CHAPTER II

LITERATURE REVIEW

A. Overview Considering Territorial sea

1. Law of the Sea Pre UNCLOS 1982

For centuries seas have been considered as free from any jurisdiction, where one state's sovereignty is only acknowledged in a narrow belt of a sea surrounding its coast.[1] This notion of a free sea first came from Attorney General of the Dutch Republic Hugo Grotius who published a book under the title of Mare*Liberum*in 1609 arguing that the seas are not susceptible to appropriation.[2] Grotius's intent was to ensure right of Dutch to participate in the East Indian Trade.[3]

Law of the sea was predominantly based on customary law at earlier stages; agreements between states were rare and only adopted between neighboring states as regional pacts.[4] What changed in consideration to today is that technology is developed to such extent that if the free seas theory is preserved, those states that are more advanced than other could explore and exploit seas which are not under any state's jurisdiction.

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[1]United Nations, **United Nations Convention on the Law of the Sea, a Historical Perspective** (*online*), http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective(27 April 2014).

[2]Harisson, James, **Evolution of the law of the sea: developments in law-making in the wake of the 1982 Law of the Sea Convention**, unpublished thesis, Edingburg, School of Law, University of Edinburgh, 2007, Page 16.

[3] Alison Reppy, 1950, **The Grotian Doctrine of the Freedom of the Seas Reappraised** (*online*), 19 Fordham L. Rev. 243, http://ir.lawnet.fordham.edu/flr/vol19/iss3/1, (19 june 2014), page 244.

[4]Bean, Barbara, 2013, **Law of the Sea** (*online*), American Society of International Law, http://www.asil.org/sites/default/files/ERG_LOS.pdf (17 June 2014).

Furthermore, pollution that occurred from ships sailing high seas needs to be properly regulated and user states controlled in this aspect as well, and

such control can be achieved only through internationally recognized rules and authority, which can be attained through proper codification of International Law.

One of the issues which pushed progressive codification of International Law was issue of maritime delimitation. First attempt of such codification was in March 1930 when the Assembly of the League of Nations held the Hague Codification Conference, which is regarded by some as an initiative for intergovernmental codification – considering that at the time this work was done by learned societies and eminent publicists.[5]The Conference addressed maritime issues such as width and sovereignty of territorial sea as well as exploitation of natural resources of World Ocean.[6] Unfortunately because of inability to reach agreement, adverse stand point of colonial nations to consider the interests of less-powerful nations,[7] and very difficult financial crisis that occurred in areas of Europe and United States,[8] no issue presented was resolved.

Geneva was the host of first United Nation Conference on Law of the sea, which was held in period from 24 February 1958 until 27 April 1958 and it produced four conventions[9] and one optional protocol[10]. This

[5]Shabtai Rosenne, **Codification Revisited After 50 Years**, (*online*), http://www.mpil.de/files/pdf2/ mpunyb_rosenne_2.pdf, (18 Juni 2014).
[6]Mazen Adi, 2009, **The Application of the Law of the Sea and the Convention on the Mediterranean Sea**, (*online*), http://www.un.org/depts/los/nippon/unnff_ programme_home/fellows_pages/fellows_papers/adi_0809_syria.pdf, (18 June 2014).
[7]**The Law of the Sea**, (*online*), http://www.oceansatlas.org/unatlas/-ATLAS-/chapter14.html, (18 June 2014).
[8]Shabtai Rosenne, *Op Cit.*
[9]**The Convention on the Territorial Sea and the Contiguous Zone** (CTS) – entered into force 10 September 1964; the **Convention on the High Seas** (CHS) –30 September 1962; the **Convention on Fishing and Conservation of the Living Resources of the High Seas** (CFCLR) –20 march 1966; the **Convention on the Continental Shelf** (CCS) – 10 June 1964. (*online*)http://legal.un.org/avl/ha/gclos/gclos.html, (24 April 2014).
[10] Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.

conference was a result of a long process, dating all the way to 1930 to Conference for Codification. International law Commission (ILC)[11] made it clear since beginning of its work in 1949[12], those regulations considering territorial sea and regime ruling the high seas will dominate UNCLOS I, and it happens to be that these two issues failed to be achieved.

The General Assembly of the United Nations decided[13] to hold second international conference on the law of the sea for the purpose of further discussing unresolved questions. The Second Conference on law of the sea was held in Geneva from 17 March to 26 April 1960. The conference referred to the committee on following issues:

a. Consideration of the questions of the breadth of the territorial sea and fishery limits in accordance with resolution 1307 (XIII);
b. Adoption of convention or other instruments regarding the matters considering and of the Final Act of the Conference.[14]

Unfortunately, after long discussion governments which were represented at second conference on law of the sea could not produce convention nor resolve questions that were presented by resolution 1307 (XIII), and this is why third conference was to be held.

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[11] The International Law Commission is a subsidiary organ of the United Nations General Assembly, whose object is the promotion of the progressive development of international law and its codification. The Commission is governed by a Statute annexed to General Assembly resolution 174 (II) of 21 November 1947 (as amended). (*online*), http://legal.un.org/avl/ha/silc/silc.html, (01 May 2014).

