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### Belligerent Obligations under Article 18(1) of the Second Geneva Convention: The Impact of Sovereign Immunity, Booty of War, and the Obligation to Respect and Protect War Graves

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The thoughts and opinions expressed are those of the author and not necessarily those of the U.S. government, the U.S. Department of the Navy, or the U.S. Naval War College.

## I. INTRODUCTION

Article 18(1) of the Second Geneva Convention obliges the parties to an international armed conflict,<sup>1</sup> “after each engagement” and “without delay,” to “take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.”<sup>2</sup> This article focuses on the latter obligation: the search for the dead, as addressed in the recently published International Committee of the Red Cross (ICRC) *Commentary on the Second Geneva Convention*.<sup>3</sup> The *Commentary* relates this obligation to two important concepts: war graves and the sovereign immunity of sunken warships.<sup>4</sup> The relevant language originally provided:

As a matter of fact, subject to the availability of skilled divers, time, resources, etc., ‘possible measures’ may include entering a sunken vessel to search for, and collect, the bodies of the dead trapped inside. As a matter of international humanitarian law, however, Article 18 does not appear to go as far as requiring that. Sunken warships and other ships sunken with their crews constitute war graves, which must be respected. These vessels regain their entitlement to sovereign immunity once they have sunk.<sup>5</sup>

Later, the drafters modified this paragraph of the *Commentary* and deleted the last sentence concerning sovereign immunity. Accordingly, the rejection of an obligation on the parties to the conflict to search for and collect the dead

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1. The present article is limited to situations of international armed conflict as defined in Common Article 2 of the 1949 Geneva Conventions. *See, e.g.*, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]. The article does not address the question of whether and to what extent Article 18(1) applies to the parties to a non-international armed conflict.

2. *Id.* art 18(1).

3. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE SECOND GENEVA CONVENTION: CONVENTION (II) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA (2017) [hereinafter COMMENTARY ON THE SECOND GENEVA CONVENTION]. The *Commentary* is also available online at <https://ihl-databases.icrc.org/ihl/full/GCII-commentary>.

4. *See id.* Article 18: Search for Casualties after an Engagement, ¶¶ 1616–1702 (noting that Robin Geiss authored this portion of the *Commentary* with contributions from Bruno Demeyere).

5. *Id.* ¶ 1688.

from the wreck of a sunken warship was not based on whether it is “possible” to do so, but rather, on the fact that sunken warships “regain” sovereign immunity “once they have sunk” and that they constitute war graves.<sup>6</sup>

With regard to sovereign immunity, two questions arise. First, do sunken warships enjoy sovereign immunity? Second, assuming sunken warships enjoy (rather than regain) sovereign immunity, would this difference affect the obligation under Article 18(1)? As to sunken warships constituting war graves, there are again two questions, neither of which is adequately addressed. First, when do sunken warships qualify as war graves? Second, who is obliged to respect war graves? The present article limits itself to these four questions. Thus, related legal areas, such as the rules on underwater cultural property, do not receive discussion because their scope of applicability is limited to times of peace.<sup>7</sup>

Before addressing these questions, a short disclaimer is required. I contributed to the *Commentary* both as an author and as a member of the reading committee. In principle, I agree with most of the *Commentary*'s interpretations of Article 18(1). My intent in this article is not to object to the fundamental analysis of that provision, but to provide clarifications that might contribute to a better understanding of one of the most important obligations imposed on States in the Second Geneva Convention and its relation to the concepts of sovereign immunity and war graves.

## II. SOVEREIGN IMMUNITY OF SUNKEN WARSHIPS: AN OBSTACLE TO THE PERFORMANCE OF ARTICLE 18(1) OBLIGATIONS?

As noted above, the ICRC originally took the position that sovereign immunity would prevent a belligerent State from searching for and collecting the dead from the wreck of a sunken enemy warship. It is important to note that, although the *Commentary* did not expressly address this issue, sovereign immunity does not pose an obstacle to actions taken by the flag State, but only, and if at all, to other States, namely belligerent States and neutral States. Before elaborating on the relationship between sovereign immunity and the obligations set forth in Article 18(1), it is first necessary to address the question of whether sunken warships enjoy sovereign immunity.

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6. *Id.*

7. See U.N. Convention on the Law of the Sea arts. 149, 303, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; see also Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 2562 U.N.T.S. 3.

*A. Sovereign Immunity of Sunken Warships: A Contested Issue?*

According to well-established rules of international law, ships qualifying as warships<sup>8</sup> enjoy sovereign immunity.<sup>9</sup> However, it is not entirely settled whether warships continue to enjoy sovereign immunity after being sunk.<sup>10</sup> While some concede that “the international law on sunken military craft is still evolving,”<sup>11</sup> others take the view that even if the wreck remains the property of the flag State it no longer enjoys sovereign immunity because a sunken warship is no longer capable of performing exclusively governmental non-commercial functions.<sup>12</sup> The distinction between ownership and sovereign immunity is important, especially if a ship operated for exclusively governmental non-commercial purposes is not owned by the flag State.<sup>13</sup> If ownership rests with the flag State, there is no requirement to make that distinction, because as State property they continue to enjoy sovereign immunity

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8. For the definition of warships, see UNCLOS, *supra* note 7, art. 29. It is still an unresolved issue as to whether unmanned maritime systems qualify as warships, although they enjoy sovereign immunity. For a discussion of this issue, see Michael N. Schmitt & David S. Goddard, *International Law and the Military Use of Unmanned Maritime Systems*, 98 INTERNATIONAL REVIEW OF THE RED CROSS 567 (2016). Since it is highly improbable that there will be dead protected persons within the wreck of a sunken unmanned maritime system, the legal status of these systems is not addressed in the present article.

9. See UNCLOS, *supra* note 7, art. 95 (noting that Article 95 is reflective of customary international law); see also U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 2.1 (2017) [hereinafter THE COMMANDER'S HANDBOOK].

10. For an in-depth discussion, see Natalino Ronzitti, *The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law*, 76 YEARBOOK OF THE INSTITUTE OF INTERNATIONAL LAW 267, 286–95 (2016).

11. J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 558 (3d ed. 2012); see also Valentina Vadi, *War, Memory and Culture: The Uncertain Legal Status of Historic Sunken Warships Under International Law*, 37 TULANE MARITIME LAW JOURNAL 333 (2013); SARAH DROMGOOLE, UNDERWATER CULTURAL HERITAGE AND INTERNATIONAL LAW 134–66 (2013).

12. See, e.g., Janus Symonides & Michal Symonides, *Droits de l'Etat du Pavillon sur les Épaves des Navires de Guerre et des Autres Navires d'Etat Utilisés à des Fins Non Commerciales*, 28 REVISTA EUROPEA DE LA NAVEGACIÓN MARITIMA Y AERONAUTICA 1, 17 (2012).

13. The phrase “belonging to” in Article 29 of UNCLOS does not mean that the flag State must have ownership. For “belonging to,” it suffices if the ship is operated by the regular armed forces of the flag State for exclusively governmental non-commercial purposes. See Wolff Heintschel von Heinegg, *Warships*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Oct. 2015), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e443#>.

until that State has clearly abandoned the wreck, or relinquished or transferred title to it.<sup>14</sup> If, however, property does not rest with the flag State, for example, because the warship has been leased,<sup>15</sup> sovereign immunity no longer can be linked to State property. It may be recalled that the definition of “warship” does not require the flag State to own the vessel. Accordingly, a ship enjoys sovereign immunity, if it is operated for exclusively governmental non-commercial purposes.<sup>16</sup>

The fact that a sunken warship is no longer capable of exercising exclusively governmental functions does not deprive it of its sovereign immune status.<sup>17</sup> There is overwhelming evidence in case law, governmental statements, and scholarly publications that sunken warships continue to enjoy sovereign immunity unless the flag State has expressly abandoned the vessel and waived its right to claim sovereign immunity.<sup>18</sup> Accordingly, it is clear that the immunity of sunken warships must be respected both in times of war and peace. A warship acquires its immunity when it begins operations in the regular armed forces of the flag State. If sunk by the enemy, it continues to enjoy sovereign immunity; it does not regain it. Seemingly, the ICRC, by deleting the last sentence of paragraph 1688 in the original *Commentary*, has decided no longer to take a position on the sovereign immunity of sunken warships. Conversely, the ICRC is prepared to agree that for the purposes of Article 18 sovereign immunity is irrelevant. We will return to these points in the following section.

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14. Institute of International Law, Resolution, The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law art. 4, Aug. 29, 2015, in 76 YEARBOOK OF INSTITUTE OF INTERNATIONAL LAW 362–66 (2016).

15. In 2008, the Royal Navy (U.K.) leased four warships. See Tim Webb, *Guns for Hire? No, but There Are Warships for Rent*, GUARDIAN (Mar. 29, 2008), <https://www.theguardian.com/business/2008/mar/30/military>.

16. See *supra* note 13.

17. Ronzitti, *supra* note 10, at 294.

18. For a multitude of references, see *id.* at 288–96; see also THE COMMANDER’S HANDBOOK, *supra* note 9, ¶ 2.1.2 (“Sunken warships . . . retain their sovereign immune status and remain the property of the flag State until title is formally relinquished or abandoned, whether the cause of the sinking was through accident or enemy action (unless the warship . . . was captured before it sank.”)); Jason R. Harris, *Protecting Sunken Warships as Objects Entitled to Sovereign Immunity*, 33 UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW 101, 110–24 (2002). But see David J. Bederman, *Rethinking the Legal Status of Sunken Warships*, 31 OCEAN DEVELOPMENT AND INTERNATIONAL LAW 97, 97 (2000) (“[S]unken warships may be implicitly abandoned through a long lapse of time and a clear intention not to claim or recover the vessel.”).

*B. Sovereign Immunity and Booty of War*

The above conclusions would be incomplete without establishing the relationship between the sovereign immunity of sunken warships and the concept of booty of war.<sup>19</sup> Most importantly, if enemy sunken warships qualify as booty of war, sovereign immunity will not prevent the enemy from capturing and appropriating them.

The ICRC *Commentary* addresses the issue of booty of war only in the context of the protection against pillage.<sup>20</sup> As far as naval warfare is concerned, the *Commentary* only deals with “appropriation of enemy property in the port of an enemy” and with “measures short of attack,” that is, with prize measures directed against merchant vessels and their cargoes.<sup>21</sup> Notwithstanding that such measures are highly unlikely to be taken against enemy property in the hands of the wounded, sick, or shipwrecked, or against items in possession of the dead, the *Commentary* fails to relate the concept of booty of war to the issue of sovereign immunity of sunken warships and to clearly distinguish it from capture as prize.<sup>22</sup>

Crucially, sovereign immunity is not a bar to the right to destroy enemy warships nor to make them booty of war, even if that immunity continues to apply to sunken warships. As rightly stated by Yoram Dinstein, “there is no doubt that warships and other vessels belonging to the enemy—as well as their cargo—become booty and title passes to the adversary belligerent party immediately upon capture.”<sup>23</sup> In other words, in relations between the belligerents “sovereign immunity is without prejudice to the well-established belligerent right to treat captured enemy warships . . . as booty of war.”<sup>24</sup> In this context, it is important to note that warships do not become booty of

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19. For the concept of booty of war, see Yoram Dinstein, *Booty in Warfare*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Sept. 2015), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e256>; see also H. A. Smith, *Booty of War*, 23 BRITISH YEARBOOK OF INTERNATIONAL LAW 227 (1946).

20. COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 3, ¶ 1669.

21. *Id.*

22. Capture of a merchant vessel under prize law must be adjudicated by a duly established prize court. This requirement does not apply to the capture of enemy warships. See Dinstein, *supra* note 19.

23. *Id.*

24. Wolff Heintschel von Heinegg, *The Law of Military Operations at Sea*, in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 375, 394 (Terry D. Gill & Dieter Fleck eds., 2d ed. 2015).

war simply because the enemy sank them.<sup>25</sup> Rather, they become booty of war only if captured, which requires that the enemy has taken physical possession of the vessel with the intent of capturing it.<sup>26</sup>

It remains unsettled, however, whether sunken warships may become booty of war. According to Ashley Roach, “title to sunken warships is lost only through capture during wartime (before sinking) or through express action of the flag State.”<sup>27</sup> This position suggests that sunken warships may not be captured, and thus may not become booty of war. Since Roach has inserted the words “before sinking” in parentheses, he may not exclude the possibility of capturing sunken enemy warships and making them booty of war after salvage, however, his position on this point remains unclear. Further, it must be borne in mind that capture of an enemy warship will most likely occur after the vessel has been defeated or if it has surrendered. Although it would require considerable effort to recover a sunken warship, in many instances it would not be impossible. If damaged enemy warships can become booty of war, there is no reason to exclude the exercise of that right vis-à-vis sunken warships.

While belligerent warships continue to enjoy sovereign immunity after sinking, the enemy belligerent is not obliged to respect this immunity until the end of hostilities. Indeed, the enemy belligerent may inspect, salvage, and capture the wreck throughout the duration of the conflict. Only after the conflict ends will States be obliged to respect the sovereign immunity of the sunken warships of their former adversary. Of course, this requirement applies only to the belligerents; neutral States and their nationals remain obliged to respect the sovereign immunity of sunken belligerent warships at all times.

The sovereign immunity of sunken enemy warships does not bar a belligerent from capturing the wreck. *A fortiori*, the belligerent may enter the wreck for any reason it wishes. Since the sovereign immunity of sunken enemy warships is irrelevant as between the belligerents, a party to an international armed conflict is required to search for and collect the dead present in the wreck, if that is possible.

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25. See Symonides & Symonides, *supra* note 12.

26. See J. Ashley Roach, *Warships, Sunken*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Feb. 2015), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e444>. For example, during the 1956 Suez Crisis, Israeli Defence Forces captured the Egyptian warship *Ibrahim el Awal*. After repair, the Israeli forces renamed the warship *Haiifa* and integrated it into the Israeli Navy. *Id.*

27. *Id.*; see also THE COMMANDER'S HANDBOOK, *supra* note 9, ¶ 2.2 (suggesting the preclusion of capture after sinking).

Accordingly, the application of Article 18(1) does not depend on whether the wreck has sovereign immunity, but only on whether the search for and the collection of the dead is possible under the prevailing circumstances.<sup>28</sup> The *Commentary* should have made that point abundantly clear. The fact that the recovery of the dead from a wreck involves considerable burdens—technical, financial, or otherwise—does not absolve the parties from compliance with Article 18(1).

### III. SUNKEN WARSHIPS AS WAR GRAVES

As correctly stated in the ICRC *Commentary*, the obligations under Article 18(1) are complemented by the obligations set forth in Article 19<sup>29</sup> and Article 20<sup>30</sup> of the Second Geneva Convention. Accordingly, the dead must be collected after a successful search.<sup>31</sup> Still, the link between those provisions is not as strong as suggested. In particular, the obligation under Article 19 only applies to dead enemy personnel in the hands of a party to the conflict.<sup>32</sup> Hence, Articles 19 and 20 supplement Article 18(1), but do not serve as justification for an increased obligation under the latter provision. The *Commentary* concedes this point by recognizing that Article 18(1) does not oblige the parties to the conflict to search for and collect bodies trapped inside a sunken vessel.<sup>33</sup> Rather, the *Commentary* cites the fact that sunken warships may constitute war graves as another reason that the obligation under Article 18(1) does not apply to the dead present within the wreck.<sup>34</sup>

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28. For an in-depth discussion of what is possible in the sense of Article 18(1), see COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 3, ¶¶ 1634–52.

29. Article 19 addresses recording and forwarding information concerning the shipwrecked, wounded, sick, and dead in the hands of the opposing belligerent, death certificates, and collection and forwarding of the personal effects of the dead. *See* Geneva Convention II, *supra* note 1, art. 19; *see also* COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 3, ¶¶ 1703–1808.

30. Article 20 concerns treatment and burial of the dead. *See* Geneva Convention II, *supra* note 1, art. 20; *see also* COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 3, ¶¶ 1809–54.

31. COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 3, ¶ 1688.

32. Geneva Convention II, *supra* note 1, art. 19.

33. COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 3, ¶ 1688.

34. *Id.*

### A. *Sunken Warships as War Graves*

Left unresolved is the issue of the conditions that would render a sunken warship a war grave. Roach holds that “once hostilities have ended, sunken military craft and artefacts containing crew remains are entitled to special respect as war graves and must not be disturbed without the explicit permission of the sovereign flag State.”<sup>35</sup> However, international treaties neither regulate nor define the concept of war graves at sea. Article 17 of the First Geneva Convention,<sup>36</sup> Article 120 of the Third Geneva Convention,<sup>37</sup> and Article 130 of the Fourth Geneva Convention<sup>38</sup> only address terrestrial war graves. This is also true for the bilateral treaties concluded between the former belligerents following the Second World War.<sup>39</sup> Further, the Second Geneva Convention does not address war graves, but merely provides for burial at sea.<sup>40</sup> The location of a burial at sea does not qualify as a war grave because it need not be registered or marked, nor are the parties to the conflict required to inform the relatives of the dead of the location of the burial.

Still, this does not mean that sunken warships cannot be war graves. The ordinary meaning of grave suggests that graves are by necessity located in the soil and never at sea.<sup>41</sup> However, in the author’s view, any space or location where the dead find their enduring last rest qualifies as a war grave; hence, a warship containing the remains of crewmembers or other personnel sunk in the course of an international armed conflict qualifies as a war grave. Once qualified, it is immaterial whether, with the passage of time, the remains of the dead are detectable. The wreck of a sunken warship will remain a war grave until the flag State decides to terminate that status.

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35. Roach, *supra* note 26.

36. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 17, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I].

37. Convention (III) Relative to the Treatment of Prisoners of War art. 120, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

38. Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 130, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

39. For references to these agreements, see Michael Bothe, *War Graves*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1373–74 (Rudolf Bernhardt ed., 2000).

40. Geneva Convention II, *supra* note 1, art. 20.

41. Grave is defined as “a hole dug in the ground to receive a coffin or corpse.” CONCISE OXFORD ENGLISH DICTIONARY 622 (12th ed. 2011).

While the wrecks of sunken warships may qualify as war graves, it is uncertain whether this is the case from the time of the sinking to the termination of the conflict. As noted above, Roach's premise is that sunken warships become war graves "once hostilities have ended."<sup>42</sup> While an arguable position, it is not necessarily the correct one. Although the Second Geneva Convention is silent as to war graves, Article 17 of the First Geneva Convention obligates the parties during an international armed conflict to inter the dead of the opposing belligerent and respect their graves.<sup>43</sup> The last paragraph of that Article refers to the period following the end of hostilities only with regard to the obligation to "exchange, through the Information Bureau . . . lists showing the exact location and markings of the graves together with particulars of the dead interred therein."<sup>44</sup> Thus, the obligation to respect war graves under Article 17 begins at the time of internment.<sup>45</sup> Similarly, war graves at sea can be established during the course of an armed conflict.

*B. The Obligation to Search for and Collect the Dead*

If, as held by Roach, sunken warships do not qualify as war graves before the end of hostilities, the obligation under Article 18(1) will be fully applicable, subject only to the condition that search and collection are possible. Under the position taken by this author, where sunken warships may constitute war graves before the termination of the armed conflict, the parties to the conflict (as well as other States and their nationals) would be obligated to respect these sunken warships and to refrain from disturbing the peace of the dead.

Of course, the belligerent to whom the dead belong may decide to recover their remains in order to identify them, inform the relatives, and bury them with dignity. Given the considerable advances in marine forensics and

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42. Roach, *supra* note 26.

43. Geneva Convention I, *supra* note 36, art. 17.

44. *Id.*

45. For a discussion of the obligation to respect graves under Article 17, see INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION: CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶¶ 1687–89 (2016); see also *id.* ¶ 1684 ("The obligation to inter the dead honourably is an *absolute one*. It has both positive and negative aspects. Parties must respect the body of the deceased, the burial site and the interment ceremony.") (emphasis added).

marine taphonomy,<sup>46</sup> it is now possible to establish the identity of individuals who lost their lives at sea well in the past. A belligerent is, therefore, entitled take all necessary measures to recover the remains of their dead from its sunken warships, both in times of peace and war. Accordingly, classification of a sunken warship as a war grave does not bar the belligerent to whom the dead belong from taking the measures provided for in Article 18(1).

But the question remains as to whether a belligerent may rely on Article 18(1) as legal authority to search for and collect the dead from a sunken warship belonging to the enemy. The *Commentary* seems to suggest that the obligation to respect sunken warships as war graves prevails over the obligation under Article 18(1). This conclusion is difficult to justify, however, because of the Second Geneva Convention's silence as to war graves at sea, which stands in contrast to its clearly stated obligation to search for and collect the dead "without delay" and for as long as possible. It may be that in negotiating the Second Geneva Convention, States did not intend to extend the obligation under Article 18(1) to the dead in sunken warships. In view of the experience of the two World Wars, the negotiators were certainly aware of the issue and could have specifically addressed it. In addition, the technology available in 1949 to conduct underwater searches and to collect the dead from sunken warships was then at a very early stage of development. Nevertheless, the Article 18(1) criterion of "all possible measures" is to be interpreted in light of technological advances, not limited to what was possible in 1949. Moreover, the parties to the conflict are under a clear obligation to comply impartially with Article 18(1). As rightly stated in the ICRC *Commentary*, "Article 18 . . . sets out specific obligations that flow from the obligation of Article 12 to respect and protect the wounded, sick and shipwrecked."<sup>47</sup> This obligation extends to the dead. Accordingly, the parties to the conflict must search for and collect the dead within a sunken warship, if that is possible, out of respect for their remains, the dignity of the dead, the "feelings of the families of the deceased,"<sup>48</sup> and the legitimate interests of the enemy. As such, to which party the dead belong is irrelevant.

It follows that, in principle, and for the duration of an international armed conflict, the Article 18(1) obligation prevails over the duty to respect sunken warships as war graves. This absolute interpretation of the Convention would, however, be difficult to maintain if the belligerent to which the

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46. See COMMENTARY ON THE SECOND GENEVA CONVENTION, *supra* note 3, ¶ 1686 n.82.

47. *Id.* ¶ 1616.

48. *Id.* ¶ 1682.

warship belongs has affirmatively declared the wreck to be a war grave. After all, other than in land warfare where the belligerents are obligated to establish war graves for the enemy dead, there is no entity other than the flag State that can make that decision. First, only the flag State may decide which warships, including sunken warships, enjoy sovereign immunity. Second, because of the bond of nationality, it is again the flag State that is entitled to decide whether the dead crewmembers of its warships should remain inside a wreck instead of being “honourably interred” on land.<sup>49</sup>

The wrecks of sunken warships constitute war graves at sea that must be respected by the parties to the conflict (as well as by neutral States and their nationals). As in land warfare, war graves at sea may be established prior to the end of hostilities. Nevertheless, given its object and purpose—respect for the dead and the feelings of their families—the Article 18(1) obligation prevails over the duty to respect war graves at sea, provided search for and collection of the dead in the wreck of a sunken warship is possible. If the belligerent to whom the sunken warship belongs has declared its sunken warships war graves, the enemy belligerent is obliged to respect that decision and will no longer be bound by the Article 18(1) obligation.

#### IV. CONCLUSION

Under Article 18(1) of the Second Geneva Convention, the belligerent’s duty to search for and collect the dead extends to their remains within the wrecks of sunken warships. The fact that sunken warships continue to enjoy sovereign immunity does not bar the application of Article 18(1). In this author’s view, sunken warships qualify as booty of war, therefore, the obligation to respect the sovereign immunity of foreign warships, including sunken warships, does not apply between the parties to an international armed conflict. Accordingly, the sentence addressing sovereign immunity in paragraph 1688 of the online version of the *Commentary*<sup>50</sup> has (appropriately) been deleted and is not included in the print version.

The *Commentary*’s reference to war graves should, however, be modified. While sunken warships may qualify as war graves that must be respected, that status would impact the obligations under Article 18(1) only if the belligerent to whom the sunken warship belongs has affirmatively determined

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49. Geneva Convention I, *supra* note 36, art. 17.

50. See *supra* note 5 and accompanying text.

that the wreck constitutes a war grave. If that determination has not occurred, the enemy belligerent continues to be bound by Article 18(1) to search for and collect the dead, if that is possible.