

Shipwrecks in Legal Frameworks: the international perspective

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Shipwrecks have many interest groups

- Flag States
- Private owners
- Marine underwriters
- International organizations and NGOs (UN, IMO, UNESCO, BIMCO, etc.)
- Scientific institutions
- Governmental authorities
- Private companies and actors (i.e. survey, salvage)
- Archaeologists & historians
- Researchers
- Divers, tourists
- The public at large, relatives of the victims & crew
- Etc ...



The Protection of the Underwater Cultural Heritage



PADI



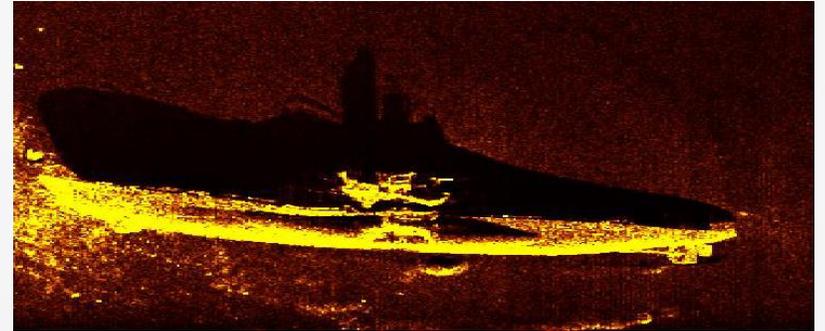
Education
Conservation
Exploration



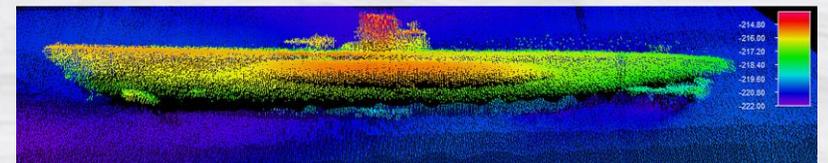
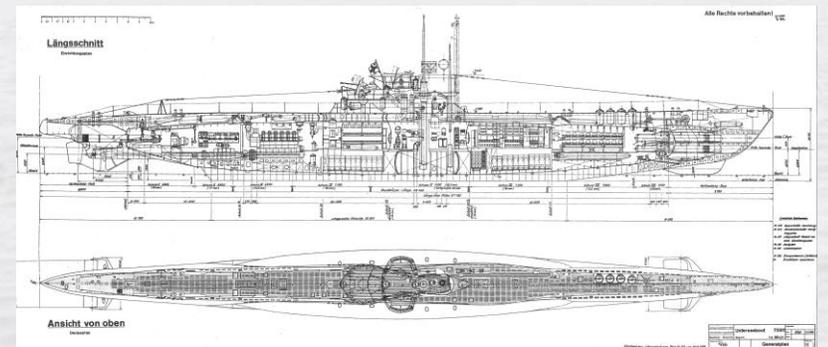
The Association of Average Adjusters

Shipwrecks can be (among many other things)

- A source of pollution (bunker oil, harmful substances, cargo)
- A Hazard:
 - For navigation
 - For the environment
- An expense
- A source of:
 - scrap metal
 - valuable objects (cargo, personal belonging), antiques market
 - income (Vasa Museum, Mary Rose)
 - information (archaeological, historical)
- A business (salvage, oil recovery, survey, museum)
- Of historical and national importance:
 - Wilhelm Gustloff, M/S Estonia, Mary Rose, Vasa, USS Arizona etc.
- (War) Graves
- Tourist attractions, memorials
- Politically sensitive, legally ambiguous
- Someone's property



Courtesy of the Estonian Maritime Administration



NOAA

What is the international perspective?

- International law is the set of rules generally regarded and accepted in relations between nations (i.e. sovereign States) and sometimes international organizations.
- Responsibilities of different actors are based on the existence or absence of jurisdiction.
 - i.e. the extent of each State's right to regulate conduct or consequences of events
- In other words jurisdiction describes the limits of the legal competence of a State or other regulatory authority (such as the European Community) to make, apply, and enforce rules of conduct upon persons'.
- In matters regarding the law of the sea, jurisdictional rights of States vary in different maritime zones.
- If a State wishes to enforce rules on any subject at sea, enforcement action and jurisdiction has to be founded on an accepted basis and principles of international law. These will depend on:
 - the nationality of the parties involved,
 - the location (i.e. the maritime zone) of the incident,
 - status of the vessel(s), and
 - the activity of the vessel(s) and
 - Individual(s) concerned.



UN-ONU PHOTO / ICJ-CIJ



United Nations 1982

The sources of International Law

- Under Art. 38 of the Statute of the International Court of Justice (ICJ), international law has three principal sources:
 - *international treaties*,
 - *custom*, and
 - *general principles of law*.
- Subsidiary sources of international law are:
 - *judicial decisions (court cases)*, and
 - *the teachings of the most highly qualified publicists of the various nations (legal literature)*.
- *International treaty law* comprises obligations states expressly and voluntarily accept between themselves in *treaties*.
- *Customary international law* is derived from the consistent practice of States (accompanied by *opinio juris*, i.e. the conviction of States that the consistent practice is required by a legal obligation).
- *General principles of law* are those commonly recognized by the major (civilized) legal systems of the world.

Shipwrecks in international treaties

Shipwreck “types”:

- Maritime incidents (ships in marine peril)
 - Currently happening
- Recent maritime casualties
 - Below 50 years old
- Older shipwrecks
 - 50-100 years old
- Historical shipwrecks
 - Traditionally over 100 years old
 - However, historical importance should not be automatically linked to any specific time limit.

Treaty “types”:

- Law of the Sea
 - UNCLOS 1982
- Maritime Law (IMO)
 - COLREGs
 - MARPOL
 - SOLAS
- Jurisdiction (UNCLOS) / general uses of the sea
 - Port/Coastal State
 - Flag State
 - “areas beyond national jurisdiction”
- Salvage and wreck removal
 - 1989 Salvage Convention
 - WRC 2007
- Protection
 - UNESCO 2001 Convention
 - Environmental / pollution / liability treaties

Shipwrecks and Treaties

- There is no commonly accepted definition for the term “*wreck*” or “shipwreck”.
 - Definitions are thus treaty specific (“for the purposes of this treaty”).
- In treaties, shipwrecks typically fall into two general categories
 - *Public vessels* (warships and other State-owned vessels operated for non-commercial purposes), and
 - *Private vessels*
- Warships and other State-owned vessels are usually exempted from the scope of treaties.
 - i.e. most treaties only cover private vessels used for commercial purposes
- A fundamental principle of the law of treaties is that a treaty does not apply retrospectively
 - This means that the treaty does not bind a party in relation to any act or fact which took place before the date of the entry into force of the treaty.
 - Thus, the current international treaties cannot impose on a ship owner or State an obligation in relation to a past event.
 - This for example includes the liability for the removal of a wreck.
- Some treaties excluding warships and other State-owned vessels state, that States should nevertheless abide by the treaty principles as far as it is reasonable and practicable to do so.

Sunken warships and other State-Owned vessels

- No treaty before the beginning of the 21st Century addressed the issue of property rights over enemy warships that sank in peacetime or might be destroyed or captured in wartime.
 - Consequently, the ownership of such ships was, and still is, a matter primarily of customary international law.
 - A coastal State does not acquire any right of ownership to a sunken military craft by reason its being located on waters over which it exercises sovereignty or jurisdiction.
- Practice shows that the wreck remains the property of the flag State.
 - The question if sovereign immunity is no longer enjoyed since the rationale for keeping immunity is lacking is under and open for debate.
- The issue of '*who owns the shipwrecks*' and '*who is responsible*' for sunken WWII wrecks is a complex one, and subject to much debate.

1982 United Nations Convention on the Law of the Sea



- Negotiated between 1973 and 1982 (3rd United Nations Conference on the Law of the Sea).
- Adopted 10 December 1982, in force 16 November 1994.
- Currently 167 State parties. An additional 14 UN member States have signed, but not ratified the convention. United States has not signed nor ratified the convention.
- “A Package deal”, unlike the previous law of the sea Conventions (1958).
- Considered as widely as the constitution of the oceans.
- Does not mention or define the term “wreck”, however:
 - Art. 149 Archaeological and historical objects (Part XI The Area).
 - Art. 303 Archaeological and historical objects found at sea (Part XVI General Provisions).
 - Thus lacks articles relating to sunken warships, State vessels, and to wrecks more generally.
- Defines and covers operational warships (Art. 29).

Convention on the Protection of the Underwater Cultural Heritage



- Adopted 2 November 2001, in force 2 January 2009.
- Currently 62 State parties.
- Aims to ensure and strengthen the protection of underwater cultural heritage, a gap left in the UNCLOS framework.
 - The definition of Underwater cultural heritage in the convention covers all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years, such as *“vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context”*.
 - Does not mention or define the term *“wreck”*, which is included in the definition of UCH.
- Art. 2.8 (Objects and general purposes):
 - Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, *nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State’s rights with respect to its State vessels and aircraft.*
- In general sunken warships form a very large and significant proportion of UCH.

International Convention on Salvage (1989)



- Adopted 28 April 1989, in force 14 July 1996
- Currently 71 State parties (53,48 % of World Tonnage).
- Replaced the old salvage convention adopted in Brussels in 1910, which incorporated the "*no cure, no pay*" principle under which a salvor is only rewarded for services if the operation is successful. The Brussels 1910 Convention did not take pollution into account.
- A salvor who prevented a major pollution incident (for example, by towing a damaged tanker away from an environmentally sensitive area) but did not manage to save the ship or the cargo got nothing.
 - There was therefore little incentive to a salvor to undertake an operation which has only a slim chance of success.
- The 1989 Convention seeks to remedy this deficiency by making provision for an enhanced salvage award taking into account the skill and efforts of the salvors in preventing or minimizing damage to the environment.
- Does not define or mention the term “wreck”.
- Art. 4 (State-owned vessels)
 - This Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognized principles of international law unless that State decides otherwise.
- Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right not to apply the provisions of this Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed. (Art. 30 Reservations)

Nairobi International Convention on the Removal of Wrecks (2007)



- Adopted 18 May 2007, in force 14 April 2015
- Currently 42 State parties (72,43% of World Tonnage)
- Focused on the Exclusive Economic Zone (EEZ)
- Has a very broad definition for the term “wreck”
- Provides a set of uniform international rules aimed at ensuring the prompt and effective removal of wrecks located beyond the territorial sea (i.e. recent maritime casualties).
- Provides the legal basis for States to remove, or have removed, shipwrecks that may have the potential to affect adversely the safety of lives, goods and property at sea, as well as the marine environment.
- The negotiation record does not reveal any discussion concerning the application of the WRC to pre-existing wrecks.
 - Does not apply retroactively

IDI 2015 RESOLUTION



- The *Institut de droit international* (IDI)'s purpose is to promote the progress of international law through, among other things, clarifying and highlighting the characteristics of the law as it exists (*lex lata*), in order to encourage respect for that law, and opining on what the law ought to be (*de lege ferenda*).
- IDI established its 9th Scientific Commission to look into the matter of the status of sunken warships in 2007.
- IDI adopted a Resolution on “*The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law*” in 2015.
 - The resolution comprises 15 substantive articles covering issues to which sunken State vessels give rise.
 - Has a definition for the terms “wreck” and “sunken State ship”
- The principle aim of the Resolution is the preservation and protection of cultural heritage.
- The work represents clarification of a subject that is still very controversial.

IDI 2015 RESOLUTION HIGHLIGHTS



- Art 1.1.: “Wreck” means a sunken State ship which is no longer operational, or any part thereof, including any sunken object that is or has been on board such ship.
- Art. 1.2.: “A sunken State ship” means a warship, naval auxiliary or other ship owned by a State and used at the time of sinking solely for governmental non-commercial purposes.
- Art. 2.5.: States shall take the measures necessary to prevent or control commercial exploitation or pillage of sunken State ships, which are part of cultural heritage, that are incompatible with the duties set out in this Article as well as in applicable treaties.
- Art. 3.: Without prejudice to other provisions of this Resolution, sunken State ships are immune from the jurisdiction of any State other than the flag State.
- Art. 4.: Sunken State ships remain the property of the flag State, unless the flag State has clearly stated that it has abandoned the wreck or relinquished or transferred title to it.

IDI 2015 RESOLUTION HIGHLIGHTS

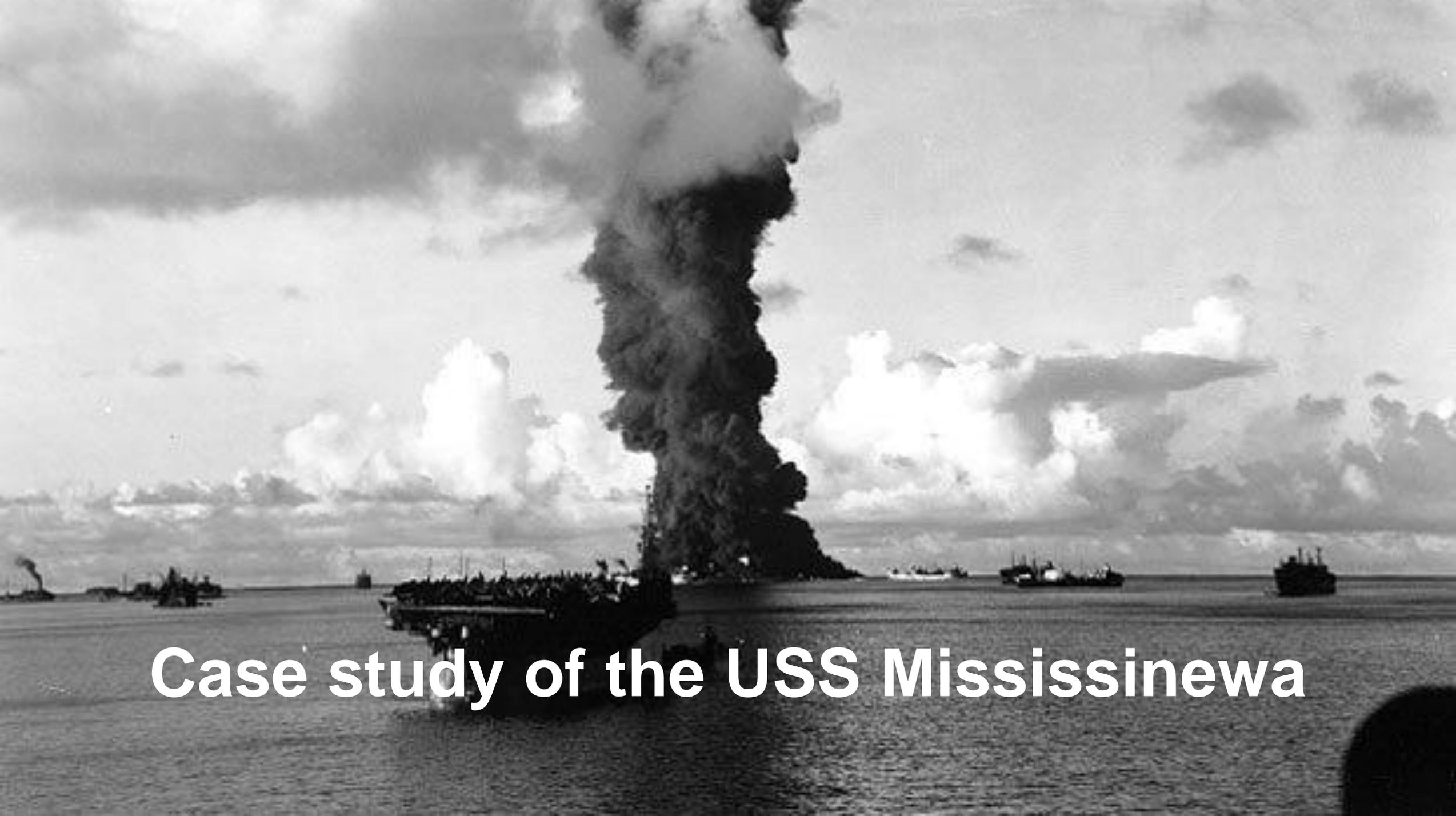


- Art. 12.: Due respect shall be shown for the remains of any person in a sunken State ship. This obligation may be implemented through the establishment of the wreck as a war cemetery or other proper treatment of the remains of deceased persons and their burial when the wreck is recovered. States concerned should provide for the establishment of war cemeteries for wrecks.
- Art. 14. 1. Subject to Article 7 of this Resolution, *the flag State shall remove wrecks constituting a hazard to navigation or a source of, or threat to, marine pollution.* 2. The coastal State may take the measures necessary to eliminate or mitigate an imminent danger.
- Art. 15.1.: All States should co-operate to protect and preserve wrecks which are part of cultural heritage, to remove wrecks which are a hazard to navigation, *and to ensure that wrecks do not cause or threaten pollution of the marine environment.* In particular, States bordering an enclosed or semi-enclosed sea should co-operate in the performance of their duties set out in this Resolution in a manner consistent with the rights and duties of other States.

IDI 2015 RESOLUTION HIGHLIGHTS

As a conclusion:

- Given the uncertainties that exist concerning the precise respective rights and jurisdiction of flag States and coastal States in maritime zones within national jurisdiction, Article 15(1) may well be designed, at least in part, to exhort States to cooperate with one another in the circumstances outlined *whatever* the precise legal niceties may be. (Dromgoole 2016)



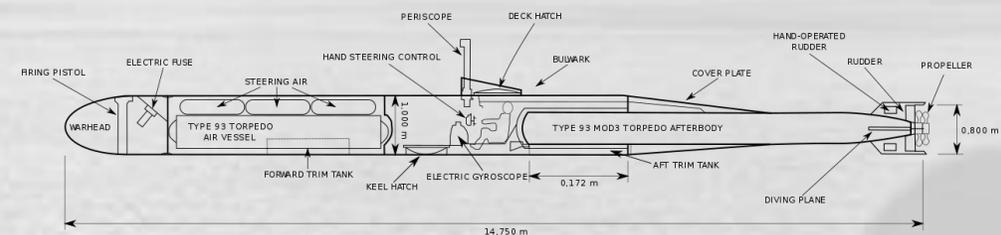
Case study of the USS Mississinewa

Case study of the USS Mississinewa

- USS Mississinewa was a United States WWII military oil tanker.
- Sunk 20 November 1944 at a depth of 22 meters, north of Mogmog island (Ulithi) in the Federal States of Micronesia (FSM).
- First (and possibly the only) vessel to be hit by a Japanese Kaiten manned torpedo.
- Four days before the sinking, the vessel was filled with:
 - 404,000 US gallons (1,530 m³) of aviation gas
 - 9,000 barrels (1,400 m³) of diesel fuel, and
 - 90,000 barrels (14,000 m³) of fuel oil



US Naval Historical Center



Schematic of a Kaiten type 1

Case study of the USS Mississinewa

- The wreck began to leak oil into the FSM's Ulithi Lagoon, after the area was hit by a typhoon in 2001.
- The FSM government declared a State of Emergency and a complete ban on fishing within the lagoon.
- Since the islanders depended upon the ocean and its natural resources for their livelihood, banning the use of the lagoon for fishing was the equivalent of closing all the nations supermarkets.
- People fell ill from eating oil-contaminated fish and the inability to promote tourism and to extract natural marine resources impacted on the island's economy.

Oil spill threatens Pacific islanders' food supply

MICRONESIA

Wellington: Tens of thousands of litres of oil from the wreck of an American tanker sunk by a Japanese suicide submarine during World War II is threatening the food supply and ecology of the Federated States of Micronesia.

A team of scuba divers from Guam was on its way to Ulithi, part of the Pacific island chain, to try to plug the leak in USS Mississinewa.

Oil is leaking into the lagoon, on which the 700 islanders rely for their food supply, at more than 2,000 litres an hour. The leak is thought to have started about a week ago after the wreck changed position during a storm.

The Mississinewa had 2 million litres of oil on board when it went down in the lagoon in 1944. It was the only American naval ship to be sunk by a kaiten, a one-man Japanese suicide submarine, during the war.

Environmental experts fear that the spill could cause an ecological disaster in the area.

The United States Navy has denied that it is responsible for the leak. A spokesman said: "It was sunk during the war and I don't think you can point the finger at anyone. It is just something that happened and now we have to figure out the best way to deal with it."

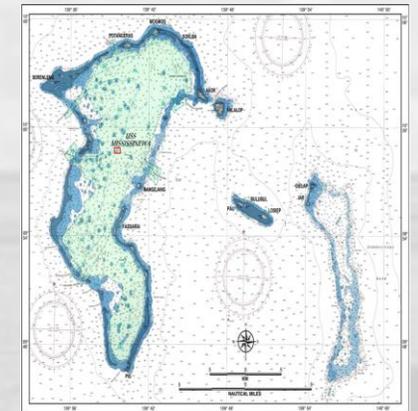
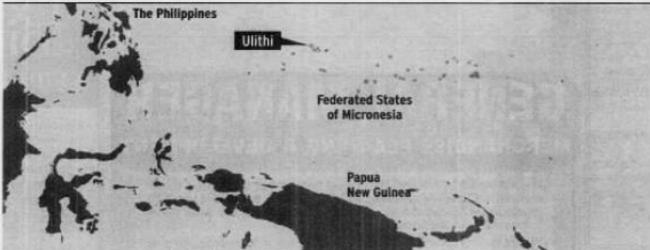
Lolly Walsh, a social worker in Guam who has relatives living on Ulithi, said she understood that the oil could be seen from the shore of the 460-square-kilometre lagoon, the world's fourth largest.

Ulithi and its neighbouring islands, with a land area of only 4.6 square kilometres, rely on the lagoon for fish. She feared the spill would affect the food supply.

"They are going to starve. I can't imagine what they are going through," she told the *Pacific Daily News* on Guam.

Ulithi was briefly the largest US naval base during the lead-up to the invasion of Okinawa. At one stage 600 vessels were moored in the lagoon.

The Telegraph, London



Case study of the USS Mississinewa

- The President of FSM contacted the United States for assistance with the environmental emergency.
- In September 2001, the US sent a US Navy dive team and dive contractors to the site of the wreck, where they plugged the leak in one of the holding tanks with quick setting cement.
- Around 5,000 gallons of oil trapped in dead spaces on the wreck was pumped to the surface.
- The South Pacific Regional Environment Programme (SPREP) in assessing the wreck, concluded that the estimated 5 million gallons of oil remaining on the USS Mississinewa continued to represent a 'grave and imminent' pollution hazard.



Case study of the USS Mississinewa

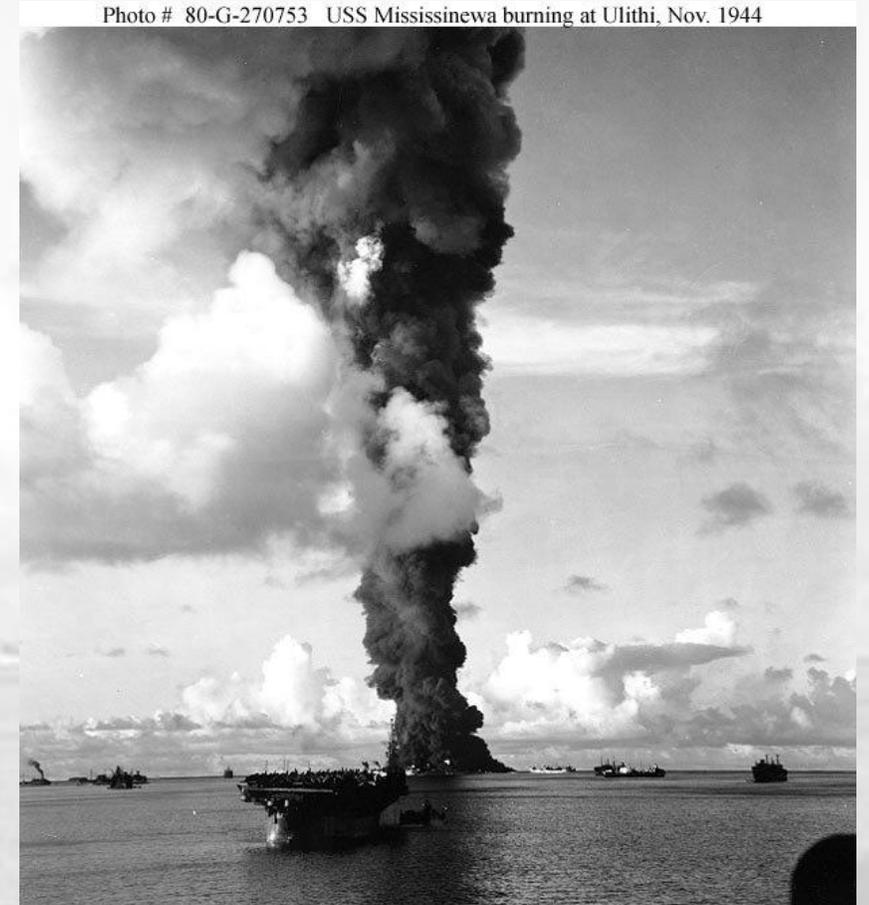
- In late December 2001, the residents of Ulithi lagoon reported another oil spill from the USS Mississinewa. The US Navy dive teams and contractors returned to the lagoon and plugged the ship's leaks.
- Finally, in February 2003, the US Navy dive teams and contractors returned for a third time and pumped out another 2 million gallons of oil from the USS Mississinewa.
- The oil was taken to Singapore for reprocessing. The cost of the exercise was borne by the US and is estimated at between US\$4-6 million.



Stern view as ship rolls to port – S. Harris, 1944

Case study of the USS Mississinewa

- Only 0.35-0.5% of the USS Mississinewa's oil cargo was released into the ocean, yet that relatively small amount had a dramatic impact on the lives of the islanders.
- After removing oil from the Mississinewa, the US insisted that it was not setting a precedent, and that the job of making safe the wrecks be dealt with on a case-by-case basis.



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Case study of the USS Mississinewa

- **Conclusion:** the United States agreed to extract the oil, but made clear that it did not have an obligation to do so.

Photo # NH 97279 USS Mississinewa (AO-59) in Hampton Roads, Va., May 1944



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Thank you!

Questions?