[12]Puspitawati, Dhiana*"**HukumLautInternasional**"*,Malang, unpublished diktat, Faculty of Law, Brawijaya University, page 14.

[13]Resolution 1307 (XIII), adopted by United Nation General Assembly on 10 December 1958.

[14] Final Act of the Second United Nations Conference on the Law of the Sea Extract from the Official Records of the Second United Nations Conference on the Law of the Sea (Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, Annexes and Final Act), UNCLOS II 1960, Document A/CONF.19/L.15, Geneva, Switzerland.

2. United Nation Convention on Law of the Sea 1982 (UNCLOS 1982)

The third conference on law of the sea was decided to be held by General Assembly resolution[15], and instructed the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (hereinafter "Committee")[16] to act as preparatory body for the conference. General Assembly Resolution 2750 (XXV) mandated the Committee to prepare draft treaty articles embodying the international regime for the deep seabed area and resources of the seabed beyond the limits of national jurisdiction as well as a comprehensive list of subjects and issues relating to the law of the sea to be dealt with by the Conference, including draft articles on such subjects and issues. Committee held several sessions in period between 1971 and 1973, consequently submitting final report to General Assembly at its twenty eights session in 1973. After evaluating the report General Assembly requested Secretary General to invite States to the Conference, where mandate of the conference was to adopt Convention dealing with all matters on law of the sea.[17]

The burden bestowed on UNCLOS III was enormous, besides answering old questions, such as breadth of territorial sea, it has to deal with

[15]General Assembly Resolution 2750 C (XXV),1970.

[16] The General Assembly, by resolution 2340 (XXII) of 18 December 1967, established an Ad Hoc Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, consisting of thirty-six Member States. The Ad Hoc Committee held three sessions during 1968, and presented its study (A/7230) to the General Assembly at its twenty-third session, in 1968. Having considered the report of the Ad Hoc Committee, the General Assembly adopted on 21 December 1968 resolution 2467 A (XXIII), by which it decided to establish a Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, consisting of forty-two Member States. United Nations, **Third United Nations Conference on the Law of the Sea, 1973-1982** (*online*),http://legal.un .org/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html, (01 May 2014).

[17]General Assembly Resolution 3067 (XXVIII),1973;

new more modern issues of deep sea mining, marine pollution and transfer of marine technology. Another obstacle was the number of UN members, which significantly increased since discussions were held for adoption of Conventions on Law of the Sea from 1958, at the time of UNCLOS III there were 160 member states of UN.[18] The Conference held 11 sessions in between 1973 up to 1982, where at its first session it set up a General Committee, three Main Committees, a Drafting Committee and a Credentials Committee. At the second session each committee, of the three main committees, were given task according to their competence, as follows:

a. First Committee - the international regime of the sea-bed and ocean floor beyond national jurisdiction;
b. Second Committee - the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone, the high seas, land-locked countries, shelf-locked States and States with narrow shelves or short coastlines and the transmission from the high seas; and
c. Third Committee - the preservation of the marine environment.[19]

The Third Conference on law of the sea adopted United Nations Convention on Law of the Sea on 10 December 1982, containing 320

[18]Full list of UN state members at the time of UNCLOS III can be seen at the **Final Act of the Conference; The Law of the Sea - Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index**, (1983) (*online*), http://www.un.org/depts/los/convention_ agreements/texts/final_act_eng.pdf, (17 June 2014).

[19] The list of the tasks was made in accordance to the issues raised in accordance to General Assembly Resolution 2750 C (XXV) (A/CONF.62/ 29); United Nation Diplomatic Conferences, **Third United Nations Conference on the Law of the Sea**, **1973-1982**, (*online*), http://legal.un.org/ diplomaticconferences/lawofthesea-1982/lawofthesea -1982.html, (01 May 2014).

articles and nine annexes. The United Nations Convention on the Law of the Sea entered into force twelve months after the deposit of the sixtieth instrument of ratification, on 16 November 1994. The Agreement relating to the implementation of Part XI of the Convention entered into force on 28 July 1996, thirty days after the deposit of the fortieth instrument of ratification.[20]

3. Maritime Zones Before and After UNCLOS 1982

States are urged to maintain cooperation between each other for the sake of economic development, peace and security, especially in connection to the maritime issues. Before Second World War it was a State's practice to claim certain maritime areas as its sovereign territory, and after the war, because of steep technological development, possibility of maritime exploitation increased.[21] The most claimed maritime area was a seabed, which is a geomorphological part of a continent on which coastal state resides, generating a new concept in International Law of the Sea, a Continental Shelf. United States Government was one of the first to claim natural resources of the subsoil and sea bed of the continental shelf, which was regarded as extension of a land mass of the coastal nation.[22]The appearing of these new maritime zones significantly increased need for formal maritime boundary delimitation in international law of the sea, which was finally facilitated in UNCLOS 1982.

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[20]*Ibid*. (Conferences).
[21]NugzarDundua, 2007, **Delimitation of Maritime Boundaries Between Adjacent States**, (*online*), http://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/ fellows_ papers/dundua_0607_georgia.pdf, (17 June 2014).
[22]President Truman, **1945 US Presidential Proclamation No. 2667, Policy of theUnited States With Respect to the Natural Resources of theSubsoil of the Sea Bed andthe Continental Shelf**, (*online*), http://www.gc.noaa.gov/documents/gcil_proc_2667.pdf, (17 June 2014).

