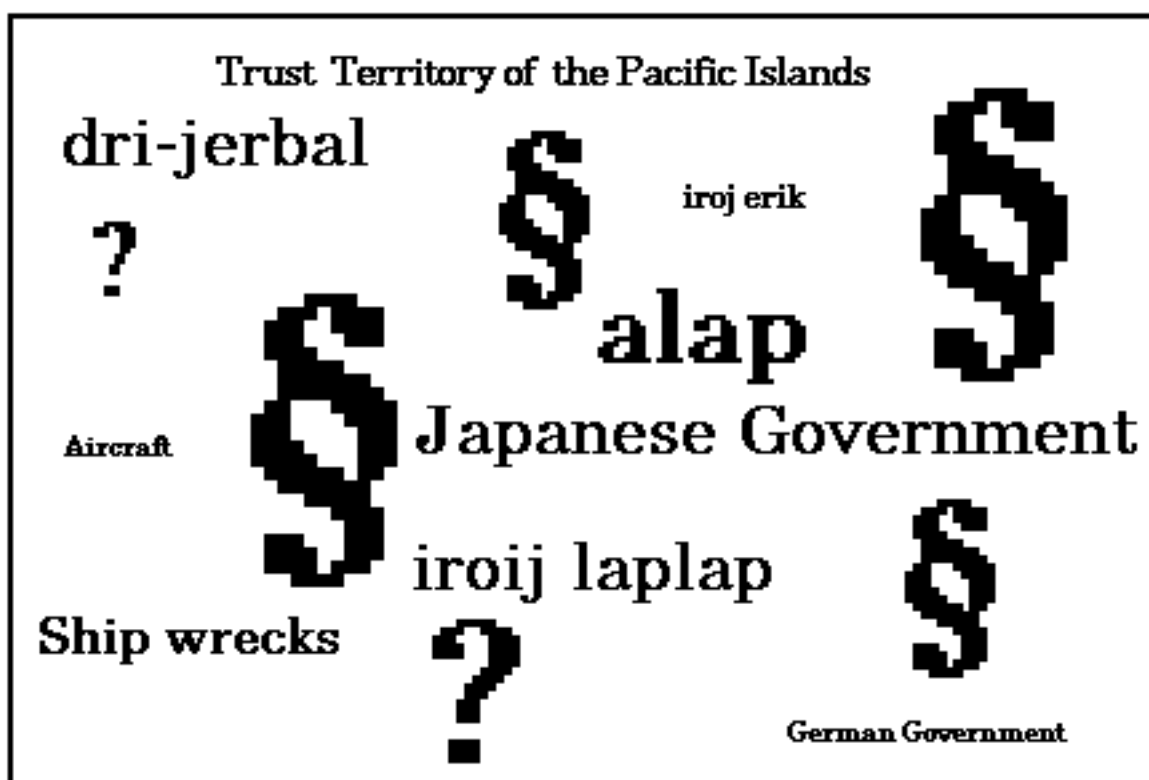


THE OWNERSHIP OF CULTURAL RESOURCES IN THE MARSHALL ISLANDS

Dirk H.R.Spennemann



MAJURO, MAY 1990

THE OWNERSHIP OF CULTURAL RESOURCES IN THE MARSHALL ISLANDS

**AN ESSAY IN PERTINENT JURISPRUDENCE
AND LEGAL HISTORY**

by

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Preface

World-wide, the ownership of cultural resources is a disputed topic. That discussion, however, mainly revolves around the question of a potential repatriation of cultural property, which, in the past, had been taken out of one country by another country. Settlement is a matter of international bilateral relations, commonly between countries of the third world asking for the return of items of their heritage, and countries of the first world, having the items in their possession.

However, in some circumstances there is still a need for a state or sovereign to assert ownership in the archaeological and cultural resources of its own heritage within its own jurisdiction. In the absence of specific legislation for the protection of its cultural and historical heritage this is the case in the Republic of the Marshall Islands. In the absence of pertinent and comprehensive legislation controlling the ownership and disposal of archaeological and cultural material, the common law and all other pertinent public laws need to be drawn upon. The present paper deals with the present legal situation in the Marshall Islands, reviews the ownership of various categories of cultural resources, and points out the available options. The paper forms part of the preparations for a cultural resource management study on the cultural resources of Majuro Atoll, which is currently being drafted by the author.

As will become clear in this paper, especially the historical resources located in the Republic of the Marshall Islands have a multitude of different owners, some of them foreign sovereigns, effectively preventing a simple approach to the matter. Based on the findings of this study, there may be a need for a legislative solution governing the ownership of the resources.

I am profoundly indebted to Mark Rosen (Legislative Counsel for the Nitijela, Majuro), Scott Steege (Attorney at Law, Kwajalein Atoll Development Authority, Majuro) and Linda Wingenbach (Attorney at Law, Micronesian Legal Services, Majuro), as well as one reviewer who wished to remain unnamed, for discussing and/or reading and commenting upon a draft version of this paper and for discussions of the matter. Any sins of omission or commission are, of course, entirely mine. Both Linda and Scott also made available their legal libraries, without which very little could have been accomplished.

The report forms part of a study on the management of the archaeological and cultural resources of the Marshall Islands and was prepared under a technical Assistance Grant of the Office of Territorial and Insular Affairs of the U.S. Department of Interior. The views expressed in this paper are those of the author and not necessarily reflect those of the U.S. Department of Interior.

Introduction

Cultural Resource Management Planning hinges on three questions: *What and where are the resources? What are the threats to the well-being of those resources?* and finally, and most crucially, *Who owns them?* Apart from the identification and classification of the archaeological and cultural resources and the identification and discussion of any potential threats to these resources, the most important issue to be addressed is the ownership. Without absolute and equivocal clarity about the legal ownership of the resources any cultural resource management planning will be founded on a very weak basis indeed.

The issue of ownership of the archaeological and cultural resources in the Marshall Islands is complex. Not only do we have to distinguish between immovable resources, such as archaeological sites, and moveable resources, such as artefacts, but we also have to take into account land ownership. Whereas the traditional landownership is a complex affair in itself, the matter is further complicated by the land transactions, legal or otherwise, which took place during the periods of the German, Japanese and U.S. administration.¹

As will become clear from the discussion below, there cannot be a single successful concept for dealing with the ownership of sites and this with the successful protection of the cultural heritage of the Marshall Islands.

In particular we will have to address in detail the following major ownership issues:

- Ownership of land
- Ownership of submerged resources

- Ownership of inter-tidal resources
- Ownership of moveable resources pre-dating World War II
- Ownership of moveable resources dating to World War II
- Ownership of immovable resources dating to World War II
- Ownership of ordnance propelled onto Marshallese land
- Ownership of human remains found on Marshallese land

The discussion presented in this section draws almost entirely upon the existing and pertinent legal literature², such as the *Constitution of the Republic of the Marshall Islands*, the *Marshall Islands Revised Code of 1989* and the *Compact of Free Association between the the Government of the United States and the Government of the Republic of the Marshall Islands* (1982), which have binding value; the findings and rulings of the Trial and the Appellate Divisions of the High Court of the Trust Territory as reported in the *Trust Territory Reports* vols. 1 to 8, which are regarded to possess strong persuasive value;³ and the cases cited and opinions expressed in *American Jurisprudence 2nd edition*, which are regarded to possess persuasive value only. Drawn upon for historical legal information were the *Trust Territory Revised Code of 1966*, the *Treaty of Versailles* (1919), the *Covenant of the League of Nations* (1919), the *Decision of the Council of the League of Nations relating to the Application of the Principles of Article 22 of the Covenant to the North Pacific Islands* (1920), the *Charter of the United Nations* (1945), and the *Trusteeship Agreement for*

the Trust Territory of the Pacific Islands (1947). Q.Wrights excellent volume on the

Mandates under the League of Nations ⁴ was also extensively consulted.

1. Ownership of land

According to the traditional Marshallese custom, land is owned by a clan and, therefore, a multitude of people holds rights to individual parcels of land (*wato*). Ownership of such rights changed by marriage, inheritance and by warfare. Since the arrival of the European visitors, however, other concepts of landownership were developed, at least for the parcels of land the Europeans (and Japanese) held interest in, which may or may not be contradictory to Marshallese custom, but which have come to be accepted fact by the general acquiescence even of those persons negatively affected.⁵ The changes in the colonial and trusteeship administrations have brought about further developments and changes in such land titles, that a detailed discussion is necessary to unravel the knot. In particular, we have to distinguish between three major land ownership issues:

T.T.P.I.

- Traditional ownership of land (in Marshallese hand)
- Ownership of land formerly owned by the Imperial German and Imperial Japanese Governments
- Ownership of land formerly used by the Imperial Japanese Navy to erect military bases

1.1.Traditional ownership of land (in Marshallese hand)

Traditional and modern land tenure in the Marshall Islands has been the focus of a number of studies.⁶ A number of people have a right in any given parcel of land: the

irooj/leeroj laplap, the *irooj/leeroj erik*, the *alap*, the *dri-jerbal* and, lastly, the lessee or tenant (if any).⁷ Under the Marshallese system of land tenure, there is an obligation on those holding rights in a piece of land to exercise the duty of loyalty all the way up the line *dri-jerbal*, *alap*, *irooj erik* to *irooj laplap* and a corresponding duty to protect the welfare of the subordinates running down the line, and strong obligation of cooperation running both ways.⁸

1.1.1. Entities holding traditional rights to a specific parcel of land

Irooj/Leeroj laplap: The position of *irooj laplap*⁹ is one of trust and responsibility, the succession to which depends on a combination of birth and recognised ability.¹⁰ There is no clearly established automatic succession to the office or the rights of an *irooj laplap*.¹¹ It is generally presumed that the *Irooj* will act justly within the framework of Marshallese custom¹² and that all land management decisions are made that way.¹³

The succeeding *irooj* needs to be recognised by all *alap* and other persons holding rights to the land.¹⁴ The *irooj laplap* has the right to a certain percentage of all proceeds from the land, be it produce, copra, or, today, monies generated by leases.¹⁵

Irooj/Leeroj erik: Prior to the increased influence of the European visitors an *irooj erik* was required to wage war offensively or defensively for the protection of his lands and the economic well-being of the people subject to him.¹⁶ An *irooj erik* may not terminate land interests of subordinates¹⁷ nor give or transfer land¹⁸ without the approval or

acquiescence of the *irooj laplap*. The *irooj erik* has the right to a certain percentage of all proceeds from the land, be it produce, copra, or, today, monies generated by leases.¹⁹

Alap : The *alap* is in charge of the organisation of the day-to-day activities on the land, as well as on the order among the people living in the wato. He is answerable, to some degree, to the *irooj laplap*. Succession of an *alap*²⁰ commonly follows the pattern in the succession of the *irooj laplaps* and *irooj eriks*.²¹ The *alap* has to respect the rights of the *dri-jerbal*²² and can designate a *dri-jerbal* on land without cutting off previously vested rights without good cause.²³ Unless in case of death of the *alap*, the rights of an *alap*, once vested, can only be terminated, changed or transferred by the *Irooj laplap* if “good cause” exists to do so.²⁴ Marshallese custom does not require the *alap* to live on the land or even work it.²⁵ *Tikoj v. Liwaikam* The *alap* has the right to a certain percentage of all proceeds from the land, be it produce, copra, or, today, monies generated by leases, the size of which is to be determined by the *irooj laplap*.

Dri-Jerbal: The rights of an *dri-jerbal*, once vested, can only be terminated, changed or transferred by the *Irooj laplap* or the *alap* if “good cause” exists to do so.²⁶ If an *alap* terminates a *dri-jerbal*'s rights, then the *irooj laplap* needs to approve.²⁷ Marshallese custom does not require the *dri-jerbal* to live on the land but it requires him to “work”²⁸ the land he holds rights in²⁹ and to perform the obligations towards *irooj* and *alap*.³⁰ The *dri-jerbal* has the right to a certain percentage of all proceeds from the land, be it produce, copra, or, today, monies generated by leases, the size of which is to be determined by the *irooj laplap*.

1.1.2 Transfer of land – General

Under Marshallese custom transfer of land could occur in a number of ways³¹ which

need to be described in short: *Inheritance* was the normal way of land transfer. The Marshallese system of inheritance of land rights is through the matrilineal lineage starting with the oldest through the youngest female sibling of each generation (*bwij*, and when it becomes extinct, a patrilineal succession through (commonly) the oldest male sibling (*ajri*) may occur for one generation; after that the interests pass in the new matrilineal line. Only if no children exist, a succession through an adopted child can be considered.³² *Gift*: Various forms of land transfer as an outright gift are recognised by Marshallese custom.³³ *Granting of partial rights to land* is possible, and commonly refer to the exploitation rights of certain trees or taro patches. This partial rights are always temporary and usually cease with the death of the grantor *War* was an exceptional case of land transfer. Titles to land seized during numerous wars between clans and lineages were recognised and have not been set aside.

Approval of any land transfer, however, needs to be given by the *irooj laplap* who must approve or acquiesce in any transfer of land interest before it is valid.³⁴ If lineage land is to be transferred in any way, be it by alienation, lease or mortgage, then the approval of the *Irooj erik*, *alap* and *dri-jerbal* must also be obtained, prior to obtaining the approval of the *Irooj laplap*.³⁵ This custom has also been included in the Constitution of the Republic of the Marshall Islands.³⁶ In addition, it is impossible for people holding rights to land to “throw off entirely all *Irooj laplap* controls over their land or pick up a new *Irooj laplap* of their own choosing for their lands”.³⁷

1.1.3 Transfer of land: Leasing land

The presently valid land law for the Republic of the Marshall Islands³⁸ stipulates that “only citizens of the republic, or corpora-

tions wholly owned by citizens of the Republic may hold title to land in the Republic”.³⁹ In order for foreigners to hold interest in any parcel of land, this parcel of land needs to be leased from the traditional owners.⁴⁰ Any such lease needs to compensate for the interests of all entities holding traditional rights to the land (see above).⁴¹ The rights of the lessee are limited, unless specified otherwise in the lease.

1.1.4. Land owned by the Catholic and Protestant churches

Deviating from the practice that only Marshallese are permitted to own land, the two major churches, the United Church of Christ of Micronesia (Protestant)⁴² and the Sacred Heart Mission (Catholic), were permitted to retain ownership over the land they had acquired land rights to during the periods of the Spanish, German⁴³ and Japanese administrations. Although several attempts have been made to dispute the landownership, courts have commonly confirmed the churches in their rights

1.1.5. The case of Likiep Atoll

A special case is represented with the landownership of the atoll of Likiep. The entire atoll had been bought in 1877 by the European traders Jose deBrum, A Capelle and Ingalls and since then has been held continuously in private land.⁴⁴ Although the atoll is in private hand, the rules of Marshallese custom apply, with some modifications. The powers of *irooj laplap* are vested with the heads of the families, while the *alap* rights are vested with the *dri-jerbal*. On their own part, the *dri-jerbal* follow the traditional Marshallese inheritance custom of the *alap* rights. In addition, *everybody* of these lineages holds *dri-jerbal* rights one way or another

1.1.6. Summary: Traditional landownership

In summing up, except in cases of public land — to be discussed below — and in the cases of land held by either the Catholic or the Protestant Churches, land is not owned by a single individual and land rights of varying degree are held by various people, namely — in decreasing order of traditional authority — the *irooj laplap*, the *irooj erik*, the *alap* and the *dri-jerbal*. Any matter concerning the land, therefore, needs the consensus, or at least the tacit agreement of all those affected

1.2. Ownership of land formerly owned by the Imperial German and the Imperial Japanese Governments

Over the past 150 years a number of nations held the sovereignty over the atolls and islands of the Marshall Islands: first Spain, then Germany, both “owning” the Marshalls outright and then Japan and the United States, handling the Marshalls on behalf of an international organisation, the League of Nations in case of Japan and the United Nations in case of the United States

1.2.1. General

The issue to be discussed here applies to the transfer of land rights when ceded or conquered territory passes from one sovereign to another. In international law it is held that the rights of citizens to their private property remain unaffected by the change in government.⁴⁵ The validity of any right is to be determined by the laws under which those rights arose and existed.⁴⁶ While this regulation clearly indicates that the frequent changes in sovereignty did not affect the ownership to private property, the case is somewhat different when discussing the ownership of property of the former sovereign as such. In order to clarify this issue

in detail it is necessary to lay it out in chronological sequence

1.2.2. History of land holdings

Status of landownership during the period of the Spanish rule: As far as can be ascertained, the Spanish “owned” the Marshall Islands⁴⁷, but never promulgated any specific landownership rules there. Historical resources indicate that trade in parcels of land took place between Marshallese and Europeans traders and between European traders themselves.⁴⁸ Occasionally, the traders traded back some of the peivces of land they owned.⁴⁹ Alwyas, purchases seem to have been made with the irooj laplap being the contact for and person of sale.⁵⁰

Land owned by commercial companies and private individuals prior to the establishment of a German colony: In the period before the establishment of the German colony traders purchased land for the establishment of trading stations from the Marshallese.⁵¹ Again, purchases seem to have been made with the irooj laplap being the contact for and person of sale

Land owned by the Imperial German government and by commercial companies: The Imperial German Government purchased the Caroline and the Marshall Islands from Spain in 1885⁵² and established a district administration office on Jaluit. The German government regulated the trade and passed land regulations which restricted the sale of locally owned land to Europeans in order to protect the property held in private land from a total sell-out.⁵³ The German trading interests formed, with the approval and possibly upon the urgency of the Imperial German government, a syndicate, the Jaluit Gesellschaft, which held a virtual monopoly on the trade.⁵⁴

The archives of the German Colonial administration regarding its South Seas possessions⁵⁵ show a wealth of data and communications between the German district administrator in Jaluit and the Governour General in Rabaul on the legal transactions regarding the possession and the purchase of Marshallese land. The communications indicate clearly that a) money was paid on each occasion a land transfer took place and that b) market values of sorts determined the choice of land purchased by the German Government.⁵⁶ The only exceptions to this rule were the atolls of Bikar and Bokak (Taongi), which the Imperial German Government regarded as *terra nullius* and confiscated as public land, which in turn was handed to the Jaluit Gesellschaft for potential commercial exploitation.

The land operated by the Jaluit Gesellschaft was bought from the Marshallese at the expense of the Jaluit Gesellschaft using proceeds from said corporation and was made land owned by the Imperial German Government. In exchange for this privilege, the German government gave the Jaluit Gesellschaft the right to cultivate and exploit the land for the duration of 30 years. Thus, since proper purchase was made, the land was legally owned by the German Government.⁵⁷

Land owned by the Imperial Japanese government and by commercial companies: After declaring war against Imperial Germany, and using only limited military force, Japan seized the German Micronesian Islands in early October 1914. Following the capitulation of Imperial Germany in 1918, the Treaty of Versailles in 1919⁵⁸ and the subsequent negotiations in the Washington Naval Treaty for limitations in naval tonnage (1922)⁵⁹ and on the status of Yap⁶⁰ brought about agreement that Japan be given the former German Colonies in Micronesia

north of the Equator⁶¹ as a class “C” mandate by the League of Nations.⁶²

Based on the principle of international law that a succeeding sovereign is entitled to rely upon and respect official acts of the preceding administration⁶³, the Imperial Japanese government took over all German Government property in the Mandated Territory as government land (“State domain”)⁶⁴ and considered land confiscated and then subsequently owned by the Imperial German government also as (Japanese) government land.⁶⁵ The government chose to give (“lease”) most of the government land to Japanese commercial companies, such as the Japanese trading firm NBK⁶⁶, for administration and exploitation.⁶⁷ Over time, the NBK expanded its holdings always legally obtaining or leasing land, apparently without undue pressure on the landowners, as far as this can be ascertained

Any land and/or property owned solely by German commercial companies, such as the Jaluit Gesellschaft, was not forfeited and remained in the possession of the company after the end of World War I.⁶⁸ However, as the German companies were no longer permitted to operate in the Mandated Territory, the Japanese Government facilitated the sale of German business interests to Japanese companies.⁶⁹ The business interests and the property holdings of the second generation traders, such as the Capelle and the deBrum, who had partially owned the Jaluit Gesellschaft, remained unaffected

Under the stipulation for class “C” Mandates of the Covenant of the League of Nations the Government of Japan was free to apply its laws to the Mandated Territory to the same extent as though it had been an “integral portion” and geographical division of the Japanese Empire.⁷⁰ Although administering the land under a mandate of the League of Nations, Japan was considered to

be “in the same position as a sovereign which has been accorded recognition”.⁷¹

During the period of their rule, the Japanese government also confiscated land under the principle of eminent domain,⁷² possibly without adequate or proper compensation.⁷³

The Japanese Government had serious problems with the Marshallese concepts of property ownership⁷⁴ and finally, using the vacancy in an *Irooj laplap* position on Majuro Atoll, promulgated some innovative land management and land transfer rules which deviated from traditional Marshallese custom but eased the execution of the Japanese form of land management.⁷⁵ Where active, the Japanese surveyors were given broad powers, which they exercised in approving the division of lands, confirming title, and in settling disputed boundaries.⁷⁶

Land held by the U.S. Trust Territory of the Pacific Islands: Following military defeat in the Marshall Islands in 1944,⁷⁷ and the conditionless surrender of Japan in 1945, Japan ceased to exercise any authority in the Mandated Territory, which was placed under U.S. military administration;⁷⁸ after the establishment of the United Nations the Micronesian Islands were declared a strategic trust and placed under the trusteeship of the United States.⁷⁹ The U.S. government validated all Spanish, German and Japanese laws, ordinances, regulations etc. still in existence throughout the area covered by the Trust Territory unless replaced by T.T.P.I. law.⁸⁰ Following the vesting of the trusteeship over Micronesia on the United States, the U.S. regarded themselves as a succeeding sovereign and thus as the successor to all title previously held by the Japanese government.⁸¹ For the determination of landownership the U.S. Trust Territory government used December 1, 1941 as the cut-off date.⁸² All law “concerning ownership, use, inheritance, and

transfer of land in effect in any part of the Trust Territory. shall remain in full force and effect”⁸³ and the T.T.P.I. Court rejected appeals against Japanese land management decisions.⁸⁴ All Japanese government-held land, however, was declared public land⁸⁵ and was vested with the Area Property Custodian,⁸⁶ while title to all Japanese non-Government property was vested with an Alien Property Custodian.⁸⁷ Over time, the T.T.P.I. government divested itself of some of the Public land.⁸⁸ By regarding as valid all land titles and transfers prior to December 1, 1941, the U.S. Trust Territory Government effectively reconfirmed some of the innovative Japanese management rules.⁸⁹ With the signing of the Compact of Free Association in 1986 the U.S Trust Territory of the Pacific Islands and all its applicable laws ceased to exist⁹⁰ as far as the USA and the Republic of the Marshall Islands were concerned⁹¹ and all rights of the U.S. administration went over into the hands of the Republic of the Marshall Islands T.T.P.I.

Land held by the Republic of the Marshall Islands: With the Compact of Free Association coming into effect in 1986,

“[t]itle to the property of the Government of the United States situated in the Trust Territory of the Pacific Islands or acquired by for or used by the Government of the Trust Territory of the Pacific Islands on or before the day preceding the effective date of this Compact shall, without reimbursement or transfer of funds, vest in the Government... of the Republic of the Marshall Islands. as set forth in a separate agreement which shall come into effect simultaneously with this Compact. The provisions of this Section shall not apply to property of the Government of the United States for which the Government of the United States determines a continuing requirement”⁹²

In the agreement referred to in the *Compact of Free Association*,⁹³ the High

Commissioner of the Trust Territory is “required to establish a list of distribution of the property among the recipient governments and in consultation with them.”⁹⁴ The *Revised Code of the Republic of the Marshall Islands* stipulates that

“ public lands are defined as being those lands situated within the Republic which were owned or maintained by the Japanese government during the Japanese administration of the islands presently comprising the Republic, as government or public lands.”⁹⁵

Thus, the government of the Republic of the Marshall Islands sees itself as the legal successor to the Japanese administration

1.2.3. Revival of customary law

There is another issue is of relevance in the matter of the ownership of cultural resources which needs to be touched upon: the revival or, rather, re-emergence of customary law in the period following the declaration of independence under the *Compact of Free Association* T.T.P.I.

During the period of the T.T.P.I. administration, custom and customary law and land law was recognised to a certain degree⁹⁶ and in court cases of the High Court defined in its applicability⁹⁷ and extent.⁹⁸ The High Court of the T.T.P.I. upheld the Japanese alterations in the land law as superseding Marshallese custom and ruled that a

“[d]etermination of Japanese Administration concerning land law, which deviated substantially from Marshallese custom, effectively changed law so as land in question is concerned” and that “ Marshallese custom does not control over clearly expressed and firmly maintained determinations of Japanese Administration”⁹⁹

T.T.P.I.

Shortly after the *Compact of Free Association*¹⁰⁰ had come into effect, the Nitijela passed the *Customary Law (Restoration) Act 1986*,¹⁰¹ an act solely devised to repeal and invalidate the decision of the High Court of the Trust Territory of the Pacific Islands in the case *Levi v. Kuntak*.¹⁰² The act also specifically invalidated all changes made by the Japanese administration as far as they were contravening Marshallese custom as the Majuro case is concerned.¹⁰³ As far as can be established, however, this act does not null and void any other T.T.H.C. rulings nor the concept that all land transactions and holdings pre-December 1941 be lawful, with the exceptions of those conducted on “Jebrik’s side” of Majuro Atoll since Jebrik’s death in 1919.

If the invalidation of the case *Levi v. Kuntak* is interpretable as a precedence, then it may follow that all land management decisions made by the Japanese government are in need of a revision and a decision by the High Court of the Republic of the Marshall Islands in each individual case as they may arise.

In addition, the second constitutional convention of the Republic of the Marshall Islands had proposed changes to the set-up of the Traditional Rights Court. The amendment to the constitution sees the Traditional Rights Court as a court in its own right, parallel to the High Court. The Traditional Rights Court is to decide land disputes, which are at present handled by the High Court. The proposal needs the approval of the people of the Republic of the Marshall Islands by means of a referendum.¹⁰⁴

1.2.4. Modern legal provisions

The Marshall Islands Revised Code of 1989 defines “public lands” as “being those

lands situated within the Republic which were owned or maintained by the Japanese Government during the Japanese administration of the islands presently comprising the Republic”.¹⁰⁵ Provision was made for the possible exchange of such public land for private land needed by the Government.¹⁰⁶

In terms of cultural resource management, this provision allows to exchange parcels of public land for parcels of private land on which archaeological or cultural sites are located, and, by doing so, transfers ownership of the archaeological or historical sites to the Government, thus allowing a stronger protection of the resources.

1.3. Ownership of land formerly used by the Imperial Japanese Navy to erect military bases

1.3.1. Background

When the political situation in SE Asia and the Pacific became more tense and the event of a Pacific War became more likely, the Japanese government, then under the political leadership of the Japanese armed forces and dominated by the Imperial Japanese Navy, began to develop military bases and fortifications on several Micronesian islands. To do so, some land, comprising entire islets on selected atolls,¹⁰⁷ was purchased outright, while other land was confiscated, or simply occupied, at least to some extent presumably under the principle of eminent domain, either with or without adequate and proper compensation

1.3.2. Stipulations of T.T.P.I law and T.T.P.I. High Court court rulings

The *Trust Territory Revised Code of 1966* stipulates that all land transfers prior to December 1 (or 8), 1941, are considered

valid. A previous, more cautious administrative policy letter¹⁰⁸ stipulates that

*"[I]and transfers from non-Japanese private owners to the government, since March, 27, 1935, will be subject to review [and], considered valid unless the former owner (or the heirs) establishes that the sale was not made of free will and just compensation was not received."*¹⁰⁹

1.3.3. History of land holdings

Land holdings on Majuro Atoll: On Djarrit I.¹¹⁰, at the eastern end of the atoll, the Japanese erected a sea-plane base. According to local informants and people involved in the actual construction of the base, the development began in 1940, but possibly even in 1939.¹¹¹ Given the early date of the construction, it appears likely that compensation of sorts was paid.

Land holdings on Maloelap Atoll: The best documented case exists for Taroa Island, on Maloelap Atoll, where the Japanese operated the second largest airbase in the Central Pacific. According to archaeological investigations¹¹² the base was built prior to World War II and construction possibly started in 1938 or 1939.¹¹³ Photographic documentation from Japanese sources documents that the base development was well under way in September 1940.¹¹⁴ Interviews with eyewitnesses of both the pre- and post-Navy phases on Maloelap stated that the *irooj laplap* had been called to Jaluit for negotiations on the land; that compensation for the watos had been properly paid; and that the people thus dispossessed were able to purchase land on other islands of Maloelap Atoll using the proceeds of the compensation.¹¹⁵

Land holdings on Jaluit Atoll: The case on Jaluit is slightly different from that in Maloelap. In Jaluit, the former German and then Japanese district centre, the Japanese had substantial holdings of public land,

which could be utilised for the construction of the military facilities

Land holdings on Mile Atoll: The Japanese operated a naval air base on Mile I. and a lookout station on the eastern half of Tokowa I., right next to the lagoonal channel. While the latter was Japanese public land,¹¹⁶ Mili itself is not. The development of Mile as an air base did not occur prior to late 1942 and appears that the Mile base was not planned prior to the war but derived from contingencies due to the taking of the (then British) Gilbert Islands.¹¹⁷ It appears unlikely, therefore, that compensation was paid given the progress of the Pacific War.

Land holdings on Wotje Atoll: The air and communications base on Wotje was set up in 1939 or 1940.¹¹⁸ Again, since the date of construction is that early, it can be assumed, based on the experiences of Taroa, Maloelap, that the Japanese paid compensation for the land appropriated for the base development.

Land holdings on Enewetak Atoll: Given the history of the development of the Japanese bases in the Marshall Islands, the base on Enewetak was developed very late, well after the establishment of Mile. It appears that Enewetak was not developed until the closing months of 1943, preceding the U.S. invasion of the Gilbert islands and the stepped up bombing raids on the Marshall Islands.¹¹⁹

Land holdings on Kwajalein Atoll: The Japanese operated three bases on Kwajalein Atoll, the airbase in the north (Roi-Namur), a seaplane base in the eastern centre (Ebeye) and another airstrip in the south (Kwajalein). The Japanese had erected their central and most powerful airfield on Roi Island, which had been joined by a causeway with Namur) where the living quarters were built. From the scanty documentary evidence, it seems, the construction of the bases started well before 1940. Presumably, the

Japanese paid proper compensation for the land.¹²⁰

1.3.4. Towards a solution of the problem

As discussed above, the *Trust Territory Revised Code of 1966* considers all those land transfers to the Government of Japan as valid which have been completed before December 1, 1941. After the war *all* such land was vested with the Area Property Custodian and considered public land of the T.T.P.I.¹²¹ An earlier view of the T.T.P.I. administration was more cautious and considered only those land transfers as valid which were made before March 27, 1935.¹²² All land transfers from non-Japanese private owners to the Japanese government, Japanese corporations or Japanese nationals after said date were subject to review and considered valid provided that the sale was made on free will and that just compensation was paid T.T.P.I.

If § 24 of the T.T.R.C. (1966) is seen as binding¹²³, then the ownership of the land of the Japanese bases is determined by the date of erection of such bases. Thus, only those bases built after December 12 (or 8), 1941, were built on land illegally transferred. If, however, the previously (1947) held view prevails, namely that there was a legal vacuum in the Mandated Territory after March 27, 1935, then *all* land transaction involving Japanese bases may have to be considered invalid.

Under the latter presumption, the land of the Japanese bases on Taroa, Maloelap Atoll, Jabwor, Jaluit Atoll, and Wotje, Wotje Atoll, is to be considered as Public land, as it had been acquired prior to December 8, 1941, the outbreak of the Pacific War. The land of the bases on Djarrit, Majuro Atoll, and Mile, Mile Atoll, however, is not public land, as the construction of both bases commenced well after the beginning of the Pacific War.

However, under the principle of eminent domain, the Japanese government was acting well within its rights when it confiscated land even against the expressed will of the land owner.¹²⁴ This is even more so, as article 2 of the Mandatory Charter permits Japan to “have full power of administration and legislation” and to “apply the laws of the Empire of Japan to the territory”.¹²⁵

Debatable, however, is the validity of a confiscation under the principle of eminent domain of such land determined to be used for the construction of naval bases and fortifications. Since the erection of directly contravenes and violates article 4 of the Mandatory Charter prohibiting the construction of such installations,¹²⁶ it can be argued that Japan failed to fulfil its obligations as a mandatory and thus is no longer regarded as the mandatory. On the other hand, it can also be argued that the confiscation of land occurred prior to the development of fortifications, therefore occurred under an unviolated Mandatory Charter, and therefore, as far as the actual land transaction is concerned, is valid

It will be either a matter for the courts to decide which legal view be adopted, or a matter for the legislative of the Republic of the Marshall Islands to pass a law regarding the ownership of the Japanese bases.

Apart from this, however, it needs to be recognised that in some circumstances the land of the Japanese bases had been previously owned by the German Government¹²⁷ and thus had become Japanese state domain. Regardless of its later use as part of a military base, such land became or should have become public land of the T.T.P. Thus the discussion regarding former T.T.P.I. public lands applies.¹²⁸

1.3.5. Quiet title

Rulings of the High Court of the T.T.P.I. held that “[a]n owner of real property may be deprived of his interests because he had not exercised proper diligence in protecting his rights in court”¹²⁹ and that “[o]ccupancy and use, long continued undisturbed, raises a presumption of ownership.”¹³⁰ However, it was also ruled that

”[c]onsent to use and occupancy of land prevents the occupants from acquiring a vested interest in land no matter how long occupance continues.”¹³¹

2. Ownership of submerged resources

Submerged resources are considered to be those archaeological and cultural resources which are permanently at least partially submerged¹³² in the internal,¹³³ archipelagic¹³⁴ and territorial waters¹³⁵ of the Republic. As far as the ownership of submerged resources is concerned, we not only have to address the question who owns them at present, but also who is entitled or empowered, under the present framework of the law, to establish future ownership of these resources.

2.1. General

In every country of the world engaging in riverine or ocean-going navigation, all vessels over a certain length, commonly 25 or 50 feet need to be registered with the local National Maritime Authority or with the Maritime Authority of another sovereign.¹³⁶ This registration process then issues papers stating the title to the vessel which will be recognised internationally.

2.1.1. Identification

A problem to be mentioned before delving into the discussion of the ownership of ship and aircraft wrecks is the problem of proper identification of the wrecked vessel or aircraft. The further we go back in time the less information is available regarding the identity of the vessel. Without the identity of the vessel being ascertained for fact, however, its original ownership cannot be established beyond reasonable doubt. This will have a bearing on the proof of abandonment and hence on any claim of ownership by salvors

2.1.2. The different scenarios of ownership

Given the varied history of the Marshall Islands since the middle of last century, we will have to distinguish between six different scenarios of ownership of the submerged resources in the Marshall Islands:

- Ships sunk in the Marshall Islands before the establishment of the German colony
- Ships sunk during the period of the German colony or the period of the Japanese mandate.
- Japanese ships sunk or scuttled during World War II
- U.S. ships sunk or scuttled during World War II
- U.S. ships sunk during the nuclear testing programme on Bikini ("Operation Crossroads")
- Ships sunk after the end of World War II
- Japanese aircraft shot down, crashed or discarded during World War II
- U.S. aircraft shot down, crashed or discarded during World War II
- Other submerged resources dating to World War II

2.2. Legal provisions by the Republic of the Marshall Islands.

2.2.1. General

No directly applicable law has been passed for the Republic of the Marshall Islands.¹³⁷ The *Marshall Islands' Revised Code of 1989* deals with the wrecks and salvage of vessels registered in the Republic of the

Marshall Islands,¹³⁸ but does not refer to vessels not registered in the Republic but sunk at a prior and later date in the internal,¹³⁹ archipelagic¹⁴⁰ and territorial waters¹⁴¹ of the Republic

2.2.2. Jurisdiction - National Government

According to the stipulations of the *Marshall Islands Revised Code*¹⁴², the National government has — where Local Governments have been created — no jurisdiction over the internal waters of the lagoons. Thus, the jurisdiction of the National Government is restricted to the uninhabited atolls, such as Taongi, Bikar or Nadidik (Knox) and the like

2.2.3. Jurisdiction - Local Governments

According to the stipulations of the *Constitution of the Republic of the Marshall Islands*¹⁴³ and according to the *Marshall Islands Revised Code*¹⁴⁴, the individual local governments have the jurisdiction over the internal waters of the lagoons as well to the ocean, extending five miles from the shore

No statutes or regulations of the local Governments have been passed regulating the ownership of the bottomlands of the lagoons. However, although the Republic has passed certain laws pertaining to admiralty matters, these only apply to vessels registered in the Republic. Since the majority of the shipwrecks in the Marshall Islands has not been registered in the Marshall Islands, and has sunk, in fact, before the creation of the Republic of the Marshall Islands as a separate legal entity, other laws need to be considered

Therefore, before addressing in detail the issue of the individual cases of ownership of the submerged resources, a digression on the principle of the *law of the flag*, on the principle of *sovereign immunity* and the general codes for *salvage and salvage rights* is in

order as it pertains directly to the issue at hand.

2.3. “Law of the flag”

It is a commonly held legal tenet that the law of the flag applies to any vessel in foreign waters.¹⁴⁵ Although sometimes disputed,¹⁴⁶ the doctrine of the law of the flag has often been extended to aircraft.¹⁴⁷ However, the “law of flag” only applies to “live vessels”, as defined by Admiralty law,¹⁴⁸ or, by extension of the definition, to all vessels afloat. Conversely, it has been held that:

*”[t]he jurisdiction of a country over one of its vessels ceases when the vessel is broken up and goes to the bottom.”*¹⁴⁹

Following from this, the courts of the Republic of the Marshall Islands have jurisdiction over all submerged resources. Depending on the nature of the resource, the jurisdiction may rest with the high court or with the Admiralty court

2.4 Sovereign Immunity

The ownership of submerged resources, especially ship wrecks, is also governed by the principle of sovereign immunity, which applies both to vessels of foreign sovereigns and to vessels of the domestic government, in its capacity as a sovereign. *American Jurisprudence* states that the principle of sovereign immunity

*“. extends to instrumentalities employed by a sovereign for public purposes [and] applies in admiralty. Although a ship is regarded as a person, in a proceeding in rem, where the question of exemption on the grounds of sovereignty is involved, the personality of the ship cannot be severed from that of the sovereign to which it belongs.”*¹⁵⁰

“[Sovereign immunity] extends, as a general rule, to the property of a foreign government that is held by its

agents for governmental purposes. The property of a state used for sovereign purposes may be exempt from taxation by another state, and as a general rule, is immune from suit, legal process, execution and tax foreclosure... it is held that sovereign immunity should be accorded to public vessels of a friendly foreign power; to merchant ships owned, controlled, and possessed by a foreign sovereign; to vessels requisitioned and taken into possession by a foreign government; and to vessels expropriated and taken into possession by a foreign government. Immunity does not extend to prize ships.”¹⁵¹

The Constitution of the Republic of the Marshall Islands specifically waives sovereign immunity.¹⁵² It should be mentioned that the second constitutional convention of the Republic of the Marshall Islands had proposed changes to this formulation, which need the approval of the people of the Republic of the Marshall Islands by means of a referendum.

Although, under existing law, the Republic of the Marshall Islands cannot claim sovereign immunity, the other countries, namely the (former) owners of the naval vessels and military aircraft sunk in the waters of the Republic of the Marshall Islands can claim it.

Under these principles¹⁵³, and under the presumption that – in the absence of Republic of the Marshall Islands law – U.S. law applies, public vessels of any friendly foreign power,¹⁵⁴ be they German, Japanese¹⁵⁵ or American as far as the historical resources of the Republic of the Marshall Islands are concerned, are exempt from admiralty jurisdiction, and thus exempt from seizure or salvage claims (see below) made under the admiralty process.¹⁵⁶

Some U.S. courts held that sovereign immunity can be claimed for all naval vessels and that such vessels, even those sunk and derelict, are never abandoned in the legal sense.¹⁵⁷

However, U.S. courts also have held that public vessels, such as naval ships, can be regarded as abandoned under certain circumstances and that therefore the claim of sovereign immunity no longer holds.¹⁵⁸ The claim of sovereign immunity, however, has also limitations. High Court of the T.T.P.I. ruled that the

*”[s]overeign immunity doctrine may become inapplicable once the government engages in proprietary functions, active wrongdoing or misfeasance, property damage, or the taking of property without just compensation.” In addition, “[c]onversion of property will subject a government entity to suit despite the sovereign immunity doctrine”.*¹⁵⁹

2.5 Salvage and salvage rights

Under Admiralty law, submerged resources, commonly shipwrecks,¹⁶⁰ fall under the principle of *salvage*, wherein a salvor has certain rights¹⁶¹ and duties.¹⁶² While mainly concentrating on shipwrecks, this section also addresses the salvage right relating to aircraft

2.5.1. General - salvage and ownership

Generally, salvors of sunken vessels and aircraft confront the legal problem of ownership. The salvor must ascertain objectively that the object of salvage, *i.e.* the sunken property, has been abandoned. In order to understand the potential applications for the protection of the submerged historical resources of the Republic of the Marshall Islands it needs to be understood that salvage services can be rendered *voluntarily*¹⁶³ and need not have the consent of the owner if the vessel is abandoned. However, it needs to be stressed that any salvage service rendered commonly entails the salvor to compensation for his services, but not to ownership of the salvaged material¹⁶⁴ or the whole salvaged vessel.¹⁶⁵ In this discussion we

need to distinguish several aspects: *Derelict vessels* and other submerged property stemming from such vessels and resting in navigable waters¹⁶⁶ constitute subjects of salvage (☞ below).¹⁶⁷ Unless proven abandonment, the ownership of such vessels is vested with the original owner, withstanding the interest obtained by the salvor, if any, of the derelict vessel. (☞ below).

Vessels sunk at anchor, however, do not constitute subjects of salvage if the vessel sank at her home port at such circumstances that no danger or unusual effort is involved in raising the vessel to the surface.¹⁶⁸ *Vessels constituting obstructions in navigable water*, however, are subject to towage and immediate destruction by the coast guard.¹⁶⁹ There are also restrictions on the abandonment process, whereby ownership of vessels forming an obstruction cannot be abandoned.¹⁷⁰ *Requisitioned vessels*: During the Pacific War, the Japanese government requisitioned large numbers of Japanese merchant vessels for service as transports, auxiliary mine-layers or auxiliary submarine chasers.¹⁷¹ It appears that the owners of such vessels were never properly compensated.¹⁷² According to U.S. law sovereign immunity cannot be claimed for such vessels,¹⁷³ nor for merchant vessels operated by civilian owners on behalf of the Japanese Government.¹⁷⁴ Therefore, if the vessels were requisitioned without proper compensation being paid, then the ownership of these vessels still rests with the original civilian owners and not with the Japanese Government.

Ownership, if insurance was paid: A further twist in the question of ownership is provided if the sunken vessel had been insured against loss. If so, the owner can “abandon” his vessel, whereby the abandonment constitutes the relinquishment to the insurer of a damaged or sunken vessel in order to receive for total loss.¹⁷⁵ If com-

ensation had been paid by the insurance company, then the ownership of the vessel is transferred to the insurance company.¹⁷⁶ However, if both the owner and its insurer abandon a derelict vessel and cargo after shipwreck, then the ownership passes to the appropriator.¹⁷⁷

2.5.2 *Salvage, derelict vessels, merchant vessels*

Traditionally, based on English law and jurisprudence, all shipwrecks became, after a grace period of one year and a day, property of the sovereign.¹⁷⁸ In American courts, this usage has sometimes been upheld,¹⁷⁹ while in other cases the view was espoused that the ownership of a shipwreck rests with the person who reduces it to possession.¹⁸⁰ In some other cases¹⁸¹ the judgement has been that the owner of the bottomlands, in which the vessel is completely or partially submerged, has constructive ownership, under the law of finds.¹⁸² According to American Jurisprudence,

“Derelict vessels and other property constitute subjects of salvage. A vessel or cargo is derelict within the rules of the maritime law relating to salvage when it is abandoned at sea without the hope of recovery and without intention of returning to it. It is immaterial whether the abandonment arises from accident, necessity, or voluntary dereliction

A right to possession of derelict property, but not necessarily ownership, always rests with the salvor.¹⁸³

“[I]n the case of a derelict [vessel], the salvors who take first possession have not only a maritime lien on the ship for salvage services, but have the entire and absolute possession and control of the vessel as well, and no one can interfere with them except in the case of manifest incompetence”¹⁸⁴

The mere fact of finding a derelict vessel, however, does not vest the finders with title

thereto,¹⁸⁵ nor does the marking of the wrecks with buoys and lines.¹⁸⁶ Owners of vessels, however, strengthen any rights against any claimed abandonment of the derelict by marking the vessel with buoys and lines.¹⁸⁷ Furthermore, courts have also held that,

*"[a]lthough the right to appropriate a derelict is one of universal law, dereliction does not necessarily imply that the owner is divested of all right in the property, nor does it necessarily rest upon a purely voluntary act [of abandonment]."*¹⁸⁸

*"The owners of a wrecked or derelict vessel or its contents do not cease to be owners until they have abandoned their property therein."*¹⁸⁹

This wreck and its cargo, then, can be sold, even though lying on the bottom of the sea,¹⁹⁰ or the ownership can be transferred to the underwriters, if the owner of the vessel carries the insurance of the vessel. It has been held that wrecks and property lying at the bottom of the sea which can be identified by the owners — or the underwriters if the owners abandoned their rights to them by carrying the insurance — remain their property, provided they appear within the statutory period after recovery or partial salvage¹⁹¹ to make their claim.¹⁹²

Another important aspect to maintain the ownership over a derelict vessel, however, is for the owner to know where the vessel is located. Generalised locations, such as "Lake Erie", were deemed not to be sufficient.¹⁹³ However, when discussing the ownership and salvageability of submerged resources other than vessels under the Admiralty law, then the fact that the location of the property is unknown may imply that the property has in fact been lost, rather than abandoned.¹⁹⁴

It has been a dispute what constitutes proper abandonment. The owner must form the intent to abandon the vessel (or other property) without being pressed by any duty,

necessity,¹⁹⁵ or utility to him- or herself, but simply because (s)he no longer desires to own the vessel and (s)he no longer intends to make any future of it. In addition, a vessel is only abandoned by the owner, if the ownership is not vested in someone else. While desertion of the property in peril is legitimate and not an act of abandonment of ownership, subsequent conduct of the owner and resulting action, or the lack thereof, may constitute this.¹⁹⁶ It has been held that the cessation of salvage operations and the sale of the salvage equipment constitutes such an abandonment¹⁹⁷ or the notification of the authorities of the abandonment.¹⁹⁸ Another factor to be considered in the establishment of abandonment of the vessel is the passage of time:

*"To constitute a vessel a derelict, it is not necessary that no owner should afterward appear; nor does an intention on the part of the owners ultimately to rescue their vessel affect its character as a derelict, if it has been allowed to remain in a wrecked condition for some time"*¹⁹⁹

The question is from when on a vessel classified as derelict, or, more specifically, what constitutes a "wrecked condition for some time".²⁰⁰ The *Rivers & Harbors Act of 1899* provides for a period of 30 days within which salvage action of some kind or another needs to be undertaken or commenced in a concise manner.²⁰¹ Court cases have held that a ship sunk in 1902 was "a derelict without question in fact in law" in 1962,²⁰² that a vessel sunken for 23 years²⁰³ or sunken vessel and cargo which had been left untouched for 28 years²⁰⁴ or a vessel derelict for 40 years²⁰⁵ were abandoned for all purposes of the law and that — in case of cargo remaining in a derelict hull for 66 years, with no claim of ownership²⁰⁶ — the person recovering the cargo is a finder having title against the owner

According to a well-settled principle, when personalty is abandoned, ownership to

the property is lost.²⁰⁷ Accordingly personality may be appropriated by anyone, and ownership of its rests, by operation of law, in the first person who finds it, and with the intent of becoming the owner, lawfully appropriates and reduces the personality to possession.²⁰⁸ Once abandoned property has been appropriated by another person, the former owner cannot reclaim it.²⁰⁹

In short, derelict but not abandoned vessels can be salvaged by anyone competent and successful, but the salvor can claim only a salvage lien, rather than outright ownership of the entire vessel. If the owner has abandoned ownership, then the ownership rests with anyone who successfully salvages the vessel. If the owner does not know the exact location of the vessel, it can also be argued that the salvor, who locates the vessel and raises or salvages it, has constructive possession. Thus, applying this to the situation in the Marshall Islands, it can be argued that a generalised location, such as Majuro Lagoon, does not constitute sufficient identification of the locality for the purposes of retaining ownership.

2.5.3 Salvage - derelict vessels, naval vessels

Under the principle of sovereign immunity, naval vessels are exempt from Admiralty jurisdiction. Therefore a derelict naval vessel is not a derelict vessel under the terms of admiralty law and its ownership still rests with the government. Any salvage proceedings, therefore, need the express consent of the government.

This view has been challenged in some court cases,²¹⁰ where it has been held that the U.S. Navy purposefully abandoned property and vessels, and that in such a case the U.S. Navy cannot claim sovereign immunity

2.5.4. Salvage and historic shipwrecks

In a key decision, the court of the Southern District of Florida ruled in the case *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*²¹¹ that archaeological considerations need to be taken into account. The court found that “the remains of the vessel; claimed are historic ruins revealing the remains of past human life and activities, which are of archaeological interest” and “that it is in the public interest that if artefacts are to be removed from the wreck the removal be conducted with scrupulous care” and that an excavation permit would be needed

In a recent case, *Colombus-America Discovery Group v. The Unidentified and abandoned Sailing Vessel SS Central America*²¹² the court held that

“Courts may decline to apply the maritime law of finds to shipwrecks of substantial historical or archaeological significance where a salvor has failed to act in good faith to preserve the scientific, historical, and, in the limited situations where applicable, archaeological provenance of the wreck and artifacts. This emerging maritime doctrine finds its roots in the admiralty principle that a salvor may not conduct itself so as to despoil property at sea. Whether applying the law of finds at sea, or the law of salvage, maritime law requires the salvor to come to court with clean hands.”²¹³

Thus, the emergent court rulings, at least in the U.S., which — as far as the Marshall Islands courts are concerned have only persuasive, but not precedential value — may imply that historic preservation consideration, which are for the common good rather than the private good, will be given an increasing weight in the future. It will depend entirely on future decisions of the Republic of the Marshall Islands courts to what extent

such a principle can be enforced in the local historic preservation context

2.5.5. Salvage - airplanes

The legal question, whether submerged aircraft or aircraft fallen into the sea represent property under maritime law is under debate in the courts and an issue for legal scholarship.²¹⁴

If a land-based plane forms part of the cargo of a vessel, and is salvaged as part of the cargo, then it falls without doubt under Admiralty jurisdiction.²¹⁵ However, if a land-based plane falls into navigatable waters, then the applicability of Admiralty law has been disputed and denied in courts.²¹⁶ *Crawford Bros. No. 2* According to the treatise on salvage in *American Jurisprudence*,

*"[a] seaplane, when on sea, is a marine object subject to maritime law of salvage, and if the seaplane moving upon the water becomes disabled and is rescued on the high seas by a ship, it is subject for a lien for salvage."*²¹⁷

The court rulings in this respect, however, are not as uniform as can be hoped for. The definitions of what entails a maritime object fit for Admiralty law differ widely.²¹⁸ In respect to seaplanes, some courts espoused the above view²¹⁹ while others did not,²²⁰ later backed up by legislative action²²¹.

Some courts held that the submerged property salvaged needs not to be of maritime nature at all for the Admiralty court to have jurisdiction and for the salvor to claim salvage award.²²² In the most important case in this respect, *Maltby v. Steam Derrick Boat*²²³ the court held that the test was no longer whether the property saved was a vessel or its cargo,

"but whether the thing saved is a moveable thing, possessing the attributes of property, susceptible of be-

ing lost and saved in places within the local jurisdiction of the admiralty."

The *Maltby Locality Test*, as it has become to be known²²⁴, has seen an increased application in recent court cases.²²⁵

If the plane is a military plane, however, then, under the doctrine of sovereign immunity, the ownership of the plane wreck rests with the respective sovereign.²²⁶

2.6. The legal view on ship and aircraft wrecks- a summary

Before applying the above quoted legal views to the matter at hand, let us first summarise them.

The fact that a vessel sinks does not divest the owner of his rights and title to the property, provided he knows where it is located, and provided he undertakes reasonable measures to salvage the vessel. If he does not undertake salvage operations, but declares and maintains his intention to do so, then the vessel, after a certain period of time, apparently over 20 years, becomes derelict and an object fit for salvage by anyone competent and successful to do so. The salvor has a lien on the vessel, but not outright ownership. If the vessel has been abandoned, however, either by passage of considerable period of time and/or declaration of intention to abandon by the owner, then the finder becomes the first taker and reduces the abandoned property to possession.

This implies that a wreck of a ship or an aircraft belongs to the original owner unless properly abandoned. However, even if abandoned, the finder of such a vessel or aircraft has the right to salvage it under the condition that a certain amount of the profit deriving from the salvage are paid to the original owner or his underwriters, if the insurance had been carried.

Naval vessels and aircraft, however, are property not distinguished from the sovereign itself, therefore fall under the principle of sovereign immunity and cannot be salvaged except for express permission by the sovereign.

2.7. Ships sunk in the Marshall Islands before the establishment of the German colony

Given the immense passage of time, all vessels sunk in the waters of the Marshall Islands before the establishment of the German colony can be considered abandoned,²²⁷ unless insured by underwriters, such as Lloyds of London. Therefore, these vessels are open to salvage by anyone competent and successful and the salvor is likely to have constructive and total possession of the salvaged material. This applies not only to European trading vessels sunk here, but also to the remains of prehistoric and historic wooden sailing canoes.²²⁸

2.8. Ships sunk during the period of the German colony or the Japanese mandate.²²⁹

Under the doctrine of the “law of flag”, German or Japanese law applies to all German or Japanese vessels²³⁰ However, since the vessels “went to the bottom” and now are derelict, the law of flag no longer applies.²³¹ Thus the submerged ships and aircraft fall under the jurisdiction of the Republic of the Marshall Islands. In the absence of specific legislation, the ownership of such vessels is determined by the Admiralty law of the U.S. and thus in accordance with above, rests with the original owners or their underwriters, unless salvaged and fully or partially claimed by the salvors.

It should be added, that the ownership of Japanese merchant vessels, which went to the

bottom before the outbreak of the Pacific War in December 1941, cannot be claimed by the Republic of the Marshall Islands on the basis that all foreign property was forfeited to the US at the outbreak of the Pacific War,²³² because the Marshall Islands were not US territory, or in the constructive possession of the U.S. at that time

2.9. Japanese ships sunk or scuttled in the ocean or lagoon during World War II

2.9.1. Legal provisions

As far as the Republic of the Marshall Islands is concerned, there is no legal provision regulating the ownership of the Japanese vessels. The *Admiralty and Maritime Act*²³³ does not stipulate any specific rules²³⁴ so that U.S. law, that is U.S. Admiralty law, is applicable. Under this, and especially under the doctrine of sovereign immunity, all those Japanese naval vessels and aircraft²³⁵, which were sunk during enemy action or were scuttled or jettisoned by the Imperial Japanese Navy, can be considered to be still owned by the Japanese Government (but see below)

Those vessels or aircraft which were captured or taken as prize of war by the U.S. forces became U.S. government property.²³⁶ If these vessels were at a later point in time sunk, scuttled or jettisoned by the U.S. armed forces and thus today form submerged cultural resources, then, under the doctrine of sovereign immunity, these vessels are not derelict, but property of the U.S. government. With the signing of the *Compact of Free Association*, then, these resources became the property of the Government of the Republic of the Marshall Islands.²³⁷ Thus the government of the Republic of the Marshall Islands can claim ownership, but may not be able to prevent a

salvor from raising the property and claiming a salvage award.

2.9.2. Local precedents

A precedent for protecting the submerged Japanese resources against salvage from Japan is set by the ships resting on the bottom of Chuuk (Truk) lagoon. Doubtlessly the most famous array of Japanese ships sunk by enemy action during World War II is the “ghost fleet” in Truk: During the attack of February 16th and 17th, 1944, about 40 ships went down; two months later, another 20 vessels went to the bottom

Today, these vessels form a historical resource of prime importance and a prove to be a money spinner for the fledging tourism industry of Chuuk (Truk) and feature prominently in various publications and newspaper/journal articles.²³⁸

In the years after World War II, Japanese industrial interests led to file an application for the permit to salvage these vessels. In the early 1950s a Japanese consortium proposed to raise seven of these vessels and to put them back into service and to salvage about 100,000 tons of scrap metal of the other vessels.²³⁹ The Trust Territory government apparently refused the permit. The reasoning for the refusal is unclear, as from the stand point of international law these vessels property of the Japanese Government, which can claim sovereign immunity and ownership.²⁴⁰

In the mid-1950 the High Commissioner of the Trust Territory of the Pacific Islands apparently then decided that the T.T.P.I. undertake salvage of some vessels in Chuuk lagoon themselves, upon which the Government of Japan reserved its rights to vessels of Japanese registry.²⁴¹ After an agreement about the salvage procedures had been reached, the salvage was carried out by a commercial firm.²⁴²

The status of the Japanese vessels throughout the Trust Territory was finally settled in 1969, when the *Agreement between the United States of America and Japan regarding the Trust Territory of the Pacific Islands* was signed. Note N° 2 exchanged in relation to this agreement stipulates that

*“the Administering Authority of the Trust Territory of the Pacific Islands will accord the Government of Japan and its nationals (including juridical persons), for a period of three years from the date on which the Administering Authority may commence purchasing Japanese products and services provided for by the Agreement, the opportunity to salvage and freely dispose of ships sunk in territorial waters of the Trust Territory which were of Japanese nationality at the time of sinking”*²⁴³

Thereafter, the Japanese Government would not lay any further claim on the wrecks based on the principle of sovereign immunity.²⁴⁴

2.9.3. Japanese Navy vessels

Initially, the Japanese government could and did claim sovereign immunity for all Japanese naval vessels sunk by enemy action. However, after the signing of the *Agreement between the United States of America and Japan regarding the Trust Territory of the Pacific Islands* the claim for sovereign immunity has been waived and the vessels are open to salvage by any interested party, unless legislative action, as in the case of Chuuk, prohibits this. In the Republic of the Marshall Islands no such legislation exists, and all Japanese naval vessels, such as those on the bottom of Kwajalein lagoon, are open to salvage

2.9.4. *Japanese merchant vessels requisitioned by the Imperial Japanese Navy*

As mentioned above,²⁴⁵ prior to and during the Pacific War, the Japanese government requisitioned large numbers of Japanese merchant vessels for naval service as transports, auxiliary mine-layers or auxiliary submarine chasers. Such vessels commonly underwent a period of refitting where weapons and communications systems were installed

It appears that the owners of such vessels were never properly compensated;²⁴⁶ therefore the ownership of these vessels still rests with the original civilian owners and not with the Japanese Government. Thus, under the terms of the law, these vessels are not owned by the Japanese Government, but by the individual shipping lines and merchants they belonged to in 1941.²⁴⁷ Since the vessels have been derelict for over 40 years, it can be safely assumed that these vessels are abandoned and thus open to salvage by any interested party.

An exception is to be made, however, if the Japanese government paid compensation to the ship owners for any vessel lost during the hostilities. If compensation was paid, then the payment of said compensation vests the ownership of the vessel with the Japanese government,²⁴⁸ which in turn waived its right to sovereign immunity.²⁴⁹

2.9.5 *Japanese merchant vessels;*

Another issue to be discussed are those vessels which were not requisitioned by the Japanese Navy for military refitting, but which were operated by the Japanese Navy for transportation purposes. These vessels were always owned by their private owners or companies, and the transportation of government materiel occurred on a contractual basis. Hence, unless intentionally aban-

doned, all such shipwrecks are still owned by the original owners, or their underwriters, if insurance was and could be carried.

2.9.6 *Japanese amphibious tanks*

Under the wide-ranging definitions as to what constitutes a vessel under Admiralty jurisdiction,²⁵⁰ it could be argued that amphibious tanks be included in a similar way as sea-planes are included in specific circumstances.²⁵¹ However, the tanks would today be regarded as “dead vessels” and thus outside of Admiralty jurisdiction and maritime law.²⁵² On the other hand, if the *Maltby Locality Test*²⁵³ is applicable, then the submerged amphibious tanks are objects to be considered falling under Admiralty jurisdiction, and hence salvageable. Since the court rulings in the U.S. are equivocal in this matter,²⁵⁴ and since the court rulings in the U.S. have only persuasive value for the High Court of the Republic of the Marshall Islands, it will require legislative action or a court case to reach a conclusive decision

2.10. U.S. ships sunk or scuttled in the ocean or lagoon during World War II

2.10.1. *Legal provisions*

The *Compact of Free Association* stipulates that all property owned by the Government of the United States in the Marshall Islands district of the former Trust Territory of Pacific Islands shall vest with the Government of the Republic of the Marshall Islands.²⁵⁵ This provision effectively transfers the ownership of all archaeological and cultural resources deriving from U.S. involvement in the Marshall Islands, regardless whether they are submerged or not, to the Republic.

2.10.2 U.S. amphibious tanks

As above for the Japanese case, under the wide-ranging definitions as to what constitutes a vessel under Admiralty jurisdiction, it could be argued that amphibious tanks.²⁵⁶ The tank, it can be argued, was U.S. government property based on the principle of sovereign immunity. Since the U.S. government vested the ownership in all its property in the Government of Republic of the Marshall Islands,²⁵⁷ the amphibious tanks are now property of the Republic

2.11 U.S. ships sunk during the nuclear testing programme on Bikini ("Operation Crossroads")

2.11.1. Background

During the nuclear testing programme executed at Bikini and Enewetak the U.S. Navy wanted to assess the effects of the nuclear devices on ships. To do so, a testing program was designed to be executed on Bikini Atoll ("Operation Crossroads"), as a direct effect of which over 50 ships were sunk in Bikini Lagoon.

2.11.2. Legal provisions

As mentioned above, the *Compact of Free Association* stipulates that all property owned by the Government of the United States in the Marshall Islands district of the former Trust Territory of Pacific Islands shall vest with the Government of the Republic of the Marshall Islands.²⁵⁸ In a special agreement pursuant to §177 of the Compact²⁵⁹ the ownership of all ships in Bikini lagoon is transferred to the people of Bikini:

Pursuant to Section 234 of the Compact, any rights, title and interest the Government of the United States may have to sunken vessels and cable

situated in the Bikini lagoon as of the effective date of this Agreement is transferred to the Government of the Marshall Islands without reimbursement or transfer of funds. It is understood that unexpended ordnance and oil remains within the hulls of such sunken vessels, and that salvage or any other use of these vessels could be hazardous. By acceptance of such right, title and interest, the Government of the Marshall Islands shall hold harmless the Government of the United States from loss, damage and liability associated with such vessels, ordnance, oil and cable, including any loss, damage and liability that may result from salvage operations or other activity that the Government of the Marshall Islands or the people of Bikini take or cause to be taken concerning such vessels or cable. The Government of the Marshall Islands shall transfer, in accordance with its constitutional processes, title to such vessels and cable to the people of Bikini.²⁶⁰

A similar agreement has been reached wherein the ownership of all cable in Enewetak lagoon.²⁶¹ is transferred to the people of Enewetak.

The former German cruiser *Prinz Eugen*, however, which had also been used as a test-ship during Operation *Crossroads*, was later towed to Kwajalein lagoon, where it sank.²⁶² The ownership of this particular vessel is transferred to the Republic of the Marshall Islands without any provision to transfer it to a local Government.²⁶³

3. Ownership of inter-tidal resources

3.1. General

3.1.1. Definition of inter-tidal resources

For the purposes of this study, all resources resting between the ordinary high water mark and the ordinary low water mark are considered as inter-tidal resources. They comprise mainly fishtraps and stone weirs,²⁶⁴ shipwrecks²⁶⁵, aircraft wrecks²⁶⁶ and wrecks of tanks and other equipment.²⁶⁷

3.1.2. Jurisdiction

The jurisdiction over the intertidal resources rests with the local government, if any has been established and, failing that, with the national government.²⁶⁸ An exception exists at Kwajalein Atoll, where access to the archaeological and historical resources located on islands of the mid-atoll corridor, on USAKA territory is regulated by special agreement between the Republic of the Marshall Islands and the Government of the United States.²⁶⁹

3.1.3. Legislative provisions, general

The Marshall Islands Revised Code of 1989 stipulates that “all marine areas below the ordinary high water mark belong to the Government”.²⁷⁰ The owner of the abutting land has the right to “fill in, erect, construct and maintain piers, buildings, or other construction on or over the water and shall have the ownership and control of such construction.”²⁷¹ This regulation, based on a similar provision on the T.T.P.I. Code²⁷² has been debated in the T.T.P.I. courts, which held that the person of the abutting land owns the

structure, but not the land the structure is located upon.²⁷³

3.1.4. Customary law

In Marshallese custom, the reefs, especially those where fishing was good, belonged to the *irooj*, who could claim them unilaterally.²⁷⁴ The property rights of each wato extended as far into the lagoon as one could stand,²⁷⁵ commonly waist-deep.²⁷⁶ In the 20th century, it seems, the *irooj* of the abutting land had customary rights to all floatsam²⁷⁷ and jetsam²⁷⁸ and ligan²⁷⁹ washed ashore.²⁸⁰

3.1.5 Submerged lands

In American law there is also the concept of submerged lands, which encompass the bottom lands on the continental shelf or similar areas within the territorial zone of the sovereign nation. While there is little, if any, bottom land on the ocean side of the atolls, given the steep drop off down to several thousand feet, the bottom lands in the lagoons are extensive. While the jurisdiction over the submerged lands in the lagoons is vested with the local governments,²⁸¹ but the ownership of the lands is not stipulated any of the laws applicable

3.2. Legal provisions - fishtraps

The owner(s) of land abutting the shore retain their rights to “erect, maintain and control the use of.[fish] weirs or traps”²⁸², possesses “such fishing rights on, and in waters over reefs where the general depth of water does not exceed four feet at mean low water as were recognised by local customary law at the time the Japanese administration abolished them”.²⁸³ The owner(s) of the abut-

ting land can furthermore “claim ownership of all materials, coconuts, or other small objects deposited on the shore or beach by action of the water.”²⁸⁴

3.3. Legal provisions - shipwrecks

The above cited provisions, however, specifically exclude “any vessel wrecked or stranded on any part of the reefs or shore of the Republic”.²⁸⁵ It is, therefore assumed that the stipulations regarding derelict vessels apply²⁸⁶ The Admiralty Law regards vessels above the low water mark but below the high water mark as vessels to which the salvage regulations apply. If the courts, following other decisions²⁸⁷ will hold that title to all derelict vessels – after the passing of a certain period of time – falls to the sovereign, then all intertidal shipwrecks will be owned by the Republic

Large parts of the vessels which have been thrown above the high water mark, however, can also be construed as floatsam which is possessed by the owner of the abutting land. It appears that the owner of the abutting land has a constructive ownership of all those derelict vessels and parts thereof, which are above the high-tide mark if they are abandoned by their original owners

3.4. Legal provisions - aircraft wrecks

3.4.1 Land-based aircraft

The provisions for shipwrecks contained in the admiralty law do not apply to the decision on the ownership of land-based aircraft. Since it has been held that floatsam and jetsam drifting to the shore - unless Government property - is owned by the owner of the abutting property. Since the principle of abandoned property applies²⁸⁸ and since the owner of the abutting land has constructive ownership, all planes crashing

onto a reef can be considered property of the owner, after a period of grace, allowing for the recovery, has passed

3.4.2 Seaplanes

It is assumed by inference that the regulations for ship wrecks on the intertidal reefs also apply to the wrecks of seaplanes, as they are sometimes considered to be vessels under the maritime law.²⁸⁹ This is particularly true if the seaplane has become stranded while in the water. If the plane crashed from flight, however, it will most likely be considered to be an aircraft and hence admiralty law will not apply.²⁹⁰

3.5. Legal provisions - tank wrecks and other equipment

It appears that the principle of abandoned property, which governs the ownership of aircraft on intertidal areas, also applies to other equipment.²⁹¹ However, since tanks are commonly Government property, the principle of sovereign immunity applies.²⁹² It is assumed by inference that the regulations for ship wrecks on the intertidal reefs also apply to the wrecks amphibious tanks.²⁹³

3.6. Applications - submerged lands

If the principle of submerged lands can be applied in the Republic of the Marshall Islands, then it will have major and very far reaching implications for the preservation of the heritage. According to U.S. law, the finder of “property which is embedded in the soil, but which is not treasure-trove, acquires no title thereto, for the presumption is that the possession of the article found is in the owner of the locus quo”²⁹⁴, who, according to some decisions, is the sovereign.²⁹⁵ In addition, if the submerged lands are government land, be it local or national government, then vessels embedded in

such lands are government property and cannot be salvaged without a salvage contract issued by the government, especially if a statute is passed and a management plan for the resources has been prepared.²⁹⁶

3.7. Court decisions

To date, no pertinent court decisions have been passed on the topic.

4. Ownership of moveable resources pre-dating World War II

4.1. General

As moveable resources, or artefacts²⁹⁷ are regarded all those impermanent alterations to the land scape which can be picked up and transported from one place to the other.²⁹⁸

4.2. Legal provisions - Abandoned property

In the legal sense, all moveable resources are regarded as property, and hence, the property laws apply in the discussion. The principle of abandoned property has been used in a court case similar to the discussion (see below). According to U.S. law,²⁹⁹ the definition of the ownership of abandoned property is as follows:³⁰⁰

*“Abandoned property is that to which the owner has voluntarily relinquished all right, title, claim and possession, with the intention of terminating his ownership, but without vesting it in any other person and with the intention of not claiming future possession or resuming the ownership, possession, or enjoyment.”*³⁰¹

*“Property which is abandoned by the owner who relinquishes it with the intention of terminating his interest in and without intending to vest ownership in another goes back into a state of nature, or, as more commonly expressed, it returns to the common mass of things in a state of nature and becomes subject to appropriation by the first taker, occupier, or finder who reduces it to possession. Such person thereupon acquires an absolute property therein as against both the former owner and the person upon whose land it happens to have been left.”*³⁰²

However, a property³⁰³ cannot

“be considered lost or subject to finder's claim, where by owning the land, the [landowner] had a constructive ownership of the [property] and where by the [landowner] demonstrated its intent to exercise dominion over the [property]”.³⁰⁴

Once abandoned, the previous owner of the property

“cannot thereafter reassert his rights of ownership to the prejudice of those who may have in the meantime appropriated the property”.³⁰⁵

In addition, the merefact of finding or locating the abandoned property, does not constitute an act of reduction to possession:

“Under law of finds, finder acquires title to lost or abandoned property by occupancy, that is, by taking possession of property and exercising dominion and control over it; finder does not acquire title merely on strength of his discoverey of lost or abandoned property.”

*“Under the principles of law of finds, persons who actually reduce lost or abandoned objects to possession and persons who are actively and ably engaged in efforts to do so, are legally protected against interference from others, wheras persons who simply discover or locate such property, but do not undertake to reduce it possession, are not.”*³⁰⁶

The state may decide to step in and take into possession of abandoned property, either into protective custody, or into outright possession, since, according to U.S. law, it is held that

“every state has power to take charge of apparently abandoned or unclaimed property, but it may not eascheat such

property administratively without judicial action."³⁰⁷

However, any such steps will be carefully scrutinised and the case for escheat needs to be strong.³⁰⁸ In any case, however, for escheat or any steps for possession to occur, it needs to be proven that the abandonment occurred intentionally. Such abandonment

"involves a conscious purpose and intention on the part of the owner, and necessarily involves an act by which the possession is relinquished, and this must be a clear and unmistakable affirmative act indicating a purpose to repudiate the ownership, mere relinquishment of the possession of a thing is not an abandonment of it in the legal sense of the word, for such an act is not wholly inconsistent with the idea of continuing ownership; the act of abandonment must be an overt act or some failure to act which carries the implication that the owner neither claims nor retains any interest in the subject-matter of the abandonment." and *"[t]he act of relinquishment of possession or enjoyment must be accompanied by an intent to part permanently with the right to the thing; otherwise there is no abandonment."*³⁰⁹

*"As a general rule, abandonment of, or an intention to abandon, property is not presumed. Especially this is true if the conduct of the owner can be explained to be affirmatively with a continued claim. An abandonment must be made to appear affirmatively by the party relying thereon, and the burden is on upon him who sets up abandonment to prove it by clear, unequivocal and decisive evidence."*³¹⁰

4.3. Legal provisions - Treasure trove

A variation of the principle of abandoned property is that of treasure trove. While in other countries artefacts made of valuable metal, such as gold and silver, are reasonably common, this will be the exception in the Republic of the Marshall Islands. With the exception the European period, metal was unknown in the Marshall Islands. It is con-

ceivable, however, that, during the European period, a trader may have hidden away resources, such as gold and silver coinage, which may be found accidentally in the course of survey, gardening or construction. In such a case, the principle of *treasure trove* applies:

*"[T]reasure-trove is any gold or silver in coin, plate or bullion found concealed in the earth or in a house or other private place, but not lying on the ground, whose owner is unknown."*³¹¹

According to U.S. jurisprudence, and in the absence of specific legislation therein as far as the U.S. are concerned³¹², the ownership of the treasure-trove rests with the finder "against all the world except the former owner."³¹³ With the lack of pertinent legislation, it has to be assumed that courts in the Marshall Islands would follow the U.S. examples. It is within the realm of the legislative of the Republic of the Marshall Islands to pass laws similar to those of other countries, wherein all antiquities and treasure-trove are the sole property of the sovereign.³¹⁴

Distinguished from the principle of treasure trove needs to be the principle of *property embedded in the earth*,³¹⁵ which will be discussed below.

4.4. Legal provisions - Property embedded in the earth

While the determination of the finders right to abandoned property is unaffected by the ownership of the land on which the property is found, there is one notable exception. According to U.S. law, the finder of

"property which is embedded in the soil, but which is not treasure-trove, acquires no title thereto, for the presumption is that the possession of the article found is in the owner of the locus quo".³¹⁶

Following from this, therefore, the owner of the land the property is found in has constructive ownership and is thus free to dispose of it in any way he sees fit, the only exception to which is provided by the principle of treasure trove.³¹⁷

4.5. Legal provisions - USAKA installations, Kwajalein Atoll

The administrative and legal control of Republic of the Marshall Islands over those islands of Kwajalein Atoll, which are utilised by U.S. Army Kwajalein Atoll Facility (USAKA) are regulated by a special agreement. With the signature of the *Compact of Free Association*³¹⁸ and a related agreement regarding the utilisation of the islands of the mid-atoll corridor on Kwajalein Atoll³¹⁹, the Government of the United States retained the exclusive rights to use these islands for its U.S. Army Kwajalein Atoll Facility. With regards to the archaeological and other cultural sites, the agreement stipulates that

*“[a]ll minerals, including oil, antiquities and treasure trove in a defense site and all rights relating thereto are reserved to the Government of the Marshall Islands, but any exploitation thereof shall require the prior concurrence of the Government of the United States”.*³²⁰

4.6. Application — prehistoric and historic artefacts

The application of these general principles has wide-ranging implications for the management of archaeological and historical sites. We have to distinguish between various artefact categories: those made of precious metals, that is gold and silver, and those which are not. The former category would fall under the principle of treasure trove, while the latter category falls under the principles of abandoned property, if the artefacts are lying on the surface, or the principle

of property embedded in the soil, if it is located in the ground.

Following from these general laws, and specifically in the absence of any specific legislation regarding the possession and management of archaeological sites, any archaeological site, and any artefacts therein — save for those artefacts found on the surface, which are the property of the first finder or taker reducing them to his possession — are the undisputed property of the owner of the land. Furthermore, unless courts would overrule the law of finds in the light of public interest and common good, any landowner can systematically excavate any archaeological site and can sell any of the finds without violating the law.

5. Ownership of moveable resources dating to World War II

5.1. General

This section was split on purpose from the previous section because of the relative short distance in time when the events took place. In addition, the property discussed here was, at the time of its production and use, either government property of the Imperial Japanese Government or government property of the Government of the United States.

As moveable resources dating to World War II regarded all those impermanent alterations to the land scape, such as aircraft, trucks, bombs³²¹ and guns³²² and parts thereof.³²³

5.2. Legal provisions - Abandoned property, general

The principle of abandoned property has been used in a court case (involving a World War II aircraft) pertinent to the discussion at hand (see below).³²⁴, The definition of the ownership of abandoned property, according to U.S. law, has been given in section.4.2.

The question arises to what extent the principle of abandoned property is applicable in the issue of World War II materiel. Assuming the principle is seen as valid, then anyone who clears an aircraft or any other moveable object for that matter, obtains the property rights to this object. It remains to be a matter to be decided in court whether letting an aircraft become overgrown with vines after having initially cleared it of its vegetative cover - and thus having reduced it to possession³²⁵ - constitutes an act of abandonment. It appears that the owners need to express the intention to abandon the

aircraft and to “relinquish the property with the intention of terminating his interest in it”³²⁶. In a pertinent case tried this fact was not established and the ownership of the property remained with the person/lineage who had cleared the aircraft.³²⁷

By the same token, however, it needs to be established beyond reasonable doubt by anyone claiming the rights as a first taker, occupier or finder, that the original owner, in that case the Imperial Japanese Government, represented by the Imperial Japanese Navy, or its legal successor as far as property is concerned, the T.T.P.I., in fact relinquished the property with the intention of terminating its interest in it.³²⁸ This issue is further discussed in the section of the actual court case tried

5.3. Legal provisions - aircraft

The *Marshall Islands' Revised Code of 1989* differentiates between *civil aircraft*, which are defined as “any aircraft other than a public aircraft or a military aircraft”³²⁹, and *public aircraft*, which are defined as “aircraft used exclusively in the service of any government or of any political jurisdiction thereof, including the Government of the Marshall Islands , but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes”. Military aircraft are not covered and considered under the law. Any such aircraft, however, need to be in flying or operating condition. Hence, the stipulations do not apply to World War II materiel.

5.4. Court decisions - aircraft

There is a decision of the Appellate Division of the High Court of the Trust Territory regarding the ownership of a Japanese "Zero" aircraft³³⁰ which had been taken from Taroa Island, Maloelap Atoll³³¹ in February 1979 for shipment to the USA.³³² While the court case mainly revolves around the identity of the specific aircraft and the fact from which way the aircraft actually came, the case also touches upon the question of ownership and is thus pertinent for the present discussion. An aircraft was found on Taroa and was cleared of the surrounding vegetation. The aircraft was later on transported to Majuro for sale overseas by person(s) other than those clearing the aircraft of vegetation. Not until then the ownership of the aircraft was specifically claimed or disputed. Based on evidence presented, Chief Justice Munson ruled that the principle of abandoned property (see above) applied in this case and that the aircraft be owned by the person(s) who initially cleared it of all vegetation and thus reduced it to its possession.³³³

As has been mentioned above (section.5.2.1.) it needs to be established beyond reasonable doubt by anyone claiming the rights as a first taker, occupier or finder, that the original owner, in that case the Imperial Japanese Navy, or its legal successor as far as property is concerned, the T.T.P.I. , has to relinquish the property with the intention of terminating its interest in it. It appears very doubtful whether this fact can be established:

As far as can be made out, the Imperial Japanese Navy never relinquished ownership intentionally. In fact, as can be documented on other occasions³³⁴, damaged aircraft were kept to be cannibalised for spare parts. The fact that the Japanese garrison on Taroa did

not surrender³³⁵ until September 5th, 1945, that is 20 days after the call for surrender by the Japanese Emperor on August 17, 1945, indicates that the Japanese atoll commander of Taroa, Captain Kamada, Shoshi, IJN, Flag No. 492, employed by and thus acting on behalf of the Imperial Japanese Navy retained possession of the atoll and therefore ownership of all military property. The commanding order had been to keep the bypassed garrisons, such as Taroa, capable of receiving a relieving force in case of a counter-offensive. After the Japanese surrender the atoll and all *alien property* was taken into custody by the U.S. Navy and later claimed by the T.T.P.I. government by virtue of the principle of *mutatis mutandis* and transfer of ownership of the loser of a war to the winner.³³⁶ T.T.P.I.

Therefore, it needs to be established that the T.T.P.I. government intentionally relinquished ownership in Japanese war materiel. There are several indications to the contrary: After the war an application by Japanese companies to salvage the ships Japanese ships sunk in Chuuk (Truk) lagoon was refused.³³⁷

5.5. Legal provisions - weapons³³⁸

Given the state of war in 1944 during the occupation of most of the Marshall Islands by U.S. forces and given the terms of surrender of the individual Japanese garrisons in the Marshall Islands all weapons and ammunition had to be surrendered to the U.S. authorities. Since these weapons were items of war of a hostile belligerent nation, they were rightfully confiscated by the U.S. under the normal terms of war legislation and thus were owned by the U.S. government. With the transfer of all U.S. government property to the Government of the Republic of the Marshall Islands as stipulated in the *Compact of Free Association*³³⁹ all such weaponry is owned by the Republic. Since it

is government property, which falls under sovereign immunity it cannot be considered abandoned and therefore cannot be claimed by the first finder and taker. Therefore, not only the small arms, but also the anti-aircraft batteries and the large coastal defense guns are owned by the Republic, and thus protected from appropriation by individuals.

Summary: Ownership of moveable resources on private land in the Republic of the Marshall Islands

The principle of abandoned and lost property applies in all cases of archaeological and prehistoric material, unless specifically covered by law. As at the time of writing no Historic Preservation Legislation has been enacted for the Marshall Islands, the principle of abandoned property can be claimed to apply universally. We have to distinguish between various artefact categories: those made of precious metals, that is gold and silver, and those which are not. The former category would fall under the principle of treasure trove, while the latter category falls under the principles of abandoned property, if the artefacts are lying on the surface, or the principle of property embedded in the soil, if it is located in the ground.

Any archaeological site, and any artefacts therein — save for those artefacts found on the surface, which are the property of the first finder and taker reducing them to his possession— is the undisputed property of the owner of the land. Furthermore, unless courts would overrule the law of finds in the light of public interest and common good, any landowner can systematically excavate any archaeological site and can sell any of the finds without violating the law.

As far as World War II material is concerned, we also have to apply the principle of abandoned property, but are faced with the problem of establishing that the property has

been abandoned intentionally under all purposes of the law. If the Historic Preservation Office can demonstrate that the governments of Japan and the U.S. never abandoned their property, and that therefore the government of the Republic of the Marshall Islands as the succeeding sovereign is the owner, then the sites can be protected.

Summary: Ownership of moveable resources on public land in the Republic of the Marshall Islands

Following from the above, all those archaeological sites located on public land are the property of the government of the Republic of the Marshall Islands, while the artefacts lying on the surface can be claimed by the first finder and taker.

6. Ownership of ordnance propelled onto Marshallese land

Another issue of ownership to be addressed is that of the ordnance propelled or dropped onto various islands and atolls of the Republic of the Marshall Islands during World War II by the means of naval gunfire or aircraft bombardment. A large number of unexploded, and potentially “live” ammunition can still be found on several atolls of the Marshall Islands.³⁴⁰ The question of ownership of such resources is of importance not only for purposes of historic preservation of those pieces of ordnance considered to be harmless and encountered in the context of archaeological or historic sites, but also and especially of those pieces of ordnance considered to be still dangerous. