

In rem Jurisdiction under International Law: its consequences on Salvage Services and its balance on Underwater Cultural Heritage

by
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*Hominum causa omne ju constitum*¹

INTRODUCTION

Throughout the decades, humans have always had the aspiration of finding a lost treasure at sea. It is the dream for the ultimate reward of a lifetime of hard work and adventures. Few people get to fulfill their dream and when they do, they find themselves stranded on a non ending battle with maritime customs, national laws, and contemporary jurisprudence. Shipwrecks, once thought to be at an impossible reach, are now the proof that state-of the art technology can take treasure hunters anywhere in the deepest areas of the open ocean.² However, when problems arise between the national interest, salvors and archeologists, a claim under *in rem* jurisdiction³ makes the Court of Justice⁴ the only venue for a peaceful solution. International Law, under the Law of Finds and Salvage Law, dictates the legal standard to follow and courts all over the world

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¹ "All law was established for men's sake". ENCLICOPEDIA BRITANNICA (online), available at <http://www.britannica.com/topic-1271640/Salmond-on-Jurisprudence>.

² See Angus Konstam, *THE HISTORY OF SHIPWRECKS 16-20* (The Lion press 2002). See also Robert D. Ballard, Rick Archbold and Ken Marshall, *THE LOST SHIPS OF ROBERT BALLARD: AN UNFORGETTABLE UNDERWATER TOUR BY THE WORLD'S LEADING DEEP-SEA EXPLORER* (Thunder Bay Press 2005) and Robert D. Ballard and Malcolm McConnell, *ADVENTURES IN OCEAN EXPLORATION: FROM THE DISCOVERY OF THE TITANIC TO THE SEARCH FOR NOAH'S FLOOD* (National Geographic 2001).

³ *In rem* jurisdiction is the power used by the court to exercise its authority over a thing. See *RMS Titanic v. Haver*, 171 F.3d 943, 957 (4th Cir. 1999) (here the court reviews the definition of the different types of jurisdiction).

⁴ The connotation of such Court of Justice is not to be confused with the International Court of Justice. Here it means the place where a plaintiff goes to claim justice; a place of judicial authority to vindicate rights and privileges.

establish the precedents for disputes stirring from salvaging expeditions on vessels in international waters. The recoveries of artifacts from in the Titanic and the sole ownerships rights obtained by it salvors have generated a series of legal controversies. It is necessary to distinguish the types of jurisdiction for which a U.S. Court can retain authority and review the current international law together with its jurisprudence. A balance must be established between the Law of Finds and the rights of those who embark on salvage operations with the significance of archaeological preservation of underwater cultural heritage. Furthermore, the rule of law and its applicability to incidents in maritime issues arousing in the high seas must resemble the nation's interest to protect sailors and their vessels.

***IN REM* JURISDICTION**

The judicial system has three methods of acquiring jurisdiction over a person or a thing: *in personam*,⁵ *in rem*,⁶ and *quasi in rem*.⁷ Thomas Street⁸ explains each one of them and articulates that *in personam* “provides courts the ability to adjudicate cases over an individual or corporation”.⁹ This jurisdiction can be retained by consent, a statute or by the presence of diversity in jurisdiction.¹⁰ He defines *in rem* as a jurisdiction that “is not over a person, but rather over a thing, such as a ship or its cargo”.¹¹ He goes further and describes *quasi in rem* as a type of hybrid authority of the previous two, and says that “[i]t effectively allows a court to claim

⁵ *In personam* jurisdiction is used here for the only purpose of identifying the three types of jurisdiction. It does have a particular significance with the subject at hand but under it will not be discussed more than for the explanation of an *in rem* action. BALLENTINE'S LAW DICTIONARY 691 (3rd ed. 1969) “[j]urisdiction over a person of the defendant which can be acquired only by service of process upon the defendant in the state to which the court belongs or by voluntary submission to jurisdiction”.

⁶ See, *infra* note 13-14.

⁷ See, *infra* note 10.

⁸ Thomas Street, *Underwater Cultural Heritage Policies of the United States Coastal Zone*, 34:4 COASTAL MANAGEMENT 467, 469 (Taylor & Francis 2006) (discussing the issue of cultural heritage and shipwrecks).

⁹ *Id.* at 469.

¹⁰ *Id.* See also BLACK'S LAW DICTIONARY 870 (8th ed. 2004) where it is also defined as jurisdiction that adjudicates “over a defendant's personal rights, rather than merely over property interests”.

¹¹ *Id.*

jurisdiction over the property of a person to which it cannot claim full *in personam* jurisdiction”.¹² *Quasi in rem* is also defined as a “[j]urisdiction over a person but based on that person's interest in property located within the court's territory”.¹³ Regardless of which one is used to acquire authority to hear and resolve a dispute, one of them must be present for the court to retain jurisdiction and to be able to vindicate rights and privileges.

The principle of *in rem* jurisdiction¹⁴ is defined by the Black's Law Dictionary as “[a] court's power to adjudicate the rights to a given piece of property, including the power to seize and hold it”.¹⁵ It creates the legal action towards a specific “thing”,¹⁶ a *rea*, rather than toward a particular person. The *rem*¹⁷ is the subject matter at issue. The consequences of a judgment in an *in rem* or *quasi in rem* action are, nevertheless, limited to the property subject to the jurisdiction of the court; as a result, it does not impose a personal liability on the property owner or affect others assets of the owner's.¹⁸ Rulings in this action are not “only binding on the parties to the litigation but also upon all who may be interested in the *res*”.¹⁹ A significance characteristic of a judgment under *in rem* jurisdiction is that the people not notified of the proceeding are bound by the decision.²⁰ It is a judgment that compels the whole world even in the absent of a possible interest party.

Madhavi Divan, citing *Salmond on Jurisprudence*,²¹ defines the concepts of *in personam* and *in rem* and explains the distinction between the two as:

¹² *Id.*

¹³ BLACK'S, *supra* note 10.

¹⁴ See 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE § 3221 (2nd ed. 2007).

¹⁵ BLACK'S, *supra* note 10.

¹⁶ See Ignacio Rivera-García, DICCIONARIO DE TÉRMINOS JURÍDICOS 376 (Lexis-Nexis 3th ed. 2000).

¹⁷ The concept is defined as “a thing.” BLACK'S, *supra* note 10. “[i]nvolving or determining the status of thing”.

¹⁸ 46 AM. JUR. 2D *Judgments* § 173 (2007).

¹⁹ *Id.*

²⁰ *Id.*

²¹ P.J. Fitzgerald, SALMOND ON JURISPRUDENCE 234-238 (Sweet & Maxwell 12th ed. 1966).

[a] right *in rem*, sometimes called a real right, corresponds to duty imposed upon persons in general; a right *in personam*, sometimes called a personal right, corresponds to a duty imposed upon determinate individuals. A right *in rem* is available against the world at large; a right *in personam* is available only against particular persons [...]. Almost all rights *in rem* are negative, and most rights *in personam* are positive [...]. The essence of a right *in rem* is that it avails against an open or indefinite class of persons, whereas a right *in personam* avails against a specific person or persons.²²

In 1900, Chief Justice Holmes, in *Tyler v. Judges of the Court of Registration*,²³ articulated the distinction between the actions and expressed that both are no more than fictions, suitably stating the nature of the process and the result:

[i]f the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection, so that only certain persons are entitled to be heard in defense, the action is *in personam*, although it may concern the right to, or possession of, a tangible thing. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established, and if anyone in the world has a right to be heard on the strength of alleging facts which, if true, show an inconsistent interest, the proceeding is *in rem*. All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected. Hence, the *res* need not be personified and made a party defendant, as happens with the ship in the Admiralty. It need not even be a tangible thing at all, as sufficiently appears by the case of the probate of wills. Personification and naming of the *res* as defendant are merely symbols, not essential matter.²⁴

Nonetheless, it is through the use of these actions and under a hybrid combination of both, as a *quasi in rem*, that a claim under international law can be submitted to a U.S. court. Otherwise, the *rea*, and for that matter, the parties that need to be compelled to appear before the court, will be left without a remedy and a suitable forum to resolve any dispute.

²² Madhavi Divan, *Admiralty Jurisdiction after the World Tanker Case*, 2 SCC (Jour) 33, (2000). (quoting from P.J. Fitzgerald, *supra* note 21).

²³ *Tyler v. Judges of the Court of Registration*, 175 Mass. 71, 55 N.E. 812 (1900).

²⁴ *Id.* at 76-77, 813-15.

A Salvor²⁵ has to file an *in rem* claim in order to protect his exclusive salvage rights. However, Scholar Anastasia Strati argues that a salvor's rights may be sheltered by an action *in rem* or *in personam*; nonetheless, she emphasizes that when the property is *res nullius*,²⁶ the claim can only be by an action *in rem*.²⁷ If the salvor so desires to pursue his suit in the United States, he is obliged to file his action in any federal district court. This is because the U.S. Constitution clearly gives judicial power to the federal court to "all cases of admiralty and maritime jurisdiction".²⁸ Congress gave the districts courts original jurisdiction on: "(1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled and (2) any prize brought into the United States and all proceedings for the condemnation of property taken as prize".²⁹ However, it is not from U.S. laws that the district courts gets its command but under the law than is older that navigation itself. This was well observed by Chief Justice Marshall in *The American Ins. Co. v Bales of Cotton*,³⁰ when he wrote: "[a] case in admiralty does not, in fact, arise under the constitution of law of the U.S. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Court to the cases as they arise".³¹ The Constitution

²⁵ BLACK'S, *supra* note 10, at 1367. A salvor is define as "[a] person who saves a vessel and its cargo from danger or loss; a person entitled to salvage". BLACK'S LAW, *Id.* citing Martin J. Norris, *The Law of Salvage* § 4, at 4 (1958), adds that "[a]salvor is a person, who, without any particular relation to a ship or property in distress, performs useful service, and gives it as a volunteer without any pre-existing contract that connected him with the duty of employing himself for the preservation of the ship or property." In addition, citing 68 AM. JUR. 2D *Salvage* § 2 (2007), BLACK'S adds that "[a] 'salvor' is a person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the ship. To be a salvor, one must have the intention and capacity to save the distressed property involved, but need not have an intent to acquire it." *Id.*

²⁶ It means the thing of no one. BLACK'S, *supra* note 10 at 1337. "[a] thing that can belong to no one; an ownerless chattel."

²⁷ Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, 23 PUBLICATIONS ON OCEAN DEVELOPMENT 7, 44 (Martinus Nijhoff Publishers 1995).

²⁸ U.S. Const. art. III, § 2, cl. 1.

²⁹ 28 U.S.C. § 1333 (1948).

³⁰ *The American Ins. Co. v Bales of Cotton*, 26 U.S. 511, 1 Pet. 511, 7 L.Ed. 242 (1828).

³¹ *Id.* at 544-45.

gives admiralty subject matter jurisdiction to the federal courts and authorizes them to continue the development of the Law of the Sea.³² It has conferred the power to enforce the common law of maritime nations, the *jus gentium*,³³ when exercising its jurisdiction.³⁴

In *Adams v. Unione Mediterranea Di Sicurtà*,³⁵ the court expressed that once property is successfully saved “the salvor obtains a maritime lien on the salvaged property, which he can enforce *in rem* in an admiralty court”.³⁶ In addition, Justice Matthews, in *Covell v. Heyman*,³⁷ citing Justice Nelson in *Taylor v. Carryl*,³⁸ conveyed that in a proceeding *in rem*, for the court to be able to acquire jurisdiction, “there must be a valid seizure and an actual control of the *res* under the process”.³⁹ In order for the authority of an admiralty court to become active, and recognized by other sovereign states, the *res*⁴⁰ must be brought before the district court or a court of admiralty of another jurisdiction.⁴¹ To satisfy the element of control of the *res*, the salvor must bring an artifact from the shipwreck to the court. If this is not done, then the proceeding *in rem* will become one of *ex parte*⁴² and, as expressed by *Rose v. Himely*,⁴³ it will be an “act against a thing which is not in the power of the sovereign under whose authority the court proceeds”.⁴⁴ Chief Justice Marshall emphasized that otherwise “no nation will admit that its

³² BLACK'S, *supra* note 10 at 904. The Law of the Sea, also known as Maritime Law, is defined as the “[t]he body of international law governing how nations use and control the sea and its resources”.

³³ The laws of the nations. BLACK'S, *supra* note 10 at 877. [t]he body of laws, taken to be common to all civilized peoples, and applied in dealing with the relations between Roman citizens and foreigners”.

³⁴ See *Titanic II*, 171 F.3d at 966-67.

³⁵ *Adams v. Unione Mediterranea Di Sicurtà*, 220 F.3d 659 (2000).

³⁶ *Id.* at 670. (citing Martin J. Norris, *Benedict on Admiralty*, § 802[A] at 8-4 (1998)).

³⁷ *Covell v. Heyman*, 111 U.S. 176, 4 S. Ct. 355 (1884).

³⁸ *Taylor v. Carryl*, 61 U.S. 583, 20 How. 583, 15 L. Ed. 1028 (1857).

³⁹ *Covell*, 111 U.S. at 177.

⁴⁰ BLACK'S, *supra* note 10 at 1291. *Rea* or *Res* mean “[i]n civil and canon law, a defendant. It is the “thing” against the claim is brought.

⁴¹ *Infra*, note 43. See also Street, *supra* note 8 at 469.

⁴² BLACK'S, *supra* note 10 at 617. “[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested; of or relating to court action taken by one party without notice to the other”.

⁴³ *Rose v. Himely*, 8 U.S. 241, 251, (4 Cranch) 241, (1808).

⁴⁴ *Id.* at 277.

property should be absolutely changed, while remaining in its own possession”.⁴⁵ Without the *rea*, any court ruling will lack enforceability and will not stand at any jurisdiction to where the *rea* has been brought to.

The court in *RMS Titanic v. Haver*⁴⁶ (hereafter *Titanic II*) concluded that in order to decide a claim of salvage it had to take *in rem* jurisdiction over the *Titanic* wreck in international waters to be able to “protect the salvor in possession when it is impossible to bring the entire wreck into the judicial district at a single point in time”.⁴⁷ An *in rem* action only requires that the interested party bring the *res* to the custody of the court and that public notice of his intentions be given to enable others to claim an interest in the *rem*.⁴⁸ Nonetheless, in *Marex Int’l Inc. v. Wrecked and Abandoned Vessel*,⁴⁹ the court also recognized “the impossibility of bringing a shipwreck and all of its contents into court” and asserted that exercising *quasi in rem* jurisdiction over wrecks in international waters is an exception to the traditional requirement.⁵⁰ In expanding this analysis, the court ruled that they could exercise *in rem* jurisdiction because the salvor, in this case, had demonstrated adequate control over the ship’s artifacts.⁵¹

U.S. courts have developed the concept of “constructive *in rem* jurisdiction” to allow salvors the extraordinary exception of bringing only an item from a wreck in international waters into their jurisdiction so they can impose salvage rights over the entire vessel.⁵² Under this authority, the court may enter orders and judgments to secure the wreck or the ostensible salvors’

⁴⁵ *Id.*

⁴⁶ *RMS Titanic v. Haver*, 171 F. 3d 943 (1999). (hereafter *Titanic II*)

⁴⁷ *Id.* at 956. (quoting from *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel*, 9 F. Supp.2d 624, 633 (4th Cir. 1998).

⁴⁸ *Roller v. Holly*, 176 U.S. 398, 403-06 (1900).

⁴⁹ *Marex Int’l Inc. v. Wrecked and Abandoned Vessel*, 952 F. Supp. 825 (1997).

⁵⁰ *Id.* at 828. (quoting from *R.M.S. Titanic*, 9 F. Supp.2d at 632).

⁵¹ *Id.*

⁵² Thomas H. Belknap, Jr., *Treasure Salvage: Finders Keepers?*, MARITIME REPORTER & ENGINEERING NEWS, June 2007, at 80:¶7.

right to salvage it.⁵³ However, as appropriately argued by Thomas H. Belknap, under the Law of the Sea, when the basis of jurisdiction is “constructive *in rem*,” the court's authority is something less since the enforcement of the court's decrees “depends upon the cooperation of nations and may only be accomplished when the people or property are brought within the ‘zone of power’ of nations who together recognize and enforce the general maritime law”.⁵⁴ Nevertheless, in *Titanic II*, the U.S. Appeal’s Court underlined the standard that “[n]o theory of ‘constructive *in rem* jurisdiction’ permits a court to adjudicate the rights of persons over which it lacks personal jurisdiction with respect to a vessel [in international waters] that has never been within the court's territory”.⁵⁵ This exceptional jurisdiction continues to be used more often by maritime cases. Its applicability makes easier *in rem* proceedings. Nonetheless, it is argued, that its use contradicts the due process clause⁵⁶ by taking away from prospers defendants their day at court.

In *The Brig Ann*⁵⁷ case, Justice Story, delivering the court’s opinion, uttered that “[i]n order to institute and perfect proceedings *in rem*, it is necessary that the thing should be actually or constructively within the reach of the Court. [...] it is constructively so, when, by a seizure, it is held to ascertain and enforce a right of forfeiture which can alone be decided by a judicial decree *in rem*”.⁵⁸ Under the Law of the Sea, as a general rule, the *res* must be *custodia legis*;⁵⁹ however, this possession may be real or constructive.⁶⁰ This type of control, as defined by *Titanic II*, “connotes something less than physical seizure of a *res* by a court”.⁶¹ Nevertheless, the aptness of the court under this jurisdiction rests “upon the fiction that the *res* is not divided

⁵³ *Id.*

⁵⁴ *Id.* at ¶5.

⁵⁵ *Titanic II*, 171 F.3d at 952.

⁵⁶ U.S. CONST. art. IV; and U.S. CONST. amend XIV § 1.

⁵⁷ *The Brig Ann*, 13 U.S. 289, (9 Cranch) 289, 3 L.Ed. 734 (1815).

⁵⁸ *Id.* at 291.

⁵⁹ BLACK'S, *supra* note 10 at 783. “[i]n the custody of the law. [...] The phrase is traditionally used in reference to property taken into the court’s charge during pending litigation over it.”

⁶⁰ *Titanic II*, 171 F.3d at 964.

⁶¹ *Id.*

and that therefore possession of some of it is constructively possession of all”⁶² by the court. Recently, the court articulated that the term ‘constructive’, as used in admiralty cases, means “an ‘imperfect’ or ‘inchoate’ *in rem* jurisdiction which falls short of giving the court sovereignty over the wreck. It represents rather a ‘shared sovereignty’ with other nations enforcing the same *jus gentium*”.⁶³ This assumption of indivisibility is subject to the *rea* itself. If an item or artifact is separated from the main *rea*, then the fiction fails and the court will be in a traditional *in rem* adjudication subject to the authority of another court with the *rea* under its jurisdiction.

In *Titanic II*, limitations were recognized to the constructive *in rem* jurisdiction. It was emphasized that, contrary to an *in rem*, “any power exercised in international waters through ‘constructive *in rem*’ jurisdiction could not be exclusive as to the whole world”.⁶⁴ Nonetheless, Circuit Judge Niemeyer accentuated that, under international law, even though other sovereign states courts may as well retain similar jurisdiction, and, “as long as the salvage operation continues”,⁶⁵ the nonexclusive control “over the *res* would not defeat the district court's first purpose of declaring salvage rights to the wreck as against the world”.⁶⁶ Moreover, he avowed that the court shared the belief “that the *jus gentium* authorizes an admiralty court to do so, even though the exclusiveness of any such order could legitimately be questioned by any other court in admiralty”.⁶⁷ Through this mechanism, as stated by Niemeyer, rights may be legally internationally declared but not recognizable to be enforced. It requires “the additional steps of bringing either property or persons involved before the district court or a court in admiralty of another nation”⁶⁸ to bind all jurisdictions by its *dictum*.⁶⁹

⁶² *Id.*

⁶³ *Id.* at 967.

⁶⁴ *Titanic II*, 171 F.3d at 967.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 968

It could be subject to debate that presenting a small item from a wreck should not be enough to satisfy this essential element of authority binding. Conversely, the Law of the Sea's principles was implemented to avoid ambiguous questions from preventing a salvor from protecting their rights. In recent decisions, as in *California v Deep-sea Research*,⁷⁰ a salvor presented a full bottle of champagne and a bras spike from the ship's hull,⁷¹ and in *RMST Titanic*, another salvor presented the court with a wine decanter retrieved from the ship.⁷² In both cases, the Supreme Court acknowledged the aptness of the district court in exercising *in rem* admiralty jurisdiction over the shipwrecks. However, these laws, the *jus gentium*, must be compatible with the worldwide recognized Rules of Salvage. The main principle of this system encourages the practice of *in rem* over wreck sites to facilitate the recovery of artifacts and the willingness of those that take the risk of salvaging them. It would be impracticable, not to say impossible, for a salvor to go from port to port until he finds a court willing to hear his claim. Likewise, it will be unfair and contrary to the stability of the rule of law at sea that once a court has exercised *in rem* jurisdiction, another one refuses to abide by its decision, and gives rights over the *rea* to some else. Nations have agreed by international customs on the Law of the Sea; they have consented to rules beyond their sovereign boundaries; the laws can only be honored and enforced when they are brought within a nation's judicial power. In *Lauritzen v. Larsen*⁷³ the Supreme Court ruled that maritime law "has the force of law, not from extraterritorial reach of national laws, not from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable

⁶⁹ BLACK'S, *supra* note 10 at 485. ("[a] statement of opinion or belief considered authoritative because of the dignity of the person making it").

⁷⁰ *California v Deep-sea Research*, 523 U.S. 491 (1998).

⁷¹ *Id.* at 496.

⁷² *RMS Titanic*, 9 F. Supp.2d at 626.

⁷³ *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

commercial relationship”.⁷⁴ It is in the best interest of global economic and international relations among countries to have salvage claims decided in a single forum.⁷⁵ An *in rem* action is the only method, aside from constructive *in rem* jurisdiction, that nations have to assure their sailors, and those who provide salvage services, that their actions and interests on high seas will be protected by a court of law.

INTERNATIONAL LAW: LAW OF FINDS AND SALVAGE LAW

As basic international law principle, no nation may take sovereignty of the open seas. Nevertheless, this statement has not always been factual. The freedom over the “seven seas”⁷⁶ has had an extensive development of centuries of maritime customs that derived from the most part from Roman law. R.P. Anand,⁷⁷ makes the observations that “[f]reedom of the Seas was a recognized rule in the Rhodian Maritime Code⁷⁸ and was unequivocally adopted in Roman law”.⁷⁹ Scholar Eke Boesten emphasizes that in the *Corpus Juris Civilis*⁸⁰ it was declared “that

⁷⁴ *Id.* at 581-82.

⁷⁵ *RMS Titanic*, 9 F. Supp.2d at 634.

⁷⁶ James C.F. Wang contradicts the existence of the “seven seas” and argues that today’s oceanographers refer only to three great oceans of the world based of their dimensions: the Atlantic, the Pacific and the Indian oceans. All other bodies of water are marginal enclosed or semi-enclosed seas connected to or tributaries of the three great oceans. James C. F. Wang, HANDBOOK ON OCEAN POLITICS AND LAW 14 (Greenwood Press 1992).

⁷⁷ R.P. Anand, *Changing Concepts of Freedoms of the Seas: A Historical Perspective* FREEDOM FOR THE SEAS IN THE 21ST CENTURY 72 (J.M. Van Dyke, D. Zaelke and G. Hewison eds., Island Press 1993).

⁷⁸ Justice Strong expressed that “[t]he Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodian only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations”. The *Scotia*, 81 U.S. 170, 188 (December Term 1871). More recently, the Ninth Circuit described that the rights acquired under the law of the sea goes back to “the ancient Rhodian, whose maritime accomplishments began to reach their height in the late fourth century B.C., and who are thought by some to be the earliest culture to have devised a system of maritime law The manuscript known as ‘The Rhodian Sea-Law,’ which in its extant form has been dated to about 600-800 A.D. includes provisions awarding “the fifth part of what he saves” to one who saves a ship or its cargo, and awarding to the finder of sunken gold or silver one half, one third, or one tenth of its value, depending on the depth from which it was brought up. *Bartholomew v. Crowley Marine Services, Inc.*, 337 F.3d 1083 1084-85 (9th Cir. 2003).

⁷⁹ Anand, *supra* note 77 at 73.

⁸⁰ See Peter Stein, ROMAN LAW IN EUROPE HISTORY 32 (Cambridge Univ. Press 1999). It is the product of a man ambition to “renew the ancient glory to the Roman empire in all its aspects”. *Id.* It became law on December 31, 529 A.D. It was a compilation of civil law; arranged by titles in chronological order and resolving many controversies no settled since the classical jurists. See also George Mousourakis, THE HISTORICAL AND

the Sea is common property to all, *res communis omnium*, according to the law of nations”.⁸¹ Referring to the work of G.J Mangone,⁸² Boesten explains that since in the term *res communes*⁸³ there was no clear distinction between the concepts of *res nullius* or *res publicae* during Roman times, “[f]ree use of the Sea was not to be explained as ‘accessible to everyone’ but had to be read as, ‘free use of the Sea by all subjects of the Roman Empire’ ”.⁸⁴ The definition of the high seas has been subjected to a constant transformation due to the changes in world politics and economic necessities of states. Its size has grown and stricken depending of the desires and needs of coastal nations and their imposition of their jurisdiction over the part of the ocean that limits their borders.⁸⁵

The high sea has not always been open and free for everyone to use. This concept has been a changing doctrine throughout the decades. The principle was first proposed in the second

INSTITUTIONAL CONTEXT OF THE ROMAN LAW 381 (Ashgate Publishing 2003). *See also* Galarza Soto v. ELA, 109 D.P.R. 179, 187 (P. Rico 1979) (the court actually cites the *Corpus Juris Civilis* and applies it as a source of law during its analysis); Lugo Estrada v. Tribunal Superior, 101 D.P.R. 231,232-33 (P. Rico 1973) (here the court rules under the *Corpus Juris Civilis* and concludes that an heir has the right [under the corpus] to request at anytime the partition of the inheritance); U.T.I.E.R. v. J.R.T, 99 D.P.R. 512, 538 note 6, (P. Rico 1970) (the court looks back at the main principles of the civil law and emphasis that the *Corpus Juris Civilis* lays forwards the values of the law; “the rule of the law are: live honestly, do not cause harm to others and give to each person what is theirs”). *See also* Timothy G. Kearley, *Justice Fred Blume and The Translation of Justinian’s Code*, 99 LAW LIBR. J. 525, (2007) (discussing the activeness of the Roman law around the world); John R. Kroger, *The Philosophical Foundations of Roman Law: Aristotle, The Stoics, and Roman Theories of Natural Law*, WIS. L. REV. 905, (2004) (discussing the importance of the Roman law in numerous legal systems throughout the world; emphasizing that everything that is known about classical Roman law is because of the *Corpus Juris Civilis*).

⁸¹ Eke Boesten, *ARCHAEOLOGICAL AND/OR HISTORIC VALUABLE SHIPWRECKS IN INTERNATIONAL WATERS: PUBLIC INTERNATIONAL LAW AND WHAT IT OFFERS* 16 note 27 (T.M.C. Asser Press 2002).

⁸² *Id.*

⁸³ BALLENTINE’S, *supra* nota 5 at 1100. *Res comunes* is defined as [t]hings which are common to property.” BLACK’S, *supra* note 10 at 133. Here is defined as [t]hings common to all; things that cannot be owned or appropriated, such as light, air and the sea”.

⁸⁴ Boesten, *supra* note 81.

⁸⁵ The States are free from establishing their extraterritorial jurisdiction up to 12 miles nautical miles. *See* United Nations Convention on the Law of the Sea II § 2 art. 3, Dec. 10, 1982, S. Treaty Doc. No. 103-39, 1833 U.N.T.S. 397. (“Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles”). Nevertheless, the limit imposed is to the maximum of nautical miles but it is silence to what is the minimum. Hence, it is up to the states to dictate until where their jurisdiction will apply. In the case of the Unites States, the federal the states of the union enjoy a presumption of jurisdiction within three miles of their coasts. *See* Alaska v. U.S., 545 U.S. 75, 78-79 125 S.Ct. 2137 (2005). *See* MARTINUS NIJHOFF, *STABILITY AND CHANGE IN THE LAW OF THE SEA: THE ROLE OF THE LOS CONVENTION* (Alex G. Oude Elferink ed., Martinus Nijhoff Publishers 2005).

century A.D by a Roman jurist, named Marcianus.⁸⁶ In the *Digest of Justinian*, Marcianus “stated that all men had the right to use the sea for commercial and navigation purpose”.⁸⁷ Even though there was no exclusive ownership; the Roman Empire⁸⁸ controlled partially parts of the oceans. With the fall of the Empire, Rome lost all its control over the seas and, during the early period of regional trade of medieval times, they were seen as *res communes*, and free from possibility of occupation or claims of exclusive sovereignty.⁸⁹ Nonetheless, with the European intercontinental expansion to protect their trade routes and the new acquisition in the Americas, nations⁹⁰ moved in and claimed authority over parts of it. For a relative period of 300 years, between the XIII and XVI century, broad portions of the high seas were under the particular control of any state competent of exercising its jurisdiction. This gave birth to the principle *res nullius*, making the seas subject to appropriation by anyone able to impose restrictions of use and capable enough to implement and protect its maritime perimeter.⁹¹

To shield their economic interest, Spain and Portugal, under the Treaty of Tordesillas⁹² in 1494, implemented proprietary concepts over the high seas⁹³ and claimed jurisdiction over

⁸⁶ Wang, *supra* note 70 at 75.

⁸⁷ *Id.*

⁸⁸ See Peter Heather, *THE FALL OF THE ROMAN EMPIRE: A NEW HISTORY OF ROME AND THE BARBARIANS* (Oxford University Press 2007); Stephen Mitchell, *A HISTORY OF THE LATER ROMAN EMPIRE, AD 284-641: THE TRANSFORMATION OF THE ANCIENT WORLD* (Blackwell Publishing Limited 2006); and David Vagi, *COINAGE AND HISTORY OF THE ROMAN EMPIRE* vol. 1 (Fitzroy Dearborn Publishers 2001).

⁸⁹ Boesten, *supra* note 81 at 16.

⁹⁰ Wang, *supra* note 70 at 75. During the Middle Ages, Venice exercised dominion over the Adriatic Sea, Sweden claimed the Baltic, Denmark-Norway considered all northern seas their jurisdiction, and England laid claim over a large part of the Atlantic and the North Sea.

⁹¹ *Id.*

⁹² The Treaty was issued by Pope Alexander VI on May 4, 1493 and re-negotiated by the parties on June 1494. It established an imaginary line running north and south through the mid-Atlantic indicating what unclaimed territories Spain and Portugal could claim possession. In *International Organization of Masters, Mates & Pilots v. Brown*, 698 F.2d 536 547 note 20 (D.C. Cir 1983), the courts made a reference to the treaty and commented that “[a]fter Columbus' first voyage to the “New World” in 1492, the Portuguese charged that the Spaniards had encroached on an area in the Atlantic reserved for them by a previous treaty. The Castilian monarchs responded by seeking help from Pope Alexander VI, also a Spaniard. The pontiff issued a series of bulls in 1493 that established a line of demarcation between the two realms of exploration. In 1494, in the Treaty of Tordesillas, the Spanish and Portuguese accepted the principle of the papal division but moved the line farther west”.

⁹³ Boesten, *supra* note 81 at 16.

specific areas of the ocean. This approach created a “trade route war” among the rest of the states, especially with the closure of Seville and Lisbon’s ports as a result of Portugal annexation to Spain in 1585.⁹⁴ Nonetheless, about 1580, Spain made a formal complain to England in regards to the constant exploits of Sir Francis Drake⁹⁵ on the Pacific. Queen Elizabeth I answered the accusation and indirectly established the legal principle that the seas were for common use and no one should have title of it.⁹⁶ In 1609, Dutch jurist Hugo De Groot “Grotius”, transformed this idea in jurisdictional terms and wrote in his treatise *De Mare Liberum* that “no one could claim sovereignty over the seas, which were to immense for anyone to effectively occupy”.⁹⁷ His proposed thesis was based on the principle that the sea “cannot be occupied, or which never had been, cannot be the property of anyone, because all property has arisen from occupation”.⁹⁸ For many years, countries refused to accept the notion of liberated seas but eventually, as the trade between England and the United States became more “ocean consuming,” the concept was accepted to the extent that became a traditional custom of international maritime law.⁹⁹

In the United States, the perception of freedom to navigate the high seas was made into law in 1825, when the Supreme Court, in *The Marianna Flora*,¹⁰⁰ ruled that the ocean is the “common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of

⁹⁴ *Id.*

⁹⁵ See *Cassagnol-Figueroa v. U.S.*, 755 F.Supp. 514, 521 (D. Puerto Rico 1991) (here the court defined Sir Francis Drake as a “human symbol of England’s emerging sea power”. See also *Hartzell v. U. S.*, 72 F.2d 569 (8th Cir. 1934) (discussing the claim of Sir Francis Drake’s estate by his heir).

⁹⁶ Wang, *supra* note 70 at 75.

⁹⁷ *Id.*

⁹⁸ Boesten, *supra* note 81 at 16, n. 29.

⁹⁹ Wang, *supra* note 70 at 78. Wang adds to his conclusion that “[t]he doctrine that the high seas belong to no one and are to be used by all has been generally accepted as an important part of customary international law. The traditional high seas regime has been enforced since the mid-seventeen century by a mayor maritime operation of the vast expanse of the open and high seas. The doctrine in its traditional sense has enabled the maritime powers not only to expand their trade routes worldwide, but to acquire their overseas empires”. *Id.*

¹⁰⁰ *The Marianna Flora*, 24 U.S. 1, 1825 WL 3124 (U.S.Mass.), 6 L.Ed. 405, 11 Wheat. 1.

pursuing her own lawful business without interruption”.¹⁰¹ However, the court made it clear that the free will of the high seas does not mean that is lawlessness¹⁰² and subjected the condition to actions that does not violated the rights of others.¹⁰³ In 1958, UNCLOS I¹⁰⁴ defined high seas as “all parts of the sea that are not included in the territorial or in the internal waters of a state”.¹⁰⁵ Subsequently, the 1982 LOS Convention¹⁰⁶ revised the term and described it as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state”.¹⁰⁷ Nevertheless, regardless of the intent by the conventions to establish a universal ‘sea’ definition with accepted rules to deal with conflicting claims and contemporary issues, such as salvors and specific national interest, the subject continues to raise problems when a national court claims jurisdiction over international waters.

¹⁰¹ *Id.* at 20.

¹⁰² Wang, *supra* note 70 at 77.

¹⁰³ *The Marianna Flora*, *supra* note 100.

¹⁰⁴ The United Nations held Geneva its first Conference on the Law of the Sea in 1956. United Nations Convention on the Law of the Sea (UNCLOS I) is made up of four different treaties with dissimilar dates of entry into force: Convention on the High Seas in 1962, Convention on the Territorial Sea and Contiguous Zone and Convention on the Continental Shelf in 1964 and Convention on Fishing and Conservation of Living Resources of the High Seas in 1966. The Second United Nations Conference on the Law of the Sea (UNCLOS II) (held from March 17 until April 26, 1960) did not result in any international agreements. See Lawrence Juda, INTERNATIONAL LAW AND OCEAN USE MANAGEMENT (OCEAN MANAGEMENT AND POLICY SERIES) 138-160 (Routledge 1996).

¹⁰⁵ Wang, *supra* note 70 at 76.

¹⁰⁶ The Third United Nations Conference on the Law of the Sea (known as UNCLOS III or the LOS Convention of 1982), held from 1973 to 1982, address the issued many of the previous issues and came into force on November 14, 1994. See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. As October 26, 2007, 155 countries have ratified the LOS Convention of 1982. Among the first 25 countries to sign the Convention: Fiji on Dec. 1982; Jamaica, México and Zambia on March 1983; Sudan on 23 Jan. 1985; Senegal on 25 Oct. 1984; Cuba on 15 Aug. 1984; Gambia and Philippines on May 1984; Côte d’Ivoire on March 1984; Egypt and Belize on Aug. 1983; Bahamas on July 1983; Ghana on June 1983; Namibia on April 1983; Cameroon on Nov. 1985; United Republic of Tanzania and Guinea on Sep. 1985; Iraq and Mali on July 1985; Iceland on June 1985; Bahrain on May 1985; Tunisia and Togo on April 1985; Saint Lucia on March 1985. The last three States to endorse the Convention were Moldova on Feb. 2007; and Lesotho and Morocco on May 2007. See *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements* UNITED NATIONS, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA (2007), http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Oct. 28, 2007). The United States has not ratified the LOS Convention.

¹⁰⁷ Wang, *supra* note 70 at 76.

The Law of the Sea is made of international maritime customs, treaties¹⁰⁸ and the norms of the Law of Finds and Salvage Law. As a general rule, Salvage Law presumes that salvaged property has an owner and he or she has never abandoned it. The Law of finds, in the contrary, assumes that the property has been abandoned and the finder acquires a right of ownership to his finding. Maritime jurisprudence has come to the conclusion that the Salvage Law is favored over application of the Law of Finds.¹⁰⁹ In *Titanic II*, the court observed that “[t]he general maritime law of nations includes a law of finds and a law of salvage, and courts of admiralty apply one to the exclusion of the other, as appropriate, to resolve claims in property discovered and recovered in navigable waters by those other than the property's owners or those taking through them”.¹¹⁰ Under the Law of Finds, the court argued that, “a person, who discovers a shipwreck in navigable waters that has been long lost and abandoned and who reduces the property to actual or constructive possession, becomes the property's owner”.¹¹¹ On the opposite, Salvage Law is intended to “encourage persons to render prompt, voluntary, and effective service to ships at peril or in distress by assuring them compensation and reward for their salvage efforts”.¹¹² Nonetheless, when long-lost shipwrecks are the *rem* subject to adjudication, the Law of Finds is preferred and most often applied.¹¹³

¹⁰⁸ See, *supra* notes 98 and 100. See also *Mayagüezanos por la salud y el ambiente v. United States*, 38 F. Supp. 2d 168,175 (D.P.R.) (here the court observed that “UNCLOS III contains ‘customary international law’ that the United States is bound to observe, regardless of whether it ratifies UNCLOS III”; the “United States is bound to the purpose and principles of UNCLOS III”). and Ved P. Nanda and David K. Pansius, *Unratified Treaties*, 2 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS, LOID § 10:11 (2007).

¹⁰⁹ *Falgout Brothers v. S/V Pangaea*, 966 F.Supp. 1143 (1998).

¹¹⁰ *Titanic II*, 171 F. 3d at 961. See *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 459-60 (4th Cir. 1992).

¹¹¹ *Id.* See *Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir. 1987); *Hener v. United States*, 525 F.Supp. 350, 354-57 (S.D.N.Y.1981) (cited and quoted with approval in *Columbus-America Discovery*, 974 F.2d at 460).

¹¹² *Id.* at 962. See *The Akaba v. Burg et al. Boston Towboat Co.*, 54 F. 197 (4th Cir. 1893). (Here the court ruled that, in this specific case where “the rescuing vessel lost her regular return trip, and her cargo of vegetables and fruit perished from the delay”, an “award of \$30,000 salvage was not so excessive as to be disturbed on appeal”). *Id.* at 196.

¹¹³ *Id.*

As mention above, a claim under Law of Finds dispossesses the true owner of his or her property right over the *rea*, the courts disfavor its application and favor the Law of Salvage in its stead. They have concluded that it “better serves the needs of maritime commerce by encouraging the saving of property for the benefit of its owner rather than the secretive discovery of property in an effort to deprive the owner of title”.¹¹⁴ The court bases its preference over Law of Finds because Salvage Law policies have existed “as an important part of the general maritime law of nations as long as there has been navigation”.¹¹⁵ District judge Niemeyer quoted article XLV of the 3,000-year old Rhodian Code, in which it provides that “if a ship be surprised at sea with whirlwinds, or be shipwrecked, any person saving anything of the wreck, shall have one-fifth of what he saves.”¹¹⁶ This concept, as expressed by the court in *Margate Shipping Co. v. M/V JA Orgeron*,¹¹⁷ “has been an integral part of maritime commerce in the western world since it was civilized”.¹¹⁸ The right of property¹¹⁹ is an international recognized privilege¹²⁰ and the application of the Law of Finds will contravene the fundamental principle of such right. Nonetheless, it is argued that the acquisition of artifacts through salvage services does create an ownership over the things.

¹¹⁴ *Id.* at 961. See *Columbus-America Discovery*, 974 F.2d at 464 and *Hener*, 525 F.Supp. at 354. (the court in *Hener* expresses that “salvage law assumes that the property being salvaged is owned by another, and thus that it has not been abandoned”). *Id.*

¹¹⁵ *Id.* at 962.

¹¹⁶ *Id.*

¹¹⁷ *Margate Shipping Co. v. M/V JA Orgeron*, 143 F.3d 976 (1998).

¹¹⁸ *Id.* at 985.

¹¹⁹ This subject deserves a more profound study. The right of property, as central principle of capitalism, is a privilege that push forward the global economy and gives a sense of stability to individuals. Therefore, it is an issue that requires a more extensive research. The U.S Constitution, *infra* note 121, as well as many others around the world, including the Universal Declaration of Human Rights, *infra*, note 120, established the principle of ownership but it also expresses an exception to take away that right. The legal problems arouses when the privilege and the exception collapse together and the court are obliged to resolve under a sphere of public interest. See *The Akaba*, 54 F. at 200, (here the court stated that “[w]hen articles are lost at sea the title of the owner in them remains, even if they be found floating on the surface or cast upon the shore”).

¹²⁰ See Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71 (art. 17), U.N. GAOR, 3rd Sess. U.N. Doc. A/810 (10 Dec. 10, 1948). The Universal Declaration of Human Rights proclaims that “[e]veryone has the right to own property alone” and “[n]o one shall be arbitrarily deprived of his property”.

Pursuant to the U.S. Constitution, no one shall be “deprived of [...] property, without due process of law; nor shall private property be taken for public use, without just compensation”.¹²¹ With this perception of constitutional protection, Justice Davis, in *Peralta v. U.S.*,¹²² ruled that “[t]he right of property, as every other valuable right, depends in a great measure for its security on the stability of judicial decisions”.¹²³ Furthermore, more than one hundred years later, Justice Thomas averred that property rights were not instituted merely as a federal safeguard to its citizens and concluded that ownership rights “are not created by the Constitution, but rather by existing rules or understandings that stem from an independent source such as state law”.¹²⁴ Under the constitutional power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”,¹²⁵ Congress restricted the sovereign immunity and enacted the Foreign Sovereign Immunities Act 1976 (FSIA)¹²⁶ with the purpose of prohibiting immunity to foreign states that violate the right of property under international law.¹²⁷ Consequently, even though the Salvage Law precedes the Law of Finds, both concepts must be weighted with the individual facts of each case and a disparity must be found between them so the right of ownership of the finder or salvor is not affected by the right of property of the original proprietor.

¹²¹ U.S. CONST. amend. V.

¹²² *Peralta v. U.S.*, 70 U.S. 434 (1865), 18 L.Ed. 221, 3 Wall. 434.

¹²³ *Id.* at 439.

¹²⁴ *Delaware v. New York*, 507 U.S. 490, 502, (1993).

¹²⁵ U.S. CONST. art. I, § 8, cl. 10.

¹²⁶ Foreign Sovereign Immunities Act 1976, 28 U.S.C. § 1605(a)(3) (2006). Under the *General exceptions to the jurisdictional immunity of a foreign state*, “(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—[...] (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States; [...]”.

¹²⁷ See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989). (the court analyzed FSIA and concluded that the simple implication of “immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions”).

In *Adams*, the court, citing with authority *Benedict Admiralty*,¹²⁸ expressed that:

[t]he common law of finds treats property that is abandoned as returned to the state of nature and thus equivalent to property, such as fish or ocean plants, with no prior owner [...]. Admiralty favors the law of salvage over the law of finds because salvage law's aims, assumptions, and rules are more consonant with the needs of maritime activity and because salvage law encourages less competitive and secretive forms of conduct than finds law [...].¹²⁹

The court raised the question to what an owner must do to release title and abandon property under the Law of Finds. The property is considered abandoned if it was expressed and made public by the owner or if the items are recovered from ancient shipwrecks and no owner appears in court to claim them.¹³⁰ A party may demonstrate abandonment only by a palpable and unmistakable act indicating repudiation of ownership.¹³¹ In *Falgout Brothers*, the district court ruled that, under the Law of Finds, “[a]bandonment must be proven by clear and convincing evidence, such as the owner's express declaration abandoning title”.¹³² To comply with the protection of the right of property, the act of abandonment by the owner must be without any ambiguity. It does not have to be formal or subscribed by a legal document but it must be clear and noticeable enough to revoke a right of ownership.

Jurisprudence has favored the presumption that when property is lost at sea, the title of such *res* remains with the original owner, regardless of the time passed.¹³³ Hence, Salvage Law, under this assumption and contrary to the law of Finds, aims to restore lost property to the

¹²⁸ *Benedict Admiralty* § 158 at 11-16.

¹²⁹ *Adams*, 220 F.3d at 671.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Falgout*, 966 F. Supp. at 1145.

¹³³ *R.M.S. Titanic v. Wreck and Abandoned Vessel*, 286 F.3d 194, 203 (4th Cir. 2002). (537 U.S. 885 (2002) writ of certiorari denied) (here the courts analyze the balance between the right to property of a salvor over the artifacts saved. Circuit Judge Niemeyer concludes that “[b]y saving property at sea, salvors do not become the property's owner; rather, they save it for the owners and become entitled to a reward from the owner or from his property”. *Id.* at 202. He stated that “[u]nder salvage law, salvor receives lien in property, not title to property, and as long as case remains salvage case, lien holder cannot assert right to title even though he may end up with title following execution or foreclosure of lien”). *Id.* 204-05. Moreover, he distinguished it from Law of Finds and expressed that “[u]nder finds law, title to abandoned property vests in person who reduces that property to his or her possession; before such conversion is made, however, prerequisites for divesting title must be satisfied. *Id.* at 205.

rightful owner.¹³⁴ Both of these doctrines focus on promoting the search and discovery of lost property at sea; in a case under Salvage Law for the owner of the vessel, and under the Law of Finds for the finder's own interest.¹³⁵ However, some admiralty courts have declined to apply the theory that property can never be lost and have use instead the principle of "finder's keepers." This doctrine grants ownership to the person who makes the discovery and takes possession of long lost or abandoned objects.¹³⁶ This is the case of ancient shipwrecks, under the doctrine of *animus revertendi*,¹³⁷ where the owner is no where to be found or, in the case of earlier period empires or historic nations, has no desire or cannot legally present a claim of proprietorship.¹³⁸ Nevertheless, it has been averred that this thinking may sponsor acts of piracy and indiscriminate search for sunken vessels all over the high seas.¹³⁹ Therefore, as a direct effect, it promotes an inevitable catastrophe on wreck sites and, indirectly, exacerbates the burden on any nation's interest on protecting their archeological underwater culture heritage.¹⁴⁰

SALVAGE SERVICES

¹³⁴ Belknap, *supra* note 52 at 80:¶8.

¹³⁵ *Id.* at 80:¶9.

¹³⁶ Anastasia, *supra* note 27 at 46.

¹³⁷ Rivera-García, *supra* note 14 at 363. ("[t]he intention to return something").

¹³⁸ Many accident countries and empires disappear and there is no government or minority group to claim property over the artifact found. Ancient shipwrecks from this historical civilization have no owner and therefore, are abandoned on the presumption of the law. Some of this societies are the Indus Valley (Indus Valley of Pakistan and India); Persian Empire (Asia as far as the Indus River, Greece, and North Africa including what is now Egypt and Libya); Minoan Culture (islands in the Aegean Sea); Etruscan Civilization (in the Etruria region of Italy); Caral-Supe Civilization (the Supe Valley of Perú); Olmec Civilization (Central American); Moche Civilization (the coast of what is now Perú); Hittite Empire (roughly what today is Turkey). See K. Kris Hirst, *Top 8 Top Unknown Ancient Empires*, ABOUT.COM: ARCHEOLOGY, http://archaeology.about.com/od/ancientcivilizations/tp/unknown_civ.htm. (last visited Oct. 25, 2007).

¹³⁹ Anastasia, *supra* note 27 at 46.

¹⁴⁰ Archeological underwater culture heritage is a subject that deserves a more extensive study; it is mention for the sole purpose of the main analysis. The controversy raises the question of the necessity of salvors and their services as the main source of archeological discoveries. There are many perspectives and points of view among many scholars and the debate encounters many issues along the border line of economic sources and cultural preservation. See Laurajane Smith, *ARCHAEOLOGICAL THEORY AND THE POLITICS OF CULTURE HERITAGE* (Routledge 2004); *SUBMERGED CULTURAL RESOURCE MANAGEMENT: PRESERVING AND INTERPRETING OUR SUNKEN MARITIME HERITAGE* (James D. Spirek and Della A. Scott-Ireton eds., Springer 2003); among others.

The landmark case, *The Blackwall*,¹⁴¹ defined salvage as “the compensation allowed to persons by whose assistance a ship or her cargo has been saved, in whole or in part, from impending peril on the sea, or in recovering such property from actual loss, as in cases of shipwreck, derelict, or recapture”.¹⁴² Salvage service is defined as the “aid or rescue given, either voluntary or by contract, to a vessel in need of assistance because of present or apprehended danger”.¹⁴³ It is distinguishable from towing services¹⁴⁴ in the matter that salving procedures are done under dangerous circumstances. The right to salvage is an ancient rule of maritime law and is not based on contractual rights.¹⁴⁵ Consequently, any awards for such services are based on the necessarily cost incurred to conduct the salvage operation;¹⁴⁶ they are, as a general rule, judged and established by the court. Moreover, the reader must keep in mind that the award is not a simply payment for the service on *quantum meruit*¹⁴⁷ or as compensation *pro opera et labore*,¹⁴⁸

¹⁴¹ *The Blackwall*, 77 U.S. 1, (1869) 10 Wall. 1.

¹⁴² *Id.* at 12. See *The Sanibe*, 101 U.S. 384 (1879) (here the definition set by *The Blackwall*'s decision is reaffirmed again by Justice Clifford.)

¹⁴³ BLACK'S, *supra* note 10, at 1367.

¹⁴⁴ *Id.* As general principle, towing is not considered a dangerous activity. (“[a]lthough salvage may involve towing, it is distinguished from *towing service*, which is rendered merely to expedite a voyage, not to respond to dangerous circumstances”).

¹⁴⁵ *Id.* (citing 2 E.W. Chance, PRINCIPLES OF MERCANTILE LAW, 98 (10th ed. 1951)).

¹⁴⁶ *Id.*

¹⁴⁷ BLACK'S, *supra* note 10 at 1276. [t]he reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship”. See Rivera-García, *supra* note 14 at 395.

¹⁴⁸ There is no definitive definition for the phrase *pro opera et labore*. However, from the use in the following cases, it can be infer that the concept means just compensation for the work rendered, without any extra reward or reimbursement. See *The Massasoit*, 16 F.Cas. 1070, 1072 (D.C.Mass. 1844). (“[a]nd the conclusion finally arrived at is, that they are not to be rewarded as general salvors, but are to be allowed, in addition to wages, a reasonable compensation, *pro opera et labore*”); *The Dawn*, 7 F.Cas. 204, 212 (D.C.Me. 1841.) (“[b]ut they are to be allowed a reasonable compensation *pro opera et labore*”); *The Henry Ewbank*, 11 F.Cas. 1166, 1170 (C.C.Mass. 1833.) (“[s]alvage, it is true, is not a question of compensation *pro opera et labore*. It rises to a higher dignity. It takes its source in a deeper policy. It combines with private merit and individual sacrifices larger considerations of the public good, of commercial liberality, and of international justice. It offers, a premium, by way of honorary award, for prompt and ready assistance to human sufferings; for a bold and fearless intrepidity; and for that affecting chivalry, which forgets itself in an anxiety to save property, as well as life”); *The Two Catherines*, 24 F.Cas. 424,431 (C.C.R.I. 1821) (“[t]he sole ground, upon which they are denied salvage in common cases, is that they are earning wages within the line of their ordinary duty; and when this is removed, they stand upon the same right as other persons, to be paid a compensation *pro opera et labore*”). *R.M.S. Titanic*, 286 F.3d at 203. (“[s]alvage, it is true, is not a question of compensation *pro opera et labore*”). See *Paul v. Niemeyer*, Applying Jus Gentium to the Salvage

but “as a reward to persons participating and the owners of salving property, voluntarily rendering their services and to encourage others to similarly undertake the saving of life and property”.¹⁴⁹ Salvage is the voluntarily rescue of imperil property, on or under water, with the solely intention of receiving a reward based on the situation and the extreme conditions that induced the vessel to be salved in the first place.

In order to be entitled to a salvage claim, salvors must be successful in their service.¹⁵⁰ No compensation will be allowed if the property is not saved or if it eventually perishes.¹⁵¹ In the occurrence that more than one salvor partake and materially contributed in the salvage operation, Justice Clifford voiced the opinion of the court and indicated that such salvor should be “entitled to share in the reward which the law allows for such meritorious service, and in proportion to the nature, duration, risk, and value of the service rendered”.¹⁵² In *Falgout Brothers*¹⁵³ the court underlined the rule that for a salvor to be eligible for a salvage award, he must provide evidence that the vessel was actually in maritime peril¹⁵⁴ and for which it could not have rescued but for his assistance. This principle was instituted by the Supreme Court in *The Sanibe*,¹⁵⁵ with the implementation of three elements for a valid claim: (1) a marine peril; (2) service voluntarily rendered when not required as an existing duty or from a special contract; and (3) success in whole or in part, or that the service rendered contributed to such success.¹⁵⁶

of the R.M.S. Titanic in International Waters-The Nichols J. Healy Lecture, 36 J. MAR. L. & COM. 431, 441 (2005) (quoting from *The Henry Ewbank, Id.*).

¹⁴⁹ *The Sanibe*, 101 U.S. 384 (1879); See *The Blackwall*, 77 U.S. at 10.

¹⁵⁰ *Titanic II*, 171 F. 3d at 963.

¹⁵¹ *The Blackwall*, 77 U.S. at 12.

¹⁵² *Id.*

¹⁵³ *Falgout*, 966 F. Supp. at 1147, n. 2.

¹⁵⁴ See *Lancaster v. Smith*, 330 F. Supp. 65, 67 (S.D.Ala.1971). (here the court explained that “[the peril to which a vessel is subjected need not be one of imminent danger of destruction or damage. Rather, it is sufficient that a vessel be subject to potential danger of damage or destruction to make her subject to salvage services”).

¹⁵⁵ *Supra* note 148.

¹⁵⁶ *The Sanibe*, 101 U.S. at 384.

The court articulated in *Titanic II* that when salvage services are provided, “the salvor acts on behalf on the owner in saving the owner's property even though the owner may have made no such request or had no knowledge of the need”.¹⁵⁷ It is presumed that an owner of a vessel desires salvage services.¹⁵⁸ It is this assumption, together with the guarantee of compensation under the law, which encourages salvors to render their service to protect the rights of others. This assurance is what provides the “inducement to seamen and others to embark in such undertakings to save life and property”.¹⁵⁹ It is public policy, as explained in *Blackwall*, to persuade “the hardy and adventurous mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation”.¹⁶⁰ Since 1804, through the voice of Justice Marchall in *Mason v. Ship Blaireau*,¹⁶¹ under *stare decisis*¹⁶² doctrine, the court has ruled that in rewarding services rendered at sea they must find them “in a liberal and enlarged policy”.¹⁶³ The court has empathized that a very ample compensation is intended as an encouragement “which it is for the public interests, and for the general interests of humanity, to hold forth to those who navigate the ocean”.¹⁶⁴ Furthermore, it expressed, with a spirit of promoting and as an inducement to the savors, that:

[i]t is perhaps difficult, on any other principle, to account satisfactorily for the very great difference which is made between the retribution allowed for services at sea and on land: neither will a fair calculation of the real hazard or labor, be a foundation for such a difference; nor will the benefit received always account for it.¹⁶⁵

¹⁵⁷ *Titanic II*, 171 F. 3d at 963.

¹⁵⁸ *Id.*

¹⁵⁹ *The Blackwall*, 77 U.S. at 14.

¹⁶⁰ *Id.* at 10.

¹⁶¹ *Mason v. Ship Blaireau*, 6 U.S. 240 (1804), 2 Cranch 240, 2 L.Ed. 266.

¹⁶² BLACK'S, *supra* note 10 at 1443. It is “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation”.

¹⁶³ *Mason*, 6 U.S. at 266.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

The reward should be, not a merely calculation for it to meet the specific amount of the expenses, but a remuneration that resembles the necessity, dangerous, dedication, and significance of the service given to sailors and to the nation's interest of having their sea men protected and rescued on the high seas.

Justice Marshall argued that a general rate for a salvage award has not been adopted and that such decision is left upon solely discretion of the court analyzing the circumstances of each particular case; such discretion is based on the totality of the undisputed facts. The court, in *Mason*, quoted the opinion of Sir Wm. Scott in respect to the principles that need to be use when calculating the reward:

[i] do not think that the exact service performed is the only proper test for the quantum of reward in these cases. The general interest and security of navigation is a point to which the court will also look in fixing the reward. It is for the general interest of commerce that a considerable reward should be held up; and as ships are made to pay largely for lighthouses, even where no immediate use is derived from them, from the general convenience that there should be permanent buildings of that sort provided for all occasions, although this or that ship may derive no benefit from them on this or that particular occasion; so on the same principle it is expedient for the security of navigation, that persons of this description, ready on the water, and fearless of danger, should be encouraged to go out for the assistance of vessels in distress; and therefore when they are to be paid at all, they should be paid liberally. It is on these general considerations, and not merely to mete out the payment for the exact service performed in the particular instance, that the rewards should be apportioned in these cases and it is in this view that I shall always consider them.¹⁶⁶

However, it was not until 1869, when, in *Blackwall*, the court established¹⁶⁷ the circumstances an admiralty proceeding must consider in determining the amount of the award for a salvage service. These are:

- (1) the labor expended by the salvors in rendering the salvage service;
- (2) the promptitude, skill, and energy displayed in rendering the service and saving the property;
- (3) the value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed;
- (4) the risk incurred by the salvors in securing the property from the impending peril;
- (5) the value of the property saved; and
- (6) the degree of danger from which the property was rescued.¹⁶⁸

¹⁶⁶ *Id.* at 254. Here the court cited Sir Wm. Scott's opinion from *Sarah*, 1 Rob. 263. However, the citation appears to be incorrect. The subsequent research to find the correct one has been fruitless.

¹⁶⁷ See also *Falgout Brothers*, 966 F. Supp. 1143 (1998) (here the court discusses the factors to be considerer in awarding salvage services and reaffirms the requirements establish in the previous jurisprudence).

¹⁶⁸ *The Blackwall*, 77 U.S. at 13-14.

Salvages without the proper reward will cause catastrophic results to ships and sailors. Vessels will be left at will, especially when salvaging a wreck is extremely dangerous and expensive. Moreover, remarkable ships and their cargo will be lost in the pages of history claimed by the ocean. Discouraging it will take away from society the confidence that salvors provide to the security of sailors and deprived humanity the opportunity to get back some the national property lost at sea.

Salvage Law is there to encourage rescue; nonetheless, the Fifth Circuit, in *Platoro Ltd. v. The Unidentified Remains of a Vessel*,¹⁶⁹ has noted that “[a] salvage award may be denied if the salvor forces its services on a vessel despite rejection of them by a person with authority over the vessel”.¹⁷⁰ It also imposes duties of good faith, honesty and diligence to salvors while the property is under their care.¹⁷¹ Salvors have to exercise “a trust over the property for the benefit of the owner and subject to any orders of a court”.¹⁷² Furthermore, they are not allowed to remove property from a wreck for their own use; when this expectation is breached, any salvage claim forfeits.¹⁷³ However, the need for salvors and their most need service has made International Law part of their existence, to the point that forums all over the world have developed judicial procedures to hear salvors’ claims when their clients refused to compensate them. In 1879, the Supreme Court emphasized the doctrine that once a salvor has rendered his services, he can lien upon the property saved to begin an *in rem* action against the vessel. This is

¹⁶⁹ *Platoro Ltd. v. The Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Cir. 1983).

¹⁷⁰ *Id.* at 902.

¹⁷¹ *See Cromwell v. The Bark Island City*, 66 U.S. 121 (1861), (1 Black) 121, 17 L.Ed. 70).

¹⁷² *Titanic II*, 171 F. 3d at 964; *See Cromwell, supra* note 160.

¹⁷³ *Id.* As an example *see The Mabel v. Lewis*, 61 F.2d 537 (9th Cir. 1932). (here the court of appeals ruled that “[p]ersons who stripped vessel and chopped it to pieces held liable to owner”).

the remedy pursued since the lien is under maritime law and affords the best method of securing the payment for a salvage claim.¹⁷⁴

Among the rights a salvor acquires during the rendering of his service, is the power to exclude others from taking part in the salvaging operation. He can also retain the property until the lien on it has been satisfied monetarily or extinguished by other means. However, the court in *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*,¹⁷⁵ averred that, although salvage law grants the salvor a right to possession of the property while awaiting payment for his services, “the salvage of a vessel or goods at sea, even when the goods have been abandoned, does not divest the original owner of title or grant ownership rights to the salvor, except in extraordinary cases”.¹⁷⁶ The court went further and stated that only in circumstances where the property has been lost or abandoned for a very long period of time, the salvor can take ownership over them. It supported its decision on the analysis that, when “unusual circumstances” occur, the Law of Finds applies. Nevertheless, here, contrary to the rulings, the court failed to apply more than 150 years of Salvage Law, precedents and traditions. If the property has been abandoned before the salvor got to the vessel, Salvage Law does not apply; therefore, the finder gets what he found. The court in *Adams* set forward the requirements for a *rea* to be considered abandoned. In *Falgout Brothers*, it was added that the abandonment must be clear with convincing evidence of such desire. If norms set by in these two cases were fulfilled before the salvage took place, then the doctrine of *animus revertendi* applies and the Law of Finds control. There is no need to determine how long the vessel has been abandon; once the owner gave up his right of proprietorship, Salvage Law lost its purpose and international law mandates for the supplementary Law of Finds to apply.

¹⁷⁴ *The Sanibe*, 101 U.S. at 386.

¹⁷⁵ *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560 (5th Cir. 1981).

¹⁷⁶ *Id.* at 567.

TITANIC: U.S. JURISDICTION

The Titanic sank after striking an iceberg on the night of April 14, 1912. The search for it came to an end in 1985 with one of the greatest discoveries of the 20th century. It revolutionized salvage history, not because the “unsinkable” vessel was found but because man achieved what it was seen to be impossible:¹⁷⁷ to salvage a ship at one of the deepest places of the ocean.¹⁷⁸ With the concept that no nation can impose their authority over international waters, one must look at the legal bases that gave a U.S. court jurisdiction over the wreck of the Titanic, the cargo, its artifacts, resting place and everything related to the vessel itself. The first action was brought by Marex Titanic in 1992,¹⁷⁹ when he asked for possessory and ownership claims, salvage claims and injunction relief. The court retained *in rem* jurisdiction when a piece of metal and a prescription bottle taken from the vessel was brought within its jurisdiction.¹⁸⁰ It issued a warrant of arrest for the Titanic and ordered “the U.S. Marshall to receive and take into his possession and control any salvaged items from the *Titanic* until the Court made a further determination of ownership”.¹⁸¹ Subsequently, Titanic Ventures intervened seeking for the court to vacate the arrest and to decide which one of them should have salvage rights over the shipwreck. As result, the court vacated its previous warrant, declared Titanic Ventures as the first and exclusive salvors of the Titanic and entered a permanent injunction against Marex.¹⁸² Conversely, this decision was reversed by the appellate court in *Marex Titanic and Titanic Ventures v. The Wreck*

¹⁷⁷ See *Titanic II*, *supra* note 46. Here the Court talks about the process for its finding and the participants. See also Marian Leigh Miller, *Underwater Cultural Heritage: Is the Titanic Still in Peril as Courts Battle over the Future of the Historical Vessel?*, 20 EMORY INT’L L. REV. 345, (2006).

¹⁷⁸ The Titanic lies 450 miles south-east of Halifax, 12,500 feet at the bottom of the in North Atlantic Ocean. See, *Id.*

¹⁷⁹ *Marex Titanic, Inc. and Titanic Ventures v. The Wrecked and Abandoned Vessel, RMS Titanic*, 805 F. Supp. 375 (E.D.Va., 1992).

¹⁸⁰ *Marex Titanic, Inc. and Titanic Ventures v. The Wreck and Abandoned Vessel*, 2 F.3d 544 (4th Cir. 1993).

¹⁸¹ *Marex Titanic, Inc.*, 805 F. Supp. at 376.

¹⁸² *Id.* at 378.

and Abandoned Vessel,¹⁸³ because the district erred allowing Titanic Ventures to intervene in the action.¹⁸⁴

Nonetheless, in subsequent proceedings, the court ruled that Titanic Ventures was the only one responsible for the retrieving of the first artifacts.¹⁸⁵ As a result, under Salvage Law, it retained ownership of the vessel while the salvage operations continue and has proprietorship of all the items found under the Law of Finds. In 1993, they sold their salvage interest and a total of 1,800 artifacts to R.M.S. Titanic, Inc. (RMST). However, shortly after the acquisition, RMST re-filed for exclusive salvage rights¹⁸⁶ and requested the court to exercise *in rem* jurisdiction. In support of the claim, they presented the court with a wine decanter from the Titanic and indicated that many others artifacts were physically with the jurisdiction of the court.¹⁸⁷ Nevertheless, since no one else had outstanding claims against the vessel, and RMST was proved to continue with salvages operations, the court granted status of salvor-in-possession as a successor in interest. Subsequently, RMST was forced to vindicate their salvage rights. A request for a preliminary injunction was filed to prevent others from intervening with their salvage activities.

During this proceeding, and by implementing “constructive *in rem* jurisdiction,” the court awarded salvage rights, as well as ownership of all artifacts recovered or soon to be from the Titanic to RMST. In its reasoning, the court “assumed *in rem* jurisdiction over those portions of the R.M.S. TITANIC within the judicial district and constructive *in rem* jurisdiction over the

¹⁸³ *Marex Titanic, Inc.*, *supra* note 180.

¹⁸⁴ *Id.* at 547.

¹⁸⁵ It is argued that the two items presented by Marex, for which the court retained *in rem* jurisdiction, were smuggled from the items recovered by Titanic Ventures. *See Marex Titanic, Inc.* 2 F.3d at 545, n. 2.

¹⁸⁶ *See R.M.S Titanic, Inc. v. Wrecked and Abandoned Vessel*, 924 F. Supp. 2d 714 (E.D. Va., 1996); and *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel*, 920 F. Supp. 96, (E.D. Va., 1996). (hereafter Titanic I).

¹⁸⁷ *Titanic II*, 171 F. 3d at 952.

R.M.S. TITANIC wreck site”.¹⁸⁸ It applied *constructive* to “merely to protect RMST from interference in its ongoing salvage operations”.¹⁸⁹ Moreover, it is averred by the court that by maintains *in personam* jurisdiction over RMST it could issue an order to move all artifacts under its “judicial district if necessary to satisfy any competing ownership or salvage claim”.¹⁹⁰ Nonetheless, this is not essential, since in an *in rem* action, a physical arrest of the *res* places everyone with interest on notice of the proceedings.¹⁹¹ Jurisdictional rules dictates that a notice of the arrest of the *res* should be published in various newspapers to give notice to the world of the *in rem* action,¹⁹² and thus, by the court *dictum*, binding everyone with interest.

The court decision was appealed and, in *Titanic II*, the district court constructive *in rem* jurisdiction was affirmed. However, in its reasoning, Circuit Judge Niemeyer expressed that there is no theory of constructive *in rem* jurisdiction that “permits a court to adjudicate the rights of persons over which it lacks personal jurisdiction with respect to a vessel [in international waters] that has never been within the court's territory”.¹⁹³ He underlined that any analysis about the authority of a U.S. court over shipwrecks in international waters requires the inquiry of three fundamental principles of admiralty law: “(1) the nature and scope of admiralty jurisdiction, (2) the applicability of salvage law as part of the common law of maritime nations, i.e., the *jus*

¹⁸⁸ R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel, 9 F. Supp. 2d 624, 633 (1998).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 633-634. See *The Mary*, 13 U.S. 126, 144 (1815), (9 Cranch) 126, 144. (here the court explained that “[t]he whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision. The reason on which this *dictum* stands will determine its extent. Every person may make himself a party, and appeal from the sentence; but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him”).

¹⁹² See *Darlak v. Columbus-America Discovery Group*, 59 F.3d 20, 22 (4th Cir. 1995) (here the, quoting from *Thorsteinsson v. M/V Drangur*, 891 F.2d 1547, 1553 (11th Cir. 1990), asserts that if notice is provided in a newspaper of general circulation (*Darlak*, 59 F.3d at 23 n. 6) “[t]he whole world, it is said, are parties in an admiralty cause; and, therefore, the whole world is bound by the decision”. *Id.* at 22-23. Observing that the court in *Thorsteinsson* stated that “[n]o man is allowed to come in and say that the decree does not bind him and that he will have the matter retried: this is because all the world is party to a suit *in rem*”. *Id.* at 23. See also 2 Benedict on Admiralty § 231 (6th ed. 1965).

¹⁹³ *Titanic II*, 171 F. 3d at 952.

gentium, and (3) the reach of an admiralty court's *in rem* jurisdiction".¹⁹⁴ For a better understanding of to whether a U.S. court should be or not allow to exercise subject matter jurisdiction on *rems*, it is necessary, and one could argued, compulsory, to assess the three essential principles mention above.

The first one is uttered by the third article of the U.S. Constitutional; here jurisdiction is extended "to all cases of admiralty and maritime jurisdiction".¹⁹⁵ Nevertheless, this does not constitute a power to the judicial system to impose its authority beyond its ordinary power. Therefore, as the court has explained, the U.S. Constitution does not recognize an overarching maritime law but it "authorized the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction".¹⁹⁶ The court adds that when a U.S. court takes jurisdiction it is subject "to some reservations imposed by their own application of the doctrine of *forum non conveniens*".¹⁹⁷ This is because all laws are native, in theory, to the nation of origin and, consequently, they must expand the values that created them through the growing of doctrines that make any particular law contemporary and thus applicable.¹⁹⁸ The second principle answers to the condition that when Salvage Law is

¹⁹⁴ *Id.* at 959.

¹⁹⁵ U.S. CONT. art. 3§ 2.

¹⁹⁶ *Titanic II*, 171 F. 3d at 960.

¹⁹⁷ *Id.* at 962, (quoting from Grant Gilmore & Charles Black, Jr., *The Law of Admiralty* § 1-19, at 51-52 (2nd ed. 1975). The *non conveniens* doctrine states "that where the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, jurisdiction should be declined and the parties relegated to relief to be sought in another forum." BALLENTINE'S, *supra* note 5 at 493 (3rd ed. 1969); See BLACK'S, *supra* note 10 at 680. See also *Canada Malting Co. Steamship*, 285 U.S. 413, 416 n. 6 (1932); and John Bites, *Condition Forum Non Conveniens*, 67 U. CHI. L. REV. 489 (2000).

¹⁹⁸ See *The Lottawanna*, 88 U.S. 558, 21 Wall. 558, (1874) (the court stated that: "no nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local and municipal consequence and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them arising from the fact that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and

applied by the court it must be part of the *jus gentium* of the common law of maritime nations. This matter, previously explained in the paragraphs above, resembles the general understanding that the Law of the Seas is as old as navigations itself and hence, it must be compatible and stable for the civilized use of the high seas. Maritime Law is composed of the Law of Finds and Salvage Law and its applicability is based on its ability to solve claims arising from property discovered and recovered by someone other than the rightful owner. When a salvor renders his services, he acquires a lien on the property and a common law right of fair compensation. Any adjudication by a U.S. court must recognize a salvor's right of reimbursement under the applicable doctrine established by international law.

The third principle deals with the most important element of a U.S. court authority over seas. An action of *in rem* jurisdiction is what makes an admiralty ruling enforceable to all parties with interest. The absence of the *res* within the jurisdiction of the court will prohibit it from the adjudication of rights and effectively binding others¹⁹⁹ who may have actual possession of the *res*.²⁰⁰ Nonetheless, “[w]hile the *res* must be in *custodia legis*,”²⁰¹ for the court to exercise its authority “this possession may be actual or constructive”.²⁰² A traditional *in rem* proceeding will give the court “the power to order the seizure, the sale, or the transfer of the *res*”;²⁰³ however, under a constructive legal custody, the court will only be able to “issue orders respecting the *res*

thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law”). *Id.* at 573.

¹⁹⁹ See *Pennoyer v. Neff*, 95 U.S. 714, 5 Otto 714, (1877) (Justice Field, quoting from *Boswell's Lessee v. Otis*, 50 U.S. 336, 9 How. 336 (1850), distinguished two modes that jurisdiction has acquired. He expressed that “first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question”). *Id.* at 724.

²⁰⁰ *Titanic II*, 171 F. 3d at 964.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 967.

that are exclusive against the whole world”.²⁰⁴ This type of jurisdiction is seen as a sharing of sovereignty, among nations whose courts enforced the *jus gentium* of international maritime law,²⁰⁵ to overcome the imperfection of a complete *in rem* action that gives a particular court complete authority over the *res*.

The doctrine of *jus gentium* is what propounded the Fourth Circuit Court decision in the most recent Titanic case, *RMS Titanic Inc. v. The Wreck and Abandoned Vessel*.²⁰⁶ Among arguments, there was a controversy of ownership over the first 1,800 artifacts salvage by Titanic Ventura. The court, applying basic principles of international law, found that the district court²⁰⁷ lacked *in rem* jurisdiction over them. In this instance, RMST averred that the 1,800 artifacts were theirs under the Law of Finds and, on the contrary, ownership was given to them by an administrator for the Office of Maritime Affairs of France when the items arrived to that country. The district court refused to grant comity²⁰⁸ and rejected the award of title given by the French official. The court, an opinion once again by Niemeyer, argued that because the items were not in the Eastern District of Virginia or were part of the claim nor were voluntarily subjected to the authority of the court, there was no legal ground to render *in rem* jurisdiction over them. The artifacts were removed from the Titanic and taken to France six years earlier before the proceeding in 1993 and, consequently, not part of the *res* was within the district for the court to

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 967-68.

²⁰⁶ *RMS Titanic Inc. v. The Wreck and Abandoned Vessel*, 435 F.3d. 521 (4th Cir. 2006). (hereafter Titanic III)

²⁰⁷ *R.M.S. Titanic, Inc. v. Wrecked and Abandoned Vessel*, 323 F. Supp. 2d 724 (E.D. Va. 2004).

²⁰⁸ BLACK'S, *supra* note 10 at 284. “[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts”.(citing *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 143 (1895), BLACK'S, *quotes Justice Cray definition* of comity: “in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws”.

assert its authority.²⁰⁹ The court ratified its previous decisions of jurisdiction and clarified that “we did not purport to define a constructive *in rem* jurisdiction over personal property located within the sovereign limits of other nations”.²¹⁰ Contrary to the preceding cases, here the court emphasized the purpose of an *in rem* action and its consequences contained by international law. A lawful judgment by a foreign country under the principles of the Law of Seas must be recognized and enforced by the subsequent court that hears the claim. Not doing so, will have established an unmerited precedent of an incompatible standard in admiralty courts.

UNDERWATER CULTURAL HERITAGE

As we look at the issue of whether the established law balances the interests between underwater archeological preservation and the rights of those who undertake such operations for a salvage award, we first need to conclude that there cannot be equilibrium between them since they depend on each other to subsist. Over the years, judges have made it clear that without those that take the voluntarily risks and face the dangers of salvaging a vessel, there would not be an archeological site to preserve and study.²¹¹ Furthermore, without the archeological value of the artifacts salvaged, there would not be a reward incentive for the salvors. From this perspective, it will be hardly unfeasible to argue that there is balance between the interests of both groups. It is true that international, maritime law and customs conflict with domestic norms and regulations. Salvors as well as archeologists have to argue their legal claims in two completely distinct fronts. As it is expected, nations are more devoted to the local arena and are

²⁰⁹ *Titanic III*, 435 F.3d.at 529.

²¹⁰ *Id.* at 530.

²¹¹ See Christopher R. Bryant, *The Archaeological Duty of Care: The Legal, Professional, and Cultural, Struggle over Salvaging Historic Shipwrecks*, 65 ALBANY L. J. 97, 131 (2001). (he cites Pat Clyne, *Protection of Underwater Cultural Heritage: Role of the Commercial Salvor*, available at <http://www.imacdigest.com/protect.html> (last visited Oct. 29, 2007) and mention that Clyne argues “that any international convention on the preservation of our cultural heritage without the inclusion of the commercial private sector is doomed to suffer the loss of that which it intends to protect”).

reluctant to enforce international community perspectives. The expanding archeological belief²¹² that the resting ground of a sunken vessel must be treated as a cemetery, off limits to any one, makes the case for a stable relation between salvors and archeologists merely impossible.²¹³ There is an unbalance check of priorities among them and the law that protects their interest.²¹⁴

In the United States, Congress enacted the Abandoned Shipwreck Act of 1987 (ASA)²¹⁵ to eliminate the application of the Law of Finds and to apply the Law of Salvage to shipwrecks that are located in US territorial waters.²¹⁶ ASA requires states government to guarantee both recreational exploration and sector recovery in accordance with protecting the historical value of the wreck.²¹⁷ This is supposed to create a uniform system; however, since ASA also gives the states the management of the shipwreck within their own territorial waters, the incongruity allows states to enforce their regulations by imposing the need of licenses or permits.²¹⁸ Louisiana, for example, only authorizes scientific ventures and allows solely *quantum meruit*

²¹² Marian Leigh Miller, *Underwater Cultural Heritage: Is the Titanic Still in Peril as Courts Battle over the Future of the Historical Vessel?*, 20 EMORY INT'L L. REV. 345, 348 (2006). (“[t]he common view of archaeologists is that shipwrecks are valuable because they are a means to study past cultures and should be preserved from salvage operation and exploitation”).

²¹³ See also *Cobb Coin Co. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 560 n. 20 (S.D. Fla. 1982) (here the court describes shipwrecks as valuable for three conflicting purposes: (1) structure; (2) artifacts; and (3) data; and, as a consequence of its peril status, it is a time capsules that destroys itself when it is open).

²¹⁴ See Peter Prows, *Though Love: The Dramatic Birth and Looming of UNCLOS Property Law (and what is to be done about it)*, 42 TEX. INT'L L.J. 241, (2007) (the article encourages cooperatives actions among states for the protection, development and proliferation of international property law under the UNCLOS Treaty).

²¹⁵ Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106 (1987).

²¹⁶ *Id.*, at 2106(a). (“[t]he law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies”. Section 2105(a) states that “[t]he United States asserts title to any abandoned shipwreck that is--(1) embedded in submerged lands of a State; (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register”).

²¹⁷ *Id.*, at 2103(a). (under (b) the act requires states of the Union to “guarantee recreational exploration of shipwreck sites;” and “ (c) to “allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites”). See also *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 640 (4th Cir. 2000) (explaining the applicability of ASA and emphasizing that for a State of the Union to acquired jurisdiction “to a shipwreck it must be (1) abandoned and (2) on or embedded in the submerged lands of a state”).

²¹⁸ See Bryant, *supra* note 211 at 127, n. 183. (discussing the fact that “[s]ome states have responded to this requirement by creating a licensing system whereby salvors are able to perform salvage and recovery services under the purview of state control”).

compensation.²¹⁹ Ohio went beyond what is permitted by that Act, and prohibited salvors to conduct salvage operations.²²⁰ Ironically, ASA only generates more controversy to the subject, allowing for the United States to have endless ways to deal with the interests and rights of archeologists and salvors.²²¹ It's support of salvage services only by contract and the endless restrictions impose to salvor in other for them to embark on salvage expedition have caused many historic shipwrecks in state waters to remain undiscovered.²²² Previous to ASA, Congress had enacted the R.M.S. Titanic Maritime Memorial Act of 1986²²³ with the intent to encourage international agreement on the preservation of the wreck, including the prohibition to salvage it. The statute directed the President of the U.S. to enter in dialogue with Great Britain, France, Canada and other interested states to developed guidelines for the exploration of the vessel; nevertheless, no international agreement has been signed.

At the international level, the United Nations Convention on the Law of the Seas (LOS Convention or UNCLOS III) strikes to generate a balance; nonetheless, fails for its ambiguity. LOS Convention acknowledges the value of historical shipwrecks; however, it does not define archaeological and historical objects.²²⁴ It states that member nations have a duty to “protect

²¹⁹ Sabrina L. McLaughlin, *Roots, Relics and Recovery: What Went Wrong with the Abandoned Shipwreck Act of 1987*, 19 COLUM.-VLA J.L. & ARTS 149, 194-95. (1995). (discussing the issue that “[m]any states are unable to adopt the NPS [National Park Services] suggestions. State laws regularly fail to provide for expansive agency authority. Without express authority from the legislature, a shipwreck agency cannot implement the guidelines”). See also Christopher R. Bryant, *supra* note 211 at 127, n. 185.

²²⁰ *Id.*

²²¹ See Joseph C. Sweeney, *An Overview of Commercial Salvage Principles in the Context of Marine Archaeology*, 30 J. MAR. L. & COM. 185, 199-203 (1999) (“[t]he 30 coastal states have responded to the treasure salvage problem in various non-uniform and haphazard ways, despite the expectation that the states would willingly adopt the solutions proposed in the National Park Service’s Abandoned Shipwreck Guidelines”).

²²² Bryant, *supra* note 211 at 128.

²²³ R.M.S. Titanic Maritime Memorial Act, 16 U.S.C. §§ 450rr-1-450rr-6 (1986). See Mark A. Winder, *Application of Salvage Law and the Law of Finds to Sunken Shipwrecks Discoveries*, 67 DEF. COUNS. J. 94, 102 (2000). (discussing the impact of the Titanic Act of 1986).

²²⁴ Bryant, *supra* note 211 at 104. (arguing that “the ASA does not expressly make reference to human remains. Moreover, the word ‘resource,’ as it is commonly understood, is wholly inconsistent with traditional notions of cemeteries”). Similar to this statement is the fact that LOS Convection does not define archaeological and historical objects, nor expressly refer to human remains. *Id.*

objects of an archaeological and historical nature found at sea”;²²⁵ nevertheless, it affirms that no admiralty laws, including the Law of Salvage, are affected by this duty.²²⁶ The lack of stability makes the duties of LOS Convention weak and ambiguous and thus not applicable “when a salvor invokes the law of finds or the law of salvage with respect to a wreck laying in waters beyond the territorial reach of coastal nations”.²²⁷ All this causes the treaty to be subject to a bias interpretation depending of what is the State’s agenda is in enforcing it. Countries that desire to enforce the archaeology’s view of underwater tombs, have proposed the Convention on the Protection of the Underwater Cultural Heritage (UNESCO).²²⁸ The draft has as its main principle “to abolish the laws of finds and salvage with respect to historical shipwrecks and instead suggest that such wrecks should be managed exclusively through in situ preservation”.²²⁹ It is an extreme measure that will eliminate thousand of years of maritime and international customs, the LOS Convention and the ASA. An international treaty is established to pursue the general interest as a whole and UNESCO especially eliminates salvor’s rights while expanding the archaeological interest.

To better understand the reasons why a balance is not viable, it is necessary to look at the composition of cultural underwater heritage and the fact that without the service provided by

²²⁵ United Nations Convention on the Law of the Sea art. 303(1), Dec. 10, 1982, 1833 U.N.T.S. 397, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

²²⁶ *Id.* at 303(3).

²²⁷ Bryant, *supra* note 211 at 133. (explaining that “while UNCLOS III does create certain vague and ill-defined duties, they are without effect given that the laws of finds and salvage--which are expressly preserved--do not traditionally impose such duties”). *Id.*

²²⁸ UNESCO Universal Declaration on Cultural Diversity, 2 Nov. 2001, available at <http://unesdoc.unesco.org/images/0012/001233/123388e.pdf>.

²²⁹ *Id.* at 135. (arguing that “[the UNESCO Draft would remove the applicability of the laws of finds and salvage to historic shipwrecks with one prohibitively narrow exception”). *Id.* at 136. Moreover, the Bryant states that “[t]he UNESCO Draft allows for only state-authorized salvaging of shipwrecks”. *Id.* at 137. See Draft Convention on the Protection of the Underwater Cultural Heritage art. 4, U.N. ESCO, U.N. Doc. 31 C/24 (2001), available at <http://unesdoc.unesco.org/images/0012/001232/123278e.pdf>. (“[a]ny activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection”).

salvors, the existence of it would diminish at the bottom of the sea. Cultural heritage is defined as “consisting of those things and traditions which express the way of life and thought of a particular society, which are evidence of its intellectual and spiritual achievements. They represent a particular view of life and witness the history and validity of that view”.²³⁰ Additionally, Boesten avers that “the common cultural heritage of human kind would have to be something that is regarded as being of universal importance surpassing ideas of sovereignty or proprietary interest”.²³¹ Furthermore, the concept of the underwater cultural heritage refers “to that part of the cultural heritage which is found underwater. The term ‘underwater’ should be understood in its widest sense so as to apply to both seas and inland waterways”.²³² Nonetheless, there is no acceptable definition of the concept of ‘cultural heritage’ and ‘culture property’ despite the used of these terms by the United Nations (UN) and UNESCO.²³³ The terminology has been used to reflect the specific ideology advocated in resolutions, drafts or recommendations.²³⁴ This ambiguity is the result of the wide disputes raised by opponents of any regulation over shipwrecks and any artifacts found within.²³⁵

It must be recognized that without a salvor’s effort to search, find and collect abandoned or lost artifacts at sea, archeologists would not have the items to study or to conduct their research. The theory that shipwrecks are *in situ* museums and therefore any exploration or retrieval of its contents must be done by an archeologist, or under its supervision, is completely erroneous. As correctly stated by Christopher Bryant, ancient “shipwrecks possess too much

²³⁰ Boesten, *supra* note 81 at 37. (citing L.V. Prott, Legal Protection of the Cultural Heritage 224, RECUELI DES COURS (Collected Courses of the Hauge Academy of International Law 1990)).

²³¹ *Id.*

²³² Anastasia, *supra* note 27 at 10.

²³³ *Id.* at 7.

²³⁴ *Id.*

²³⁵ *Id.* at 10. (discussing that the vagueness makes its to identify the items that fall within its scope) See Marian Leigh Miller, *Underwater Cultural Heritage: Is the Titanic Still in Peril as Courts Battle over the Future of the Historical Vessel?*, 20 EMORY INT’L L. REV. 345, (2006).

social, historical, scientific, and monetary value to be treated as underwater tombs”;²³⁶ not to mention, that the main source of archeological discovery is the result of the persistent search by salvors. In order to promote the continued study of these significant artifacts of our world history, and in many cases, specific moments that shaped our current society and laws, it is crucial that the diverse value of historic shipwrecks “should not glibly be labeled as cemeteries and kept off-limits to salvors and others”.²³⁷ It is necessary to mention the Law of Finds and Salvage Law does not prohibit the salvaging of wrecks containing human remains.²³⁸ Moreover, LOS Convention does not define it nor prohibit salvaging vessels having them.²³⁹ Any restraint, other than perseverance,²⁴⁰ against exploration of underwater heritage not only prejudices salvors but also obliterates society’s participation in the discovery of a past one thought to be lost at the bottom of the sea

CONCLUSION

The use of an *in rem* action strives to vindicate rights that otherwise may be overlooked or not protected at all. The evolution of such court jurisdiction is a response of the constant

²³⁶ Bryant, *supra* note 211 at 114.

²³⁷ *Id.* at 104.

²³⁸ *Id.* See 2 ADMIRALTY & MAR. LAW § 16-8 (4th ed.) (the reason why is not foreseen under international law is because “[u]nder the general maritime law, a life salvor has no claim against the person saved, and a ‘pure life salvor’ [one who saves life when no property is saved] has no right to compensation from the owner of the ship or its cargo. [...] There is a duty under both international law and domestic law to endeavor to save life at sea”).

²³⁹ *Id.* at 105.

²⁴⁰ Preservation is a completely dissimilar subject and it deserves an independent study. Nevertheless, it is necessary to mention that without the preservation of the shipwreck and its artifacts, the purpose of salvage and archeologist theory would have lost its significance. The concept of preservation is defined as the protection from injury or peril. THE AMERICAN HERITAGE DICTIONARY 665 (4th ed. 2001). Furthermore, a historic preservation law is defined as “[a]n ordinance prohibiting the demolition or exterior alteration of certain historic buildings or of all buildings in a historic district”. BLACK’S, *supra* note 10, at 1367. See Lawrence J. Kahn, Comment: Sunken Treasures: Conflicts Between Historic Preservation Law and the Maritime Law of Finds, 7 *Tul. Envtl. L.J.* 595, 596 (1994) (arguing that “[s]uccessful application of the law of finds to sunken treasure can reduce valuable historic objects to the personal property of private collectors”). See also *Berman v. Parker*, 348 U.S. 26, 33 (1954) (indicating that historic preservation is the “[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary”) and *Titanic III*, 435 F.3d at 536 (here the court argued that under a spirit of preservation, RMS Titanic “voluntarily and openly pursued its functions as a trustee for the public interest, and the district court has repeatedly accepted that offer”).

growth of a contemporary global economy. Frontiers are not longer measure by the ability of a nation to impose their will over the high seas, but by their capability of a state to have the interest and rights of their salvor and sailors be acknowledged and guarantee at international forums. The *jus gentium* made of the Law of Finds and Salvage Law and its applicability and recognition by common maritime law and traditions imposes a legal burden to U.S. Courts by upholding the *stare decisis* of international law jurisprudence. However, when deciding what legal norm is to be followed, the courts must look at the right of property assured by the federal and states' constitution and laws to conclude which party rights, the salvor or the presumed original owner, must be compromise for the betterment of public interest. *In rem* actions, and its variable, are the only suitable procedures for issues arising in the high seas and subject to international law.

The Titanic case is great example on how courts have dealt with the controversy of reimbursing salvage services, the applicability of the Law of Finds as well as Salvage Law along with the debated balance of underwater archeological preservation. Rulings must be followed by the international community to harmonize the use of the high seas and to expand its productivity for the common wealth of all its users. Salvor must be compensated for their service and be encouraged to continue their search for the vessels that were lost in our history. Only by their work would the archeologist be able to study and preserve hundreds of artifacts before they eventually perish on the ocean floor. It is imperative to remember that society is able to enjoy and study the Titanic, as well as many hundreds of other wrecks, because the willingness and the risk taker spirit of salvors. A balance of interests among our current law is not viable; not because it is not possible, but due to the fact that the existing laws are either too broad or too restrictive. They must be amended to reflect the needs and rights of both sides in order to reach

an appropriate stability. Salvors thirst for treasure and adventure is our source of archeological discoveries. It is them who are keeping our underwater heritage alive.