem proceedings for arrest.

Notably, however, neither the Australian nor the UK immunity statutes confine the scope of immunity to ships or cargo found on the high seas. It appears therefore that the same adjudicatory immunity regime applies to vessels located in the exclusive economic zone, continental shelf or territorial waters of the forum state.

The Australian FSIA and UK SIA also have provisions specifically dealing with immunity in in rem proceedings against *the cargo* carried by the vessel. In such a case the salvor may identify articles recovered in the salvage and proceed against them instead of the vessel itself. Such an approach is likely to be common in shipwreck cases, given the technical difficulties in raising an ancient sunken vessel from the seabed.

Section 18(3) of the FSIA provides that a foreign state is not immune in a proceeding commenced an action in rem against cargo that was *at the time the cause of action arose*, commercial cargo. Section 18(5) provides that the reference to commercial cargo is to cargo that is 'commercial property' under section 32(3) of the Act, which is defined as 'property other than diplomatic or military property, that is, in use by the foreign state substantially for commercial purposes'. A 'commercial purpose' includes 'a business, professional or industrial purpose'.[29] While sections 18(1) and (3) exclude immunity from in rem jurisdiction against a foreign state vessel and cargo, they do not allow the arrest or detention of such property: see article 18(4). Arrest is however possible under section 32(2) where a foreign state is not immune in a proceeding against a ship or cargo *and if at the time of the arrest or detention* (a) the ship or cargo was commercial property and (b) the ship carrying the cargo was commercial property. Note that commercial property excludes military property which is defined in section 3(1) to include warships.

Section 10(4) of the SIA is similar but has some textual, if not substantive, differences. First, the claimant must show in an in rem proceeding against the cargo that both the ship *and* the cargo were in use or intended use for commercial purposes, not simply the cargo as under the FSIA. Secondly, as noted earlier, the term 'commercial purposes' is defined by reference to the transactions referred to in section 3(3) of the SIA. Like the FSIA, however, arrest of the vessel or cargo may only occur if the property was in use for commercial purposes at the time of arrest: section 13(2)(b), (4). Interestingly however, in the SIA, there is no express exclusion of warships from the scope of arrest but

[25] (1873) Law Rep 4; 4 A & E 59, 96.
[26] (1880) LR 5 PD 197.
[27] [1976] 1 Lloyd's Law Reports 234.
[28] Article 96 replicates article 9 of the *Geneva Convention on the High Seas*, 1958, 450 UNTS 11.
[29] FSIA s 3(5).

since warships are rarely used for a commercial purpose, the difference between the UK and Australian positions is likely to be minimal.[30]

The SS Tilawa decision

The question of whether cargo was in use for commercial purposes was directly considered in the *SS Tilawa* case,[31] whose facts were as follows. The SS Tilawa sank on the high seas in the Indian Ocean in 1942, along with its cargo, which consisted of silver bars. In 2017 the claimant salved the cargo and brought it to England where it was declared to the Receiver of Wreck. Initially the claimant asserted ownership of the cargo but subsequently chose to pursue a claim for a salvage reward after the Republic of South Africa claimed title. The claimant commenced an in rem action in the English Admiralty court against the cargo, with the foreign state owner pleading immunity from jurisdiction. No arrest of the cargo was however sought.

The first major question for the court was whether the cargo, at the time when the cause of action arose, was in use for commercial purposes under section 10(4) of the SIA. The argument for South Africa was that at the time the salvage services were performed—2017—the silver bars were no longer in use for commercial purposes. The claimant however asserted that it was necessary to examine the position at the time of sinking—1942—and then apply the status *at that time* to the position in 2017. According to the claimant, the South African government had purchased the silver bars under an FOB contract of sale which were being transported by the SS Tilawa pursuant to a carriage contract. Consequently therefore, at the time of sinking, the silver bars were the subject of two commercial contracts: one for sale of goods and one for carriage.

The court largely agreed with the claimant, rejecting the defendant state's blanket argument that, whatever the status of the cargo was at the time of sinking (1942), it was only the status at the time of salvage (2017) that was relevant. The argument for South Africa led to an absurd result:[32]

> If that is the correct approach it would follow that in a case where both ship and cargo were in use for commercial purposes immediately prior to sinking, they would cease to be so once they had been sunk with the result that if the cargo were later salved the RSA would be immune from a claim in rem for salvage … The state would be immune from an action in rem … because at the time when the cause of action for salvage arose, the vessel was no longer in use or intended use for commercial purposes but was merely a wreck.

In effect, the vessel's subsequent status as a wreck would be utterly decisive of the immunity question and a salvor could never bring an in rem proceeding against a foreign state's cargo on a sunken vessel. In light of the restrictive theory of immunity, the court considered that it was more likely that Parliament intended that courts consider the legal status of the vessel and the cargo at the time when the vessel was carrying the cargo. Such status would not be determinative of the immunity issue but 'a relevant consideration'.[33]

South Africa's next argument was that even if the status of the cargo in 1942 was relevant to the question of immunity, the cargo was not 'in use' because it was merely on board the vessel. Further, even if the silver had any use in 1942, it was to produce coins or currency for the South African state, which was a sovereign purpose.

The court rejected both arguments. As to the first point, the court acknowledged that as a matter of ordinary language, cargo may seem to be not in use when in the process of carriage on board a vessel:[34]

> cargoes, typically are not put to the use for which they were grown or manufactured during carriage. They are only put to the use for which they have been grown or manufactured after the carriage has been completed and they are no longer on board the ship.

[30] Australian Law Reform Commission (n 20) [129]. Note that both sets of legislation also allow the admission of a certificate by the head of the foreign state's diplomatic mission as to the use of property. Such certificate is prima facie evidence which may be rebutted by the claimant: FSIA s 41; SIA s 13(5).
[31] [2020] EWHC 3434.
[32] Ibid [121].
[33] Ibid [123].
[34] Ibid [96].

The problem however with such an interpretation is that it effectively destroys the exception to immunity for in rem cargo claims as 'few if any cargoes would be in use'.[35] Parliament could not have intended such a result. Interestingly, the drafters of the FSIA anticipated this very point, with the Australian Law Reform Commission noting that cargo on board a vessel was not in use for any purpose.[36] In response to the problem, the drafters included a helpful provision[37] that states that 'property that is … apparently not in use shall be taken to be used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes'. The English court in *The SS Tilawa* reached the same result in the absence of such a provision by a policy analysis of the SIA.

Secondly, the court in *The SS Tilawa* found that the cargo was not only 'in use', but in use for commercial purposes. The silver had been purchased from a commercial supplier pursuant to an fob contract of sale and a shipped under a contract of carriage. The court referred with approval to the earlier mentioned decision of the English Commercial Court in *The Altair* who (obiter) found that cargo (wheat) was in use for commercial purposes under section 10(4)(b) when the foreign state had purchased the goods from a business supplier and had them shipped commercially. Such a conclusion, the court said, was entirely consistent with the rationale of the restrictive theory of foreign state immunity, which is to deny immunity where a foreign state acts in the same manner as a private party or trader.

Furthermore, the principles underlying the law of salvage also support such a conclusion. A claim in salvage is based upon a successful salvage service from which the cargo owner derives a benefit. A liability to pay salvage:[38]

> is an incident of maritime law … which can affect all those who contract for their goods to be carried by sea. When a state contracts for its goods to be carried by sea, a basic example of a commercial contract, there is no reason why pursuant to the restrictive theory of sovereign immunity, it should not be exposed to the same liability in salvage as a private owner of cargo.

Such a result is 'more consonant with justice'.[39]

Furthermore, in *The SS Tilawa*, the fact that the silver may have been intended for use as part of the sovereign activity of producing government coinage did not affect the status of the cargo as being in use for commercial purposes. *The Altair* was again relied upon, where the court found that the fact that the cargo there was intended for public distribution in the foreign state did not preclude its being in use for commercial purposes.[40]

So, the court found the cargo to be in use for commercial purposes in 1942 and this was relevant to its characterization in 2017. The court then stated that it had no reason to conclude that the character of the cargo in 1942 had changed by 2017.[41] Counsel for South Africa further argued that once the vessel was sunk, the contract of carriage came to an end and with it the commercial character of any cargo. In effect, a 'wreck' can never be in commercial use. The court again rejected the argument, finding that the sinking of the vessel could not reinstate an immunity which had previously not been there. Such a conclusion would be inconsistent with the restrictive theory of foreign state immunity[42] and reward the foreign state for a wholly fortuitous event. Rather, for the status of cargo to have been changed by 2017, 'there must have been some decision by the [foreign] state to change it',[43] which was not present here.

The court's approach may be supported on the basis that it prevents a foreign state opportunistically relying on the fact of sinking to retain immunity in a salvage action. Yet the court's statement that immunity may be restored by the foreign state changing the status of the cargo is unclear. How, in practice, could such a change occur, given that the court had earlier found that any intended, subsequent use of the cargo was irrelevant once a preliminary finding of

[35] Ibid [154].
[36] Australian Law Reform Commission (n 20) [143].
[37] FSIA s 32(5). The Australian approach creates 'an inquiry more grounded in [commercial] reality': Sophie Hepburn and Samuel Walpole, 'State Immunity and Admiralty Actions in rem Against Cargo' (2021) 137 *Law Quarterly Review* 385, 389.
[38] [2020] EWHC 3434 [157].
[39] Ibid.
[40] Ibid [142], [165].
[41] Ibid [142].
[42] [2020] EWHC 3434 [167].
[43] Ibid [168].

commercial use had been made? Hence, if cargo is the subject of commercial transactions such as sale and carriage, its status will be difficult to alter.[44]

A variation on this argument, however, might be to say that while coins and gold and silver bars may have been originally commercial property in that they represented payment on a transaction, for example, the passage of time necessarily imbues such objects with an historical or cultural significance that transcends their mercantile origin. If such an analysis were adopted (which again focuses on the status of the cargo at the time of salvage) and had the effect of rendering the property 'governmental', then a salvor's rights to proceed in respect of foreign-state owned cargo would once more be seriously affected. While such an approach may receive support from the increased concern for protection of the 'underwater cultural heritage', an issue discussed further at IV below, it would again have the extreme consequence of making all historical wrecks immune.

Overall, the most contentious issue in *The SS Tilawa* was the finding that the cargo was in use for commercial purposes at the time of sinking. Such a conclusion, while perhaps straining the statutory language a little ('at the time the cause of action arose'), can nevertheless be defended for its consistency with the restrictive theory of foreign state immunity. Finding that the cause of action arose only at the time of salvage would mean that a foreign state would be immune in every case involving a historical wreck, a conclusion which would not be consistent with customary international law.

Finally, had the facts of *The SS Tilawa* arisen before an Australian court, the same result would likely have been reached given the similar legislative regime on immunity.

The United States approach

The United States has departed from the UK/Australian models by excluding pre-judgment in rem jurisdiction in respect of foreign-state owned vessels. The relevant provision in the United States Foreign Sovereign Immunities Act 1976 (ForSIA) is section 1609. This section provides that, subject to international agreements to which the United States is a party, the property of a foreign state shall be immune from attachment, arrest or execution except as provided in section 1610. Section 1610 then provides that immunity will not exist where the property is used for a commercial activity in the United States.

The legislative history to the ForSIA makes it clear that arrest or attachment of a foreign state vessel cannot be used 'for the purpose of obtaining [adjudicatory] jurisdiction over [the] foreign state or its property'.[45] Consequently, the ForSIA only permits a salvor to proceed in rem against a vessel or cargo to enforce a judgment against a foreign state, that is, in the context of enforcement jurisdiction.[46] Under the UK SIA and Australian FSIA, by contrast, a salvor may make a 'pre-judgment' in rem application to secure adjudicatory jurisdiction over a state-owned vessel or cargo and a 'post judgment' application to enforce a judgment against such a ship or cargo. The UK and Australian approaches are therefore more protective of salvors' rights.

The effect of the more restrictive American approach can be seen in the recent decision *Global Marine Exploration Inc v The Unidentified, Wrecked and (For Finders-Right Purposes) Abandoned Sailing Vessel*.[47] There, a salvor brought in rem claims for a salvage reward and a declaration of ownership under 'the law of finds' against a shipwrecked vessel. The French Government claimed ownership of the ship and pleaded immunity from jurisdiction under the ForSIA. The court accepted both arguments, finding that there is no pre-judgment in rem jurisdiction over foreign states, outside the specific terms of sections 1609 and 1610.

The question of in rem jurisdiction under the ForSIA was more fully explored by the US 11th Circuit Court of Appeals in *Odyssey Marine Exploration Inc v Unidentified Shipwrecked Vessel*.[48] This case concerned an in rem salvage claim against a shipwreck and its cargo found in today's Portuguese continental shelf. The salvor sought to arrest both the vessel and the cargo which were found by the court to be owned by the Kingdom of Spain. Again, the only way in which the salvor could proceed in rem was pursuant to sections 1609 and 1610. The salvor did not invoke the exception in section 1610 but argued instead that a treaty provision to which the United States was a party (specifically,

[44] Hepburn and Walpole (n 37) 388-389.
[45] HR Rep 94-1487, 26 (1976); *Odyssey Marine Exploration Inc v Unidentified Shipwrecked Vessel* 675 F Supp 2d 1126, 1141-2 (MD Fla 2009).
[46] Ibid 1144.
[47] 348 F Supp 2d 1221 (MD Fla 2018).
[48] 657 F 3d 1159 (2011).

article 9 of the Geneva Convention on the High Seas) created a further exception to the immunity conferred by section 1609. As noted above, article 9 provides that ships owned by a foreign state 'used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any state other than the flag state'. The salvor relied on this provision to say that the ship was engaged in commercial activity and so lost any right to immunity.

The court rejected the argument, finding that the text of article 9 created no such exception, and even if it did, the vessel in this case had not engaged in such activity. At the time it sunk, the vessel was a Spanish Navy ship. Although it transported private cargo of Spanish citizens for a charge, 'the transport was of a sovereign nature' since according to the evidence of Spanish naval historians, 'providing protection and safe passage to property of Spanish citizens was a military function of the Spanish Navy, especially in times of war or threatened war.'[49] The court also rejected the argument that the maritime lien exception to immunity applies to in rem as well as in personam cases.[50]

Finally, the salvor made an innovative argument that even if the ship was immune from arrest, the cargo aboard the vessel, was not. The court however concluded that in the context of a sunken vessel, the cargo and the shipwreck were interlinked for immunity purposes and so any immunity from in rem jurisdiction granted to the vessel must also extend to the cargo.[51] Such a conclusion followed even if the cargo was owned by private individuals, not the foreign state, or had been salvaged from the wreck. Such an analysis contrasts with the UK/Australian approaches mentioned earlier: under those laws a salvor may proceed in rem against the vessel *and/or* the cargo and immunity is assessed separately in each case.

A salvor claimant in a United States court is therefore confined to an in personam action against the foreign state shipowner or operator, at the stage of adjudicatory jurisdiction. Like the UK SIA and Australian FSIA, however, a presumption of immunity is created in section 1604, subject to exceptions in sections 1605-1607. Relevantly, there is no immunity where commercial activity is performed by the foreign state in the territory of the United States forum (section 1605(a)(2)) or where the suit is brought to enforce a maritime lien against a vessel or cargo of the foreign state (section 1605(b)), where the lien is based upon commercial activity of the foreign state.

The salvor invoked in personam jurisdiction in a later stage of the *Global Marine Exploration* litigation.[52] The salvor's claim was for a reward based on its marine exploration efforts and the benefits those efforts conferred on France, the owner of the vessel. France again asserted immunity under the FSovIA and the salvor relied on the commercial activity exception in section 1605(a)(2), which applies where the action is found to be based upon such activity carried on by the state in the United States. The court found that France's activities in the United States which underpinned the action could not be described as commercial. France had entered into an intergovernmental agreement with the state of Florida to protect and preserve French historical and naval vessels and to promote the parties' shared history of artefacts excavated from shipwreck sites. Such activities were not commercial since they related to the preservation and recovery of France's sovereign military property—which was governmental in nature.[53] Also, the agreement with Florida was more in the nature of a treaty on the diplomatic plane, dealing with sovereign matters such as cultural heritage, than a commercial contract. Secondly, even if France's activities were commercial, the salvor's claim was not 'based on' such activities. The salvor's action was based on its exploration and excavation of the wreck of which France took and enjoyed the benefits not France's efforts to preserve its culture in the United States.[54]

The required territorial link between the commercial activity of the foreign state and the United States in personal claims therefore presents a further hurdle for salvor claimants.

In summation, the United States legislative and judicial practice on adjudicative immunity is less accommodating to salvors than the Australian and British approaches which allow such persons to bring both in rem and personal claims in respect of vessels or cargo that are in use for commercial purposes. Not only are claimants in United States courts confined to personal claims against foreign states but the exceptions to immunity are difficult to satisfy. Significantly, if the facts of *The SS Tilawa* had arisen before a United States court, then South Africa would have been entitled to

[49] Ibid 1177.
[50] Ibid 1178.
[51] Ibid 1180.
[52] 2020 WL 6787408 (ND Fla).
[53] Ibid, *3 -*5.
[54] Ibid, *5 -*6.

claim immunity as no pre-judgment in rem proceedings could have been brought and South Africa also would not have been found to have engaged in any commercial activity in the United States to overcome immunity.

The UNCSI

To acquire a fuller understanding of the international law position on salvage and foreign state immunity, the text of the UNCSI should also be consulted. The UNCSI has not yet entered into force but has been adopted by 22 nation states (mainly from Western Europe) and has been described as 'a most important guide on the state of international opinion'[55] and 'reflect[ing] an international consensus on state immunity'.[56] The European Court of Human Rights has suggested that the UNCSI represents customary international law[57] and the Convention has been referred to with approval by the International Court of Justice[58] and the United States Supreme Court.[59]

There are two main provisions relevant to jurisdictional immunity of foreign states and salvage. First, there is article 10, which provides:

> Commercial transactions
>
> 1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction …

'Commercial transaction' is defined (relevantly) in article 2(1)(c):

> (i) any commercial contract or transaction for the sale of goods or supply of services;
> …
> (iii) any other contract or transaction of a commercial, industrial, trading or professional nature …

The first exception to immunity under the UNCSI that a salvor may seek to rely upon in a suit against a foreign state shipowner is where the state has engaged in a 'commercial transaction'. In practice, however, this ground is only likely to be available where the parties have entered a contract or some other commercial arrangement with respect to the salvage service. A purely unilateral *negotiorum gestio* action by the salvor would be unlikely to qualify since article 10 requires a 'transaction' 'engage[d] in' *by the state*,[60] which leads to a similar result to that reached under the FSIA and SIA. The commentary to article 2(1)(c) also emphasizes that 'the ordinary meaning of the word 'transaction' implies the limitation of Article 2(1)(c) to situations involving some deal or agreement, express or implied, between two or more parties'[61] which would exclude voluntary, unilateral provision of services by a salvor.

Secondly, and more specifically, article 16 provides:

> (1) Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court otherwise competent in a proceeding which relates to the operation of that ship if at the time the cause of action arose, the ship was used for other than government non-commercial purposes.
> (2) Paragraph (1) does not apply to warships …
> (3) Unless otherwise agreed between the parties concerned a State cannot invoke immunity from jurisdiction before a court of another State otherwise competent in a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if at the time the cause of action arose, the ship was used for other than governmental non-commercial purposes.
> (4) Paragraph (3) does not apply to any cargo carried on board [warships] nor does it apply to any cargo owned by a State and used or intended to be used for government non-commercial purposes.

[55] *AIG v Republic of Kazakhstan* [2006] 1 WLR 1420 [80] (Aikens J).
[56] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 490.
[57] *Cudak v Lithuania* (2010) App No. 15869/02 Eur Court HR [66] – [67].
[58] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (n 6).
[59] *Bolivarian Republic of Venezuela v Helmerich & Payne International Drilling Co* 581 US (2017), slip opinion, 9.
[60] Emphasis added.
[61] O'Keefe and Tams (n 9) 60.

The legislative history to article 16 makes it clear that the drafters recognized a clear trend in the practice of states to remove immunity in cases of state-owned 'vessels employed by states exclusively in commercial non-governmental service'. Consequently, in paragraph (1) immunity is removed where the ship is used for other than government non-commercial purposes. Immunity is however restored in paragraph (2) where the vessel is a warship. Such an approach represents a departure from the SIA (but not the FSIA) where there is no specific exclusion for warships but instead a general test of immunity is applied based on whether the state-owned vessel is used for non-commercial purposes. As noted earlier, however, both approaches are likely to lead to the same result.

A similar result to the Australian/UK view is reached in those states that are party to the 1926 Brussels Convention. The Convention is currently in force in the UK but not Australia or the US. Interestingly, the Convention may even still apply to states who are parties to the UNCSI because article 26 of the UNCSI preserves rights under existing treaties. Article 3(1) of the Brussels Convention preserves a foreign state's immunity in salvage proceedings relating to its 'ships of war … and other vessels owned or operated by a state exclusively at the time when the cause of action arises on government and non-commercial service'.

Article 16(3) of the UNCSI creates a further exception to immunity in the case of claims relating to the carriage of cargo. As in paragraph (1) the ship carrying the cargo must have been used for other than government non-commercial services. Under article 16(4) the exception to immunity in paragraph (3) does not apply to the carriage of cargo on warships nor in the case of state-owned cargo 'used or intended for use exclusively for government non-commercial purposes'.

Commentary has defended the inclusion of the words 'intended for use' as a means of avoiding the problem noted earlier in *The SS Tilawa* of cargo not being in use when on board the ship, presumably on the basis that a 'planned use' for the goods is easier to establish that a current use. The Australian approach discussed earlier is however preferable in assuming a use for commercial purposes unless the evidence clearly points otherwise.

Finally, and consistent with the SIA and FSIA provisions earlier mentioned, article 16(6) of the UNCSI provides that a certificate signed by a flag state representative shall serve as evidence of the character of the vessel as one engaged in sovereign or commercial activity. Again, the evidence contained in such certificate may be rebutted by contrary material.

In terms of the type of proceedings which a salvor may bring in the context of a foreign-state owned vessel or cargo article 16 suggests, on its face, that both in rem and in personam actions may be available. Article 16 must however be read with article 18 which expressly prohibits the taking 'in connection with a proceeding before a court of another state,' of 'all pre-judgment measures of constraint such as attachment or arrest, against property of a state', unless the state expressly assents to such measures. Article 18 therefore expressly prohibits pre-judgment in rem measures of restraint which creates a position like that seen earlier in the United States where only in personam actions against foreign states are available.[62] Article 18, however, is again subject to article 26 of the UNCSI which preserves rights under existing treaties. Again, the Brussels Convention may assist here, with article 3 implicitly allowing in rem proceedings against a foreign state-owned ship that is not a warship, nor 'employed exclusively at the time when the cause of action arises on government non-commercial service'.

Overall, the UNCSI provisions on jurisdictional immunity, while conferring a right on a salvor to proceed against a foreign state where the vessel is being used for commercial purposes, are more restrictive than the Australian/UK enactments in their preclusion of in rem relief. However, given the highly similar wording to the SIA and FSIA in article 16 of the UNCSI, which excludes immunity where the cargo is used for commercial purposes, it is likely that the same result would have been reached on the facts of *The SS Tilawa*.

Immunity from Enforcement Jurisdiction

Merely because a salvor has established adjudicatory jurisdiction over a foreign state or its vessel or cargo and rebutted any plea of immunity does not, however, ensure recovery for the claimant. International law has long recognized a further type of foreign state immunity which may stymie relief: immunity from enforcement jurisdiction. Such

[62] O'Keefe and Tams (n 9) 268.

immunity arises where a claimant has obtained a judgment against the foreign state or its property and then seeks to enforce and execute such judgment.

The United Kingdom and Australia

For example, section 32 of the FSIA, discussed earlier, provides that where a foreign state is not immune in a proceeding against a ship or cargo, an arrest of the ship or cargo is permissible if at the time of the arrest the ship or cargo was commercial property and the ship carrying the cargo was commercial property. 'Commercial property' is defined in section 32(3)(a) in the manner described earlier.[63]

In effect, the Australian legislation has partly unified adjudicatory and enforcement jurisdiction by creating a single test in the context of in rem claims. Suppose a foreign state vessel or cargo is held to be not entitled to immunity from jurisdiction under section 18 of the FSIA on the basis that either was commercial property at the time the cause of action arose. Suppose further that the ship or cargo was capable of being arrested under section 32 *before* judgment on the basis that, at the time of arrest, the ship or cargo was commercial property. This last finding can also be used to support an arrest under section 32 *after* judgment for enforcement and execution purposes; there is therefore a single test.

In the case of in personam claims, by contrast, the inquiries at the adjudicatory and enforcement jurisdiction stages are distinct and separate. So, where a foreign state is found not to be immune from jurisdiction because it engaged in commercial activity under section 11 of the FSIA, section 32 further requires that enforcement of any such judgment by arrest of the ship or cargo may only occur if either is commercial property at the time of arrest. The single test in in rem cases may be a further reason for the greater attractiveness of an in rem proceeding to salvors.

The UK approach under the SIA is very similar to that under the FSIA, with execution of any judgment against a foreign state available in relation to 'property which is for the time being in use or intended for use for commercial purposes' (section 13(4)).[64] As noted earlier, while warships are expressly precluded from execution under the FSIA, the SIA relies on the more general not 'in use for commercial purposes' formulation. In *The SS Tilawa,* the court, while finding that the state-owned cargo was not immune from the adjudicatory jurisdiction of the English court, expressly left open the question of whether immunity would apply in any enforcement proceeding.[65]

United States

Under the United States ForSIA, property in the US of a foreign state shall be immune from arrest, attachment or execution (section 1609) unless the property is used for a commercial activity in the United States upon which the claim is based. Arrest of a state's property is therefore permissible post-judgment. The requirement however that the property be used for a commercial activity in the United States would seem to limit the scope for execution against foreign state-owned ships and their cargoes.

UNCSI

The approach taken under the UNCSI is more elaborate and laboriously[66] drafted than the Australian or UK legislation and again appears to be more protective of the interests of foreign states.

Consequently, article 19 provides that:

> No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that (a) the State has expressly consented to the taking of such measures … (b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of the proceeding; or (c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum …

[63] See further, in a non-maritime context, *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 31.
[64] *SerVaas Incorporated v Rafidain Bank* [2013] 1 AC 595.
[65] [2020] EWHC 3434 [159].
[66] O'Keefe and Tams (n 9) 321.

In the context of salvage, the key provision is article 19(c), whose effect is to allow arrest and execution where the property of the state is 'used for the purpose of a commercial transaction as understood by [article 2 of] the Convention'.[67]

Article 19 must however also be read with article 21 which provides that:

> (1) The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19(c):…
> (b) property of a military character or used or intended for use in the performance of military functions;
> …
> (d) property forming part of the cultural heritage of the State ….

The aim of article 21 is 'to deem certain categories of property not to be specifically in use or intended for use by the state for other than government non-commercial purposes within the meaning of article 19(c)'.[68] The categories of excluded property provided in article 21 are only illustrative, not exhaustive and so a court may characterize other items of state property as not in use for commercial purposes.[69]

The first exclusion, 'property of a military character', has a parallel in the FSIA[70] and would include foreign warships. Relevantly, in the present context, a Dutch court refused an application to attach a Peruvian warship in aid of enforcement of a judgment that had ordered the recovery of a salvage award. The court found that no attachment may be made in respect of a state-owned vessel in use for governmental purposes.[71] Similarly, the International Tribunal of the Law of the Sea in the *ARA Libertad* case criticized a Ghanaian court's action in allowing the attachment of an Argentine warship in Ghanaian internal waters to satisfy an earlier judgment of a United States court against Argentina. Such an order was incompatible with the vessel's immunity under general international law.[72] Military cargo such as armaments and weaponry which have been salvaged would also likely fall under this provision.

Article 21(1)(d) includes 'cultural heritage' within the scope of immunity from enforcement and execution. Commentary has described this category as 'novel'[73] and it seems accepted that the classification of an item as cultural property will be determined by the law of the foreign state.[74] Such a view is supported by the definition of cultural property in article 1 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which refers to 'property which on religious or secular grounds, is specifically designated *by each state* as being of importance for archaeology, prehistory, literature, art or science' (emphasis added). The potential scope of this exclusion is large and in the present context may encompass many forms of cargo found on historical sunken vessels. For example, as suggested earlier, items such as coins which at the time of their usage would have been considered as instruments of trade could, due to the passage of time, be now regarded as cultural artefacts. The silver in *The SS Tilawa* could therefore be so considered which could mean that a claimant, even if successful in overcoming adjudicatory immunity, could still be denied recovery at the enforcement stage.

Such a conclusion would again effectively cloak *all* articles found in state-owned historical shipwrecks with immunity, which is hard to reconcile with the restrictive view. Yet, this approach may find support in the growing concern to protect underwater cultural heritage, which is discussed in IV below.

---

[67] Ibid 323.
[68] Ibid 334.
[69] Ibid 335, 339.
[70] FSIA s 32(3).
[71] *Wijsmuller Salvage BV v ADM Naval Services* (1989) 16 NYIL 294 ((District Court of Amsterdam).
[72] *ARA Libertad (Argentina v Ghana) (Provisional Measures)* [2012] ITLOS Reports 332.
[73] Fox and Webb (n 5) 532.
[74] O'Keefe and Tams (n 9) 344.

Immunity from Prescriptive/Legislative Jurisdiction

Immunity from salvage laws

As noted earlier, the literature on shipwrecks and underwater cultural heritage refers to a further type of immunity which is unique to the shipwreck salvage context: immunity from the prescriptive/legislative jurisdiction of the forum state. Prescriptive jurisdiction in this sense refers to the capacity of a state to enact and apply its laws to an entity. The national immunity legislation and the UNCSI earlier mentioned make no reference to this form of immunity, with commentary and case law of the International Court of Justice suggesting that it is not generally recognized in public international law.[75]

The question to be explored in this section is whether, despite there being no general international law principle of immunity from prescriptive jurisdiction, a customary norm has arisen whereby the law of salvage of coastal states cannot apply to certain state-owned marine wrecks, particularly warships. As noted earlier, international law does accept that regional or 'particular' customary norms may be recognized that depart from the general international law position.[76] If sufficient state practice and *opinio juris* exist in support of a rule that foreign states are immune from national laws in those areas, then such a customary norm may have 'crystallised' (*lex lata*) or at least be emerging (*de lege ferenda*).

Yet, even if no customary norm exists in favour of immunity from prescriptive jurisdiction, where a coastal state has legislated to prohibit commercial salvage of wrecks, for example in its territorial waters, no salvage claim can be brought in that state's courts. From the point of view of the foreign state, a similar outcome is reached to that under the immunity doctrine, at least where the state's ownership of the wreck is accepted.

In determining whether such a customary rule exists or is developing, some brief general remarks about salvage law are appropriate. The concept of salvage involves 'the rendering of assistance to vessels and their cargo in distress at sea, whether afloat, shipwrecked or sunken'.[77] The purpose of salvage is to 'encourage persons to render prompt, voluntary and effective services to ships at peril or in distress by assuring them compensation and reward for their salvage efforts'.[78]

The development of maritime law over the centuries in the United Kingdom, the United States and Australia has recognized that historic shipwrecks may be the subject of salvage claims, although until the 20th Century, immunity from adjudication largely prevented salvors from recovery against a foreign state shipowner. More recently, there has been a continued trend against the application of salvage laws to state-owned vessels such as warships or those used for government purposes both in practice and academic commentary. While the respect for sovereignty of foreign states remains paramount, there is now also the added concern to deter the 'pilfering and souvenir hunting'[79] that is said to be characteristic of salvage of wrecks. What is the evidence for this trend?

First, the provisions of the UNCLOS earlier mentioned confer on warships and other state-owned vessels used for non-commercial purposes on the high seas immunity from the jurisdiction of any state other than the flag state (articles 95 and 96).[80] A similar immunity for state vessels applies where they are in the exclusive economic zone of the coastal or forum state (article 58(2)). In the case of vessels in the territorial sea of the coastal state, article 32 of the UNCLOS is slightly less emphatic, providing that '[n]othing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes'.

---

[75] See discussion at text at (nn 5-9).
[76] See text at (nn 12-15).
[77] Guy J Dwyer, 'Ship Shape or All at Sea? A Preliminary Assessment of Australia's Recent Legislative Reforms Concerning Underwater Cultural Heritage' (2018) 32 *Australia and New Zealand Maritime Law Journal* 71, 73.
[78] *RMS Titanic Inc v Haver* 171 F 3d 943 (4th Cir 1991).
[79] Forrest (n 2) 173-174; private salvage efforts may often cause harm to wrecks, see Ole Varmer, 'The Case Against the 'Salvage' of the Cultural Heritage' (1999) 30 *Journal of Maritime Law and Commerce* 279, 280-281. Some commentators by contrast suggest that (apart from the financial motive) salvors are performing a service to humankind by recovering heritage that would otherwise not be brought to light: Forrest Booth, 'The Collision of Property Rights and Cultural Heritage: the Salvors' and Insurers' Viewpoints' in Barbara T Hoffman (ed), *Art and Cultural Heritage: Law and Policy and Practice* (Cambridge University Press, 2006) 293, 299 and David J Bederman, 'Historic Salvage and the Law of the Sea' (1998) 30 *University of Miami Inter-American Law Review* 99, 128-129.
[80] Such provisions replicate articles 8 and 9 of the 1958 Geneva Convention on the High Seas, see J Ashley Roach and Robert W Smith, *Excessive Maritime Claims* (Brill Nijhoff, 3rd ed, 2012) 535.

Secondly, the *International Convention on Salvage* of 1989, 1953 UNTS 165, (the London Convention) (to which Australia, the United Kingdom and the United States are parties) expressly excludes warships or other non-commercial vessels owned by a state and entitled to foreign state immunity from the scope of any right to salvage under the Convention: article 4(1).[81] 'Non-commercial cargoes owned by a state' are also excluded: article 25.

Thirdly, a growing practice around preservation of underwater cultural heritage has developed which opposes the commercial exploitation and salvage of material of archaeological or historical value. For example, article 303 of UNCLOS requires contracting states to protect 'objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.' Article 149 also provides that all objects of an archaeological and historical nature found on the seabed and beyond the limits of national jurisdiction shall be preserved and disposed of for the benefit of mankind, with particular regard being paid to the preferential rights of the state of origin'. While neither provision defines 'archaeological and historical object' the intention is to remove such articles from private operations such as salvage, in the interests of both the global community and the country of origin of the objects. Also, in the case of the London Convention (which provides for rights of salvage) Australia, the United Kingdom and other states including Canada, China, France and Spain entered reservations under article 30(1)(d) in respect of 'property [that] is maritime cultural property of prehistoric, archaeological and historical interest … situated on the seabed'. This reservation was enacted in Australian law in section 240(3)(c) of the *Navigation Act 2012* (Cth).

More specifically, there is the 2001 UNESCO *Convention on the Protection of Underwater Cultural Heritage*, 2562 UNTS 3, (UNESCO Convention) which defines underwater cultural heritage as 'all traces of human existence having a cultural, historical or archaeological character which have been … under water … for at least 100 years such as … (b) vessels … or any part thereof, their cargo or their contents, together with their archaeological and natural context' (article 1(a)). Such provisions should be read consistently with the aim of the Convention, which is to protect underwater cultural heritage through archaeological and other conservation measures, not commercial exploitation (article 2). Most importantly, article 4 provides that any activity relating to underwater cultural heritage to which this Convention applies *shall not be subject to the law of salvage* unless it (a) is authorized by the competent authorities; (b) is in full conformity with the Convention; and (c) ensures that any recovery of the heritage achieves its maximum protection. The intent of the drafters to prohibit commercial salvage is also expressed in article 2(7): 'underwater cultural heritage shall not be commercially exploited'.[82] The aim of this provision was to prevent 'treasure hunters' from trading in valuable historical artifacts stolen from wrecks.[83]

Arguably, therefore, private salvage of underwater cultural heritage is not permitted under the UNESCO Convention.[84]

Fourthly, several coastal states have enacted legislation to prohibit or at least limit commercial salvage of historic wrecks in their territorial waters and sometimes beyond. For example, the United Kingdom Protection of Wrecks Act 1973 prevents unauthorized salvage operations in respect of historical shipwrecks in UK territorial waters where the Secretary of State has issued an order designating the site of a wreck as a restricted area.[85] Similarly in Australia, the *Underwater Cultural Heritage Act 2018* (Cth) (UCHA) provides that the remains of vessels and articles associated with vessels that have been in Australian waters (territorial sea and continental shelf) for at least 75 years are subject to automatic protection.[86] Protection means that any activity including salvage in relation to such material is prohibited without a permit.[87] To like effect, China requires that all excavation activities in respect of wrecks located in its territorial waters be for the purpose of protection of cultural relics and scientific research.[88] A decision of the High Court of Ireland in 1994[89] is consistent with this trend. There, the remains of three Spanish vessels were found in Irish

[81] See also the exemption of states from the *Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea* (23 September 1910) art 14.
[82] See also rule 2 Annex.
[83] Roberta Garabello, 'The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage', in Roberta Garabello and Tullio Scovazzi (eds), *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff 2003) 89, 184-185.
[84] Dwyer (n77) 99; Hayley Roberts, 'The British Ratification of the Underwater Heritage Convention: Problems and Prospects' (2018) 67 *International and Comparative Law Quarterly* 833, 838.
[85] Section 1.
[86] UCHA s 16(1).
[87] Ibid ss 29-30.
[88] Regulations Concerning the Management and Protection of Underwater Cultural Relics, 20 October 1989 art 7
[89] *King v La Lavia* [1994] 7 JIC 2601; 1994 WJSC HC 3213.

territorial waters and the court denied a salvage reward, finding that the law of salvage should not be applied to historic shipwrecks, which are more appropriately the subject of archaeology and research.[90] The United States in its *Abandoned Shipwrecks Act 1987* (US) (ASA), by contrast, takes a more nuanced approach, providing that while on site preservation of underwater cultural heritage is preferred,[91] private salvage activities are still permissible 'where consistent with the protection of historical values and environmental integrity of shipwrecks and their sites'.[92] The generally consistent application of salvage law by United States courts to historic wrecks (in the absence of a finding of adjudicatory immunity such as in *Odyssey Marine*) confirms this view.[93]

The above state practice suggests that a foreign state would enjoy immunity under customary international law from a salvage claim brought under the laws of the coastal or forum state (prescriptive jurisdiction). The precise scope of such immunity is unclear as the trend in some recent instruments and practice is to go further and preclude private salvage altogether of historic shipwrecks. On balance, however, until a wider and clearer pattern of practice emerges, it may be safer to conclude that any immunity from prescriptive jurisdiction should align with the immunities from adjudicatory and enforcement jurisdiction, and so only apply to wrecks of state-owned vessels used for non-commercial purposes and warships.

Immunity and sunken vessels

Another question that has arisen is whether *sunken* vessels or wrecks should be treated in the same manner as functional and operational ships for the purposes of immunity. Some academic commentators support the view that immunity from prescriptive and legislative jurisdiction should equally apply in respect of salvage claims involving foreign state-owned wrecks and sunken vessels. Not only do wrecks contain materials of historical and cultural significance to the flag state and the international community more generally but, in the case of warships, they may also be gravesites of soldiers of that state or repositories of sensitive military intelligence. Relevantly, article 3 of the *Institut de Droit International Resolution on the Legal Regime of Wrecks and Warships and other State-Owned Ships in International Law*[94] provides that 'sunken state ships' are immune from the jurisdiction of any state other than the flag state. Article 5 of the same resolution confers the same status on cargo on board a sunken ship. There are therefore strong reasons for recognizing immunity from national salvage law in such cases.[95] Consistently with the earlier mentioned immunities, however, the immunity should be restrictive not absolute and only apply where the vessel or cargo was being used, at the time the cause of action arose, for government purposes.

By contrast, several authors have contended that immunity from legislative/prescriptive jurisdiction should not apply to sunken vessels or wrecks. Their reasoning is that a warship that has been 'sunk' cannot be described as a warship because it can no longer perform such a role and so is no longer 'of strategic importance'.[96] Article 29 of UNCLOS is cited in support, which refers to a 'warship' as being 'under the command of an officer' and 'manned by a crew' as well as article 1(b) of the Salvage Convention which defines a vessel as 'any ship … capable of navigation'.

Weighed against these textual references, however, is the practice and academic opinion referred to earlier opposing the right to private salvage or commercial exploitation of state-owned vessels and cargo not used for commercial

[90] Ibid [189] – [191].
[91] Varmer (n 79) 283.
[92] ASA 43 USC 2103(a)(2)(C).
[93] See, eg, *Platoro Ltd Inc v Unidentified Remains of a Vessel* 614 F 2d 1051, 1055-56 (5th Cir. 1980) and *Treasure Salvors Inc v Unidentified, Wrecked & Abandoned Sailing Vessel* 569 F 2d 330, 337 (5th Cir 1978).
[94] (9th Commission, 29 August 2015), available at https://www.idi-iil.org/app/uploads/2017/06/2015_Tallinn_09_en-1.pdf
[95] Valentina S Vadi, 'International Law and the Uncertain Fate of Military Sunken Vessels' (2009) 19 *Italian Yearbook of International Law* 253, 265-268; Roach and Smith, (n 80) 542, 554; Mariano J Aznar-Gomez, 'Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (2010) 25 *International Journal of Marine and Coastal Law* 209, 223; Anastasia Strati, 'Protection of the Underwater Cultural Heritage: From the Shortcomings of the UN Convention on the Law of the Sea to the Compromises of the UNESCO Convention' in Anastasia Strati, Maria Gavouneli and Nikos Skourtos (eds), *Unresolved Issues and New Challenges to the Law of the Sea* (Brill Nijhoff, 2006) 48-49; Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press, 2013) 134; Dwyer (n 77) 97; Roberts (n 84) 848-849.
[96] Lucius Caflish, 'Submarine Antiquities and the International Law of the Sea' (1982) 13 *Netherlands Yearbook of International Law* 3, 32; Luigi Migliorino, 'The Recovery of Sunken Warships in International Law' in Budislav Vukas (ed), *Essays on the New Law of the Sea* (1985) 244, 251; MM Losier, 'The Conflict between Sovereign Immunity and the Cargo of Sunken Colonial Vessels' (2018) 33 *International Journal of Marine and Coastal Law* 528, 535; Craig Forrest, 'A New International Regime for the Protection of Underwater Cultural Heritage' (2002) 51 *International and Comparative Law Quarterly* 511, 527; Jerry E Walker, 'A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations' (1999-2000) 12 *University of San Francisco Maritime Law Journal* 311, 351.

purposes. Such a position sits awkwardly with the view that sunken vessels are not entitled to immunity. Moreover, in the parallel contexts of adjudicatory and enforcement jurisdiction, there is no suggestion that sunken ships are treated differently from operational vessels for immunity purposes.[97] For example, the courts in *The SS Tilawa* and the United States decisions considered earlier,[98] all accepted that wrecks are entitled to immunity. According to the court in *The SS Tilawa*, the key inquiry was the *use* of the vessel or cargo at the time of sinking: only if it were found to be used for commercial purposes at that point would no immunity exist. Such a balanced and nuanced approach should equally apply to the context of immunity from prescriptive jurisdiction.

There is also United States authority that appears to recognize immunity from prescriptive jurisdiction in the case of salvage of sunken state vessels and cargo. In *Sea Hunt Inc v Unidentified Shipwreck Vessel*,[99] two historical vessels owned by Spain, lying in United States territorial waters, were salvaged despite the foreign state refusing salvage services. The salvors were denied a salvage reward after Spain's rights to ownership were established, with a 1902 treaty between the United States and Spain creating reciprocal immunities for historical shipwrecks. Significantly, the court noted, 'the protection of the sacred sites of other nations thus assists in preventing the disturbance of our own'.[100]

Further, in practice, a conclusion that a state-owned wreck is not immune from a coastal state's legislative jurisdiction is unlikely to be useful to a salvor where the foreign state has earlier been granted immunity from the *adjudicatory* jurisdiction of the coastal state's courts. Legislative jurisdiction, in the sense of application of a coastal state's laws if the matter proceeded to the merits, would only arise if the court found no adjudicatory immunity to exist or if the foreign state failed to plead or waived such immunity. Once however a case is dismissed on adjudicatory immunity grounds, the merits of any salvage claim are not reached. Such an observation provides a further reason for interpreting the scope of the immunities consistently.

On balance, therefore, there is insufficient evidence in state practice to support the view that wrecks are not entitled to the protection of foreign state immunity from national laws permitting salvage. Indeed, the key contemporary goal of protecting underwater cultural heritage from potentially harmful and invasive activities acts to reinforce the application of immunity from salvage claims. It therefore seems unlikely that states would be keen to countenance a return to the 'treasure hunting' of times past at the expense of cultural and humanitarian concerns.[101] Of course, where ownership of the wreck has been clearly and expressly abandoned by the foreign state,[102] then immunity cannot apply.

Immunity from coastal state protective measures

To be fair, some of the academic commentary referred to earlier which rejects the view that sunken vessels should be entitled to immunity from legislative/prescriptive jurisdiction, does not do so out of a concern to protect private salvage or commercial exploitation of underwater cultural heritage. Indeed, their argument is almost the reverse: that the manifest contemporary concern with protection of underwater cultural heritage means that foreign states should be bound by national laws of the coastal state that *seek to protect wrecks for their archaeological or historical value*. So, while it is entirely appropriate for a foreign state to resist national laws that allow their wrecks to be exploited by private treasure hunters, such states should arguably be required to comply with laws of the coastal state that seek to protect such artefacts, such as through legitimate marine scientific research.[103] Additionally, a coastal state should be allowed to legislate to remove wrecks that pose an environmental hazard or barrier to economic exploration or development, at least in its territorial sea and exclusive economic zone.[104]

---

[97] It is acknowledged, however, that national immunity statutes and the UNCSI do not *expressly* address the status of sunken vessels: Sarah Dromgoole, 'The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law: The 2015 Resolution of the Institut de Droit International' (2015) 25 *Italian Yearbook of International Law* 181, 189.

[98] See e.g., *Odyssey Marine Exploration Inc v Unidentified Shipwrecked Vessel* 657 F 3d 1159 (11th Cir 2011).

[99] 221 F 3d 634 (4th Cir 2000).

[100] Ibid, 647.

[101] Roberts (n 84) 848.

[102] *Odyssey Marine Exploration Inc v Unidentified Shipwrecked Vessel* 657 F 3d 1159, 1174 (11th Cir 2011); *Sea Hunt Inc v Unidentified Shipwreck Vessel* 221 F 3d 634, 640, 642 (4th Cir 2000).

[103] See especially Craig Forrest, 'An International Perspective on Sunken State Vessels as Underwater Cultural Heritage' (2003) 34 *Ocean Development and International Law* 41, 44-46 and (n 96) 527.

[104] See e.g., in this respect the 2007 *International Convention on the Removal of Wrecks* (Nairobi, 18 May 2007) arts 9 and 14. The difficulty of reconciling immunity with these competing objectives is discussed in Dromgoole, (n 97) 189-199.

The UNESCO Convention is however equivocal on this critical issue. For example, in the case of the territorial sea article 7(1) provides that coastal states have the exclusive right to regulate and authorize activities directed at underwater cultural heritage. Article 7(3) then qualifies this right by providing that a coastal state, 'with a view to co-operating on the best methods of protecting state vessels should inform the flag state … with respect to the discovery of such … state vessels'. In the case of a wreck found in the coastal state's exclusive economic zone and continental shelf, article 10(2) provides that such state has 'the right to authorize an activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction' and article 10(4) provides that the coastal state 'may take all practicable measures and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting'. Article 10(7) then provides that, subject to (2) and (4), 'no activity directed at a state vessel shall be conducted without the agreement of the flag state'. In the case of wrecks found in international waters, the primacy of the flag state is clearer: 'no State Party shall undertake or authorize activities directed at State vessels … without the consent of the flag State' (article 12(7)).

So, coastal states are given the right under the UNESCO Convention to take measures with respect to the protection of underwater cultural heritage, on a sliding scale of consent of the flag state. Where a wreck is found in the coastal state's territorial waters, no consent of the flag state is required before conservation measures are taken, but such state 'should' be informed of the finding of any wreck. Where a wreck is located in the coastal state's exclusive economic zone or continental shelf the consent of the flag state is required but the coastal state may exceptionally take action 'prior to consultations' 'to prevent any immediate danger'. Only in the case of wrecks found in international waters is the flag state's prior consent to action strictly required. While the United States and United Kingdom assert that articles 7 and 10 threaten foreign state immunity,[105] this view overlooks article 2(8), which states that 'nothing in this Convention shall be interpreted as modifying the rules of international law and state practice relating to sovereign immunities'.[106] More likely, the intent of the drafters in articles 7 and 10 was to confer emergency powers on a coastal state to protect heritage that was in imminent harm; in that way, also protecting the interest of the flag state.[107]

On balance it is doubtful whether foreign state immunity has been displaced in the context of conservation measures by coastal states in relation to underwater cultural heritage. While the UNESCO Convention does confer greater powers on coastal states to intervene to protect heritage, it nevertheless reaffirms the central role of flag states in any action taken and makes express reference to immunity. It is suggested that the correct position remains that expressed in article 236 of UNCLOS, which provides that 'the provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship owned by a state and used … only on government non-commercial service'. Significantly, article 3 of the UNESCO Convention states that the text shall 'be interpreted and applied in the context of and in a manner consistent with international law, including [UNCLOS]'. Hence, the existing approach to immunity under UNCLOS is preserved. Finally, the UNESCO Convention, while having 63 state parties, still lacks the support of many major maritime powers such as the United Kingdom, the United States, China, Germany, Japan, the Netherlands, Norway, Russia, Singapore and the UAE which may weaken its force as an agent of custom.[108]

Consequently, the conclusion expressed earlier that foreign state immunity applies to all forms of legislative/prescriptive jurisdiction in respect of sunken state vessels that are warships or not used for commercial purposes would seem to represent the most accurate position in international law. Such a customary norm would however be a 'particular' rule, only binding on those states that accepted the rule as law in their practice among

[105] Sarah Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of Underwater Cultural Heritage' (2013) 38 *Marine Policy* 116, 119; Roberts (n 84) 839.
[106] Roberts, (n 84) 850.
[107] Ibid 851.
[108] Roach and Smith, (n 80) 552. Interestingly, in more recent writing, Forrest appears more equivocal on the issue of whether immunity exists from coastal state conservation measures, noting that the position is one of 'uncertainty' and that the UNESCO Convention 'does not directly address the issue': (n 2) 227. A variation on the anti-immunity argument is proposed by Losier, (n 96), who suggests that foreign states should be denied immunity from underwater cultural heritage laws where the artefacts were acquired by colonial powers in breach of international law norms of self-determination and human rights. The author argues that such norms are fundamental rights or 'jus cogens' which override the principles of foreign state immunity and should not therefore preclude successor state claims to such artefacts. The International Court of Justice in the *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* (n 6) case, however, refused to find that foreign state immunity principles were defeated by jus cogens norms prohibiting serious human rights violations, which casts some doubt on this argument.

themselves. States that do not recognize the immunity would be able to continue to apply their salvage or marine conservation laws to foreign state-owned wrecks.

Conclusion

The issue of foreign state immunity and marine wrecks is significant but complex. While principles of public international law have traditionally limited immunity to cases of adjudicatory and enforcement jurisdiction there is a strong view in the literature and practice that it should also be extended to questions of prescriptive/legislative jurisdiction. In the areas of adjudicatory and enforcement immunity, the restrictive doctrine is well accepted and seeks to balance the interests of commercial salvors and foreign states by only imposing immunity where a state vessel or cargo was not used for commercial purposes. As *The SS Tilawa* case shows, however, such a test is not always easy to apply given the often considerable length of time between sinking and salvage.

A key question is whether a similar model of immunity applies to the exercise of prescriptive jurisdiction by coastal states, specifically, national salvage laws and conservation measures. While a reputable argument exists in customary international law that foreign state-owned vessels and cargo not used for commercial purposes enjoy immunity from the laws of salvage, the position is less clear in the case of marine conservation laws of a coastal state. If, however, both coastal and flag states have a common interest in preservation of wrecks, it may be that expanded inter-state co-operation will render the need for pleas of immunity less necessary.