Examining the historical development of International Law of the Sea, especially regarding maritime delimitation, it can be concluded that its development went through three phases[23]:

a. *Era prior to 1958* – the main characteristic is that international law rules governing maritime delimitation were not codified. Territorial sea is the only maritime zone recognized by Customary International Law, as a narrow sea belt surrounding Coastal State, not exceeding more than 3 nautical miles[24];
b. *Era between 1958 and 1982* – although 1958 convention is silent on breadth of territorial sea, in this phase 12 nm was generally accepted by states as a proper breadth.[25] Beside territorial sea, maritime zones such as Contiguous zone[26], Continental Shelf[27], and High Seas[28] were established; and
c. *Era post 1982* – in this period two new maritime zone were added to territorial sea, which includes archipelagic waters, (in case of archipelagic state), and Exclusive Economic Zone (EEZ), in which coastal state can exercise sovereign rights.

[23]SHI Jiuyong, (2010), **The Wang Tieya Lecture in Public International Law, Maritime Delimitation in the Jurisprudence of the International Court of Justice** (*online*), The Chinese Journal of International Law, published by Oxford Journals, http://chinesejil. oxfordjournals.org/content/9/2/271.full, (17 June 2014).
[24]"The cannon-shot rule set forth that a nation controlled a territorial sea as far as a projectile could be fired from a cannon based on shore. In the 18th century this range was approximate three nautical miles. As time progressed, three miles became the widely accepted range for the territorial sea." Daniel Hollis & Tatjana Rosen, 2013, **United Nations Convention on Law of the Sea (UNCLOS), 1982**, (*online*), http://www.eoearth.org/view/article/156775/, (30 June 2014).
[25]*Ibid.*
[26]Convention on the Territorial Sea and the Contiguous Zone1958.
[27]Convention on the Continental Shelf 1958.
[28]Convention on the High Seas 1958.

The third era is the era after 1982, important period when all state members of UN decided to finalize their negotiations and agree on a convention which is going to be unified rule of law considering law of the sea, for all the states of the world. UNCLOS 1982 solved a several decades old question, question of maritime delimitation, and within it there are following maritime zones regulated:

a. Territorial Sea – adjacent belt of sea on which a sovereignty of acoastal state expands[29];
b. Contiguous Zone - a sea contiguous to the territorial sea with limited sovereign rights attributed to a coastal state, only regarding its national customs, fiscal, immigration or sanitary laws and regulations;[30]
c. Exclusive Economic Zone (EEZ) – "an area beyond and adjacent to the territorial sea"[31], subjected to the specific regime arranged with in UNCLOS 1982;
d. Archipelagic Waters – waters "enclosed by the archipelagic baselines, regardless of their depth or distance from the coast"[32], over which area sovereignty of the coastal State extends, including air space, seabed and subsoil.[33] Archipelago is a group of islands[34] connected in such manner that they create a

[29]Article 2, Paragraph (1), UNCLOS 1982.
[30]*Ibid.*,Article 33, Paragraph (1).
[31]*Ibid.*, Article 55.
[32]*Ibid.*,Article 49, Paragraph (1).
[33]*Ibid.*,Article 49, Paragraph (2).
[34]Heru Prijantono, ***Hukum Laut Internasional***, Bayumedia Publishing, Malang, 2007, Page 16.

"geographical, economic, and political entity, or which historically have been regarded as such."[35]

e. Continental Shelf – "seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin."[36]

4. Territorial sea and Regime Governing Territorial sea

Through history, even at the time of Grotius free sea teachings, state had jurisdiction over certain portion of the sea that surrounds it. Grotius in his work, *Law of War and Peace*, stated that a "country may acquire sovereignty over parts of the sea in regard to persons by an armed fleet and in regard to territory as when those that sail on the coasts of the country may be compelled from the land, as if they were on land".[37] Territorial sea was claimed by states on the basis of security issues like America did in 1793 through the letter of Secretary of State Thomas Jefferson addressed to British Minister,[38] when it claimed 3 nautical miles of territorial sea.[39] The 3 nautical miles breadth of territorial sea was based on the cannon-shot rule,[40] basically establishing territorial sea limit at the point that artillery shot could

[35]Article 46, letter (b) UNCLOS 1982.
[36]Article 76, Paragraph (1), UNCLOS 1982.
[37]Miriam Defensor Santiago, 2011, **The Arcipelago Concept in the Law of the Sea: Problems and Perspectives** (*online*), Philipine Law Journal, http://miriam.com.ph/newsblog/wp-content/uploads/2011/10/The-Archipelago-Concept-in-the-Law-of-the-Sea.pdf, (19 June 2014).
[38] Joe Mathews, 2011, **Redefining the Territorial Sea in the Clean Water Act: Replacing Outdated Terminology and Extending Regulatory Jurisdiction** (*online*), Sea Grant Law and Policy Journal, Vol. 4, No. 1, http://nsglc.olemiss.edu/sglpj/Vol4No1/Matthews.pdf, (19 June 2014).
[39] Harry N. Scheiber and Chris Carr, 1992**, Constitutionalism and the Territorial Sea: An Historical Study** (*online*), 2 Terr. Sea. J. 67 (1992), http://scholarship.law.berkeley.edu/facpubs/709, (19 June 2014).
[40] Miriam Defensor Santiago, *Loc.Cit*.

reach, reflecting the principle of "*terrae dominumfinitur, ubifiniturarmoriumvis*"[41].

Today, every coastal state has right to claim maritime belt around its coastline, and treat it as an indivisible part of its domain.[42]Sovereignty over the territorial sea is incidental to the sovereignty over the land, thus it does not have to be established,[43] but the breadth of territorial sea shall not exceed 12 nautical miles.[44] Coastal state has full, unlimited sovereignty within its internal waters, with exception in case of Coastal-archipelago states, and sovereignty enjoyed by coastal state within its territorial sea, limited only by innocent passage. In territorial sea coastal State has following rights:

a. Based on limited sovereignty of Coastal state over its territorial sea[45], coastal state have exclusive right to explore and exploit biological and non-biological resources of seabed, subsoil and superjacent waters;
b. Coastal state have exclusive right to use the territorial sea to transport people and goods from one part of the state to another;
c. To enforce laws concerning "safety of navigation and the regulation of maritime traffic"[46], "the protection of navigational

[41]"The dominion of the land ends where the range of weapons end." (*online*), http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095546425, (19 June 2014).
[42]N. Shaw QC, Malcolm, **International Law**, Cambridge University Press, New York, 2008, page 554.
[43]Aust, Anthony,**Handbook of International Law**, Cambridge University Press, New York, 2005, page 302.
[44]Article 3, UNCLOS 1982.
[45]Article 2 Paragraph (1) UNCLOS 1982.
[46]*Ibid*., Article21 Paragraph (1) letter (a).

aids and facilities"[47], "the protection of cables and pipelines"[48], protection and conservation of living resources, preservation of marine environment[49], "customs, fiscal, immigration or sanitary laws"[50];

d. The right to establish sea lanes and traffic separation schemes in regard to safety of navigation;[51]

e. The right to prevent passage which is not innocent;[52]

f. The right to "suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises".[53]

g. The right to ask "warship that does not comply with the laws and regulations of the coastal State"[54] to leave the territorial sea;

h. Certain powers to exercise criminal jurisdiction over merchant ships and people on board and jurisdiction to try crimes committed on board such ships within territorial sea;[55]

The regime that rules territorial sea is not as unlimited as it is regime ruling internal waters. According to Article 17 UNCLOS 1982 ships of all States, whether coastal or land-locked, enjoy the right of innocent passage

[47] *Ibid*., letter (b).
[48] *Ibid*., letter (c).
[49] *Ibid*., leter (d), (e), and (f).
[50] *Ibid*., letter (h).
[51] *Ibid*., Article 22 Paragraph (1).
[52] *Ibid*., Article 25 Paragraph (1).
[53] *Ibid*., Paragraph (3).
[54] *Ibid*., Article 30.
[55] Article 27 Paragraph (1), letters (a), (b), (c), and (d), UNCLOS 1982.

through the territorial sea. Innocent passage is the "right of a foreign vessel to travel to a country's maritime belt without paying a tall".[56] The importance of innocent passage is that it "allows maintenance of freedom of navigation and it gives a right to a coastal state to pursue policies of territorial sovereignty".[57]

The passage under UNCLOS 1982 is defined less than two terms, traversing and proceeding[58]. Traversing is when ship sails through territorial sea of one state without harboring or entering internal waters of that state at any point, while proceeding is when ship is on the way to or from internal waters or harbor at which it docked. Such passage is considered as innocent as long as it is in compliance to the peace, good order or security of the coastal state.[59]

B. Overview Considering Warship

1. Definitions of Warship

It is very important for a coastal state to own warships, or at least to have some sort of navy fleet to conduct patrol and in a case of an incident to protect it. Warships today do exactly that. The definition of a warship according to Article 29 of UNCLOS 1982 is:

> "For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an

[56]Bryan A. Garner, **Black's Law Dictionary**,Thomson Reuters, USA, 2009, page 860.
[57]D.P. O'Connell in Mary Sabina Peters and Manu Kumar, 2012, **Analysis of Innocent Passage in the Territorial Sea under the Law of the Sea Regime 1982** (*online*), European Energy and Environmental Law Review, http://www.kluwerlawonline.com/abstract.php?area=Journals&id=EELR2012024, (20 June 2014).
[58]Article 18 Paragraph (1) letter (a) & (b) UNCLOS 1982.
[59]*Ibid*., Article 19 Paragraph (1).

> officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline."

According to Black's Law Dictionary a "warship is a ship commissioned by a nation's military, operating with a military command and crew, and displaying the nations flag or other external marks indicating its country of origin."[60] Both definitions proscribe similar elements to the characteristics that a ship ought to have in order to be considered as such. Such ship needs to be:

a. Owned by military;
b. Wearing distinguished mark of such ownership; and
c. Commanded by an Officer; and
d. Manned by a military crew.

2. History of Warships

For as long as there is a written history, human kind has been using ships to rage war at sea. The first historically recognized maritime power, at the age before Christ, was a Carthage's navy - a powerful city-state in northern Africa. Only after the break of Punic wars[61], did Crathage got destroyed and its status as a powerful navy shifted to Rome. Roman, Greek and Persian empires were the first to recognize importance of navy, and did everything to develop it.[62]

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[60]Bryan A. Garner, *Loc.Cit.*, page 1727.
[61]There were three Punic wars raiged between Chartage and Rome. First Punic War between 264 and 241 BC, Second Punic War between 218 and 201 BC, and Third Punic War between 149 and 146 BC. **Punic Wars** (*online*), http://www.history.com/topics/ancient-history/punic-wars, (21 June 2014).
[62]**History of Boats and Ships** (*online*), http://www.historyworld.net/wrldhis/PlainTextHistories.asp?ParagraphID=bnf1, (21 june 2014).

The most recognizable importance of warships was at the time of age of sail, when naval warfare was dominated by sailing ships, at the period of 16th century. The strength of sailing ships could be seen through devastating battles like one in the first Anglo-Dutch War in February 1653, off the Coast of Portland, England.[63] Even though sailing ships were constantly upgraded, in order to move faster, and at the same time to be able to maneuver and fight, sailing ships were replaced by steam powered ships in 19th century.[64]

Ships powered by steam opened possibility of inland exploration, which was first done by *Alburkah* ship which sailed the river Niger in Western Africa starting from Milford Haven in July 1832.[65] American inventor Fulton build first warship steamer for American navy at the days of the war of 1812 called *Demologos*or *Word of the People*. Steamer at this period were moved by steam power and pedal wheals, later replaced by screw propeller, and first used in *Princeton* warship designed by Ericsson.[66]

At the end of 19th and early 20th century, the naval warfare changed all together, when battleships entered the scene. Battleship is a warship of the most heavily armed kind.[67] The ship that started an era of armored warships was a battleship built at Portsmouth Dockyard, England at 1906, called *HMS Dreadnought*, represented as one of the most notable design

[63]**History Year by Year**, Dorling Kindersley Limited, London, 2011, page 219.
[64]**History of Boats and Ships**, *Loc.Cit.*
[65]*Ibid.*
[66]Jhon H. Lienhard, **The Steam Navy** (*online*), http://www.uh.edu/engines/epi2322.htm, (21 June 2014).
[67]Helen Liebrck & Elaine Pollard, **The Oxford English Minidictionary**, Oxford University Press, New York, 1995, page 40.

transformations of the armored warship era,[68] causing all battleship designed in its image to carry its name, dreadnoughts. In 1916, fearing of Japan and Germany, USA Congress authorized a large Navy to counter these threats, which was the largest naval building program, producing ten battleships and six battle cruisers.[69] Battleships were used in naval warfare all the way through the 20th century, during the first and Second World War and in a less extent during the cold war era, at which point they were replaced by larger, more powerful and more armed warships.

3. Types of Warships Today

Warships today harvest nuclear energy and can sustain long period of time sailing, which many of them do by cruising all the seas and oceans of the world. There are several major types of modern warships such as:

a. Submarines – a vessel that can be submerged and navigated under water, usually built for warfare and armed with torpedoes or guided missiles.[70]

b. Aircraft Carriers – A warship designed to support and operates aircraft, engage in attacks on targets afloat or ashore, and engage in sustained operations in support of other forces.[71] Designated as

[68]**HMS Dreadnought (Battleship, 1906-1922)**(*online*), http://www.history.navy.mil/photos/sh-fornv/uk/uksh-d/drednt9.htm, (21 June 2014).
[69]Trent Hone, **High Speed Throughbreds: The U.S. Navy's Lexington Class Battle Cruiser Designs**, Jhon Jourdan (Ed.) & Stephen Dent (As.Ed.), **Warship 2011**, Conway, London, 2011, page 8-30.
[70]**English Dictionary** (*online*), http://dictionary.reference.com/browse/submarine, (21 June 2014).
[71]**The Free Dictionary** (*online*), http://www.thefreedictionary.com/aircraft+carrier, (21 June 2014).

Cruiser Aviation or Voler (CV) or CVN. CVN is nuclear powered.[72]

c. Destroyers – A small, fast, highly maneuverable warship armed with guns, torpedoes, depth charges, and guided missiles.[73]

d. Frigates – any of various types of modern naval vessels ranging in size from a destroyer escort to a cruiser, frequently armed with guided missiles and used for aircraft carrier escort duty, shore bombardment, and miscellaneous combat functions.[74]

e. Corvettes – A small warship designed for convoy escort duty.[75]

f. Patrol Forces - a vessel designed to patrol area.

g. Amphibious Forces – "An assault ship which is designed for long sea voyages and for rapid unloading over and on to a beach".[76] It is designed to embark, deploy, and land elements of a landing force in an assault by helicopters, landing craft, amphibious vehicles, and by combinations of these methods.[77] France and Spain is leading navies in Europe that have realized the importance of Amphibious Forces for their ability to deploy and sustain an expeditionary force at distance.[78]

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[72]**CV - Aircraft Carriers**(*online*), http://www.history.navy.mil/photos/shusn-no/cv-no.htm, (21 June 2014).
[73]*Loc.Cit.*,http://www.thefreedictionary.com/Destroyer+%28ship%29, (21 June 2014).
[74]*Loc.Cit.*,http://dictionary.reference.com/browse/frigate (21 June 2014).
[75]**Oxford Dictionares** (*online*), http://www.oxforddictionaries.com/definition/english/corvette, (21 June 2014).
[76]Loc.Cit., http://www.thefreedictionary.com/Amphibious+assault+ship, (21 June 2014).
[77]Department of Defence, **Amphibious Assault Ship (general purpose),** (*online)*,http:// usmilitary. about.com/cs/generalinfo/g/amassgp.htm, (21 June 2014).
[78]Conrad Waters, **Modern European Amphibious Assoult Ships**, Jhon Jourdan (Ed.) & Stephen Dent (As.Ed.), **Warship 2011**, Conway, London, 2011, page 80-93.

4. Legal Status of a Warship under International Law

United States and England were the first states to adopt the classic formulation of sovereign immunity of warships[79] at the beginning of 19th century, with an important factor that needs to be upholder, and it is a public use of the ship.[80] The understanding public use of ships from warships slowly expanded to all ships owned by a state, even those used for commercial purpose.[81] The purpose of advancing the trade of its people or providing revenues for its Treasury, a government acquires, mans, and operates ships in the carrying of trade, they are public ships in the same sense that warships are.[82] Such stand point was firmly uphold by U.S. Supreme Court again in 1943 case[83], ruling that foreign state owned vessels were immune from suit in United States, even if both the vessel and claim were commercial.

Contemporary international law's development of sovereign immunity attributable to state owned vessels has a different view on the condition of a public service that needs to be upheld by such vessel. International Convention for the Unification of Certain Rules Concerning the Immunity

[79]"The Classic formulation of sovereign immunity was first advanced by Justice Marshall in The Schooner Exchange v McFadden, case number 11 U.S. (7 Crunch) 116 (1812)"; Thomas H. Hill, 1981, **A Policy Analysis of the American Law of Foreign State Immunity** (*online*), Fordham Law Review Volume 50, Issue 2, http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2505&context=flr, (22 June 2014).

[80]Anonimus,**Sovereign Immunity of Foreign Vessels** (*online*), Columbia Law Review, Vol. 45 No. 1, January 1945,, http://www.jstor.org/discover/10.2307/1118228?uid=3738224&uid=2129&uid=2134&uid=2477111663&uid=2477111653&uid=2&uid=70&uid=3&uid=60&sid=21104349836003, (22 June 2014).

[81]Berizzi Brothers Co. v. Steamship Pesaro (271 U.S. 562 - 1926).

[82]Anonimus, **The Development of Sovereign Immunity Law in the United States** (*online*) http://iilj.org/courses/documents/AHistoricalIntroduction.pdf, (22 June 2014).

[83]*Ex parte* Republic of Peru, (318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 - 1943).

of State-Owned Ships 1926 and Additional Protocol from 1934 (hereinafter referred to as Convention 1926) regulates that:

a. "Sea-going ships owned or operated by States, cargoes owned by them, and cargoes and passengers carried on State-owned ships, as well as the States which own or operate such ships and own such cargoes shall be subject, as regards claims in respect of the operation of such ships or in respect of the carriage of such cargoes, to the same rules of liability and the same obligations as those applicable in the case of privately-owned ships, cargoes and equipment."[Article 1].

b. "As regards such liabilities and obligations, the rules relating to the jurisdiction of the Courts, rights of actions and procedure shall be the same as for merchant ships belonging to private owners and for private cargoes and their owners."[Article 2].

State owned sea-going vessels used for commercial purpose, have the same legal status of those sea-going vessels privately owned, thus sovereign immunity in such case does not apply. Further in Article 3 Paragraph (1) of Convention 1926 is stipulated that:

> "The provisions of the two preceding Articles shall not apply to ships of war, State owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State and employed exclusively at the time when the cause of action arises on Government and non-commercial service, and such ships shall not be subject to seizure, arrest or detention by any legal process, nor to any proceedings *in rem*."

According to Convention 1926 warships and state owned ships used for non-commercial purpose enjoy full sovereign immunity as it is awarded to State itself. This principle of sovereign immunity of warships is carried all through the international law of the sea development in 20th century. UNCLOS 1982, in Article 32 regulates that "nothing in this convention affects the immunities of warships and other government ships operated for non-commercial purposes", adopted from Article 22 Geneva Convention on the Territorial Sea and Contiguous Zone 1958. Sovereign immunity of

warships sailing High Seas was first regulated by Article 8, Paragraph (1) of the Geneva Convention on the High Seas 1958, wholly reproduced in Article 95 and Article 96 of UNCLOS 1982.

Sovereign immunity awarded to warships is not without its limit. It is regulated in Subsection C. Rules Applicable to Warships and Other Government Ships Operated for Non-Commercial Purposes of UNCLOS 1982 that a foreign warship has to comply to the laws and regulations of coastal State when it is traversing or proceeding through coastal State's territorial sea, if not, coastal State may require it to leave the territorial sea immediately.[84] In case of loss or damage resulting for non-compliance of a warship, flag state bares international responsibility.[85]

A warship will lose its status of a state organ if shipwrecked and abandoned, or under control of mutinous crew.[86] Contemporary international law does not address issue of abandonment in formal sense, but in some courts practices as well as in customary international law, the abandonment is considered as determining factor. The abandonment can be expressive, when state formally denounces its ownership rights, and implied abandonment, concluded through passing of time and inaction of Flag State to recover the wreck.[87]

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[84] *Ibid.*,Article 30.
[85] *Ibid*., Article 31.
[86] B.M. Dimri, 2013, **The Arrest of Argentine Warship 'ARA Libertad': Revisiting International Law Governing Warships, Sovereign Immunity, and Naval Diplomatic Roles** (*online*), Journal of Defence Studies, Vol-7, Issue-3, http://idsa.in/jds/7_3_2013_TheArrestof ArgentineWarship _bmdimri, (22 June 2014), page 97-124.
[87] Craig JS Forrest, 2012, **Culturally and Environmentally Sensitive Sunken Warships** *(online)*, Australian and New Zeland Maritime Law Journal, https:// maritimejournal.murdoch .edu.au/index.php/maritimejournal/article/view/181 (10 July 2014).

C. Overview Considering Shipwrecks

1. Definition of a Shipwrecks

English language defines shipwreck as a "destruction of a vessel because of circumstances beyond the owner's control, rendering the vessel incapable of carrying out its mission",[88] and as "remains of a wrecked ship".[89] The remains of wrecked ship can be of the commercial ship or even of the State owned ship, whether it is on the bottom of the sea or stranded at coast.

The formal definition was adopted by International Maritime Organization (IMO)[90], through Nairobi International Convention on the Removal of Wrecks, adopted on 18 May 2007 (hereinafter referred to as 2007 Nairobi Convention), and is expected to enter into force on 14 April 2015[91], as:

> "'Wreck', following upon a maritime casualty, means:
> a. a sunken or stranded ship; or
> b. any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or
> c. any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or
> d. A ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken."[Article 1, number (4)]

UNCLOS 1982 in Article 303 briefly addresses objects of archaeological and historical nature found at sea, not specifying whether

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[88] Bryan A. Garner, *Loc.Cit*., page 1504.
[89]"wreck", Jonathan Law & Elizabeth A. Martin, *Loc.Cit*., page 592.
[90]International Maritime Organization is an inclusive organizations where all interested parties can join,. Samuel Barkin, **International Organization: Theories and Institutions**, Palgrave Maximillian, New York, 2006, Page 1; IMO is seen as a hybrid international organization, considering that its work is not only done through state actors, but it is such organization that works closely to industry groups to gather information's about their issue – areas and to set standards. *Ibid*., page 45.
[91]IMO, **Nairobi International Convention on the Removal of Wrecks** (*online*), http://www.imo.org/About/Conventions/ListOfConventions/Pages/Nairobi-International-Convention-on-the-Removal-of-Wrecks.aspx, (22 June 2014).

such object is a ship, or a cargo, or a construction. While UNESCO Convention on Protection of the Underwater Cultural Heritage 2001 (hereinafter referred to as UNESCO Convention2001) has wide scope which includes all traces of humankind, not specifically regulating shipwrecks:

> "Underwater cultural heritage means 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:
>
> (i) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context;
>
> (ii) Vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
>
> (iii) Objects of prehistoric character."

2. Types of Shipwrecks

Each and every ship wrecks represents a part of our history. Whether such history is important for the world or just on a local level, distinguish the importance of the shipwreck itself. There are several types of shipwrecks:

a. Historical shipwrecks – these shipwrecks are archaeological sites, which if well preserved and undisturbed provide valuable information's, not only why such ship sunk, but as well as how it operated and sort of technological development at the period it sailed.[92]

b. Contemporary Shipwrecks – shipwrecks of a modern ship, such as oil tankers, very often cause pollution of marine environment. Example of such shipwreck is of the *Prestige* oil tanker, which

[92]Sam Willis, **Shipwreck, A History of Disasters at Sea**, Quercus, UK, 2008, page 12-14.

sunk at 2002 and is seen as Europe's worst environmental disaster.[93]

c. Warship wrecks – "State vessel that was owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes".[94]

D. Overview Considering Salvage

It is estimated that there is over three million shipwrecks spread across ocean floors[95] some of these shipwrecks have historical importance, and act as a time capsule providing valuable information's from the past. Salvaging of this shipwrecks have been conducted for as long as there is a ship in need. Certainly salvaging hundreds years ago was far different of the one done today. Then, tools used were nets, hooks, and divers who did not have proper equipment, thus salvaging of those ships that sunk in the deep area of oceans and seas was impossible. Today, the use of robotics, Global Positioning Systems and improved diving submersibles have increased the stakes in recovering wrecks and their cargoes from what was once thought to be depths unreachable by man.[96]

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[93]Fiona Govan, **Prestige oil tanker sinking: Spanish court finds nobody responsible** (*online*), http://www.telegraph.co.uk/news/worldnews/europe/spain/10447185/ Prestige-oil-tanker-sinking-Spanish-court-finds-nobody-responsible.html, (22 june 2014).

[94]Article 1, Number 8, 2001 Convention.

[95]UNESCO, **Wrecks** (*online*), http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/about-the-heritage/sites-and-museums/wrecks/, (22 June 2014).

[96]Tan Twan Eng, **Can Intellectual Property Rights Form A Part Of The Salvors' Traditional Rights, And Can A Balance Be Achieved Between Them? The Position Of English, American And South African Salvors In Light Of The Recent Decisions Of The 'R.M.S. Titanic' Cases In The United States Of America'** (*online*), unpublished Dissertation, Cape Town, Faculty of Law University of Cape Town, http://web.uct.ac.za/depts/shiplaw/theses/twan-eng.pdf, (22 June 2014).

1. Definition of Salvaging

The salvaging is an act, a service rendered by a person, who saves or helps to save maritime property.[97] Under customary law, rendering assistance at sea is a salvage service if it fulfills five conditions which are danger, voluntariness, success, place of rendering the service, and type of property saved.[98] Such service cannot be based on a contract or any other agreement attributing a legal duty to assist any subject of salvage from danger. The salver is entitled to receive a reward only if salvaging action was conducted successfully.

International Conference in Brussels was held in 1905, when those industries involved in maritime trade realized importance of unification of certain rules considering rendering assistance at sea, and five years later the International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea 1910 (hereinafter referred to as Convention 1910) was adopted. Convention 1910 regulated two types of service that could be provided to a ship in danger, which are assistance and salvaging,[99] but convention did not drawn distinction between these two terms, the difference is just academic.[100] Some academics state that the difference lies in whether or not the crew of the endangered vessels was still on board, which would be defined as assistance, and if the service was rendered to the abandoned vessel or recovery of the ships wreck, would be

[97] Jonathan Law & Elizabeth A. Martin, Loc.Cit., page 492.
[98] Natalia Malashkina, **Law Reform in the International Regime of Salvage: The Insurance Perspective** (*online*), unpublished Master Thesis, Sweden, Faculty of law, Lund University, 2010, http:/ /lup.lub .lu.se/ luur/download?func=downloadFile&recordOId=1698365&fileOId=1698369, (22 June 2014).
[99] Article 1, Convention 1910.
[100] Geoffrey Brice, **The Maritime Law of Salvage**, 5th Edition, Sweet & Maxwell, UK, 2011, page 21.

seen as salvaging.[101] Under IMO Convention 1989, the "salvage operation is defined as any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever."[102]

2. Types of Savaging

The salvaging is a service provided to a vessel in danger, and can be only differentiated on the purpose of such action. Whether purpose of salvaging is commercial or any other; the salvaging can be differentiated as follows:

a. Pure Salvage – arising without preexisting agreement between parties;[103] and
b. Contract Salvage - where owner of the wreck and salver enter in to salvaging contract before the beginning of salvaging operation, determining the pay that salver will receive for his service;[104]

In order for a salvage to be categorized as pure it needs to fulfill three elements. First it needs to be done when there is a real danger threatening loss or destruction, or detorioration of property, second, must be done voluntarily, and third must be successful (in whole or in part).[105] Main element of Contract Salvage is preexisting agreement between salver and owner of the wreck. The most famous contracts today are *Lloyd's Open*

[101]Enrico Vincenzini, **International Salvage Law**, Lloyd's of London Press Ltd, London, 1992, page 9.
[102]Article 1, Letter (a), IMO Convention 1989.
[103] Keith S. Brais, Esq.Brais& Associates, PA, **Marine Salvage at a Glance** (*online*), http://www.braislaw.com/files/salvage.pdf, (13 July 2014).
[104]**Salvage Contracts**(*online*), http://www.safesea.com/salvage/law/anderson/anderson_contracts.html, (22 June 2014).
[105]*Loc.Cit.*, Kieth; Lathrop v. Unidentified, Wrecked & Abandoned Vessel (817 F. Supp. 953 - 1993).

Form and *MARSLAV Form*, which provide that salver is engaged on a "no cure, no pay" basis, meaning that salver will be compensated only if salvage operation is successful.

The traditional view of salvage that has to be successful in order to be compensated slowly changed, especially in connection to environmental danger that some shipwrecks proposed. Salvers were not stimulated enough by traditional salvage law, since in case of environmental disasters the chances of success were minor. The incident that stimulated needed change in traditional law of salvage was the incident of *Amoco Cadiz*. *Amoco Cadiz* was an oil tanker while transporting 227.000 tons of crude oil, suffered a failure of her steering mechanism, causing her entire cargo to spill and pollutes 360 km of Brittany, France shorelines.[106] Because of the size of the ships, and the cargo those ships were carrying was often hazardous; salver was rewarded extra if he did everything in his power to prevent damage to environment.[107]

[106] **Amoco Cadiz** (*online*), http://www.cedre.fr/en/spill/amoco/amoco.php, (13 July 2014).
[107] Article 14, IMO Convention 1989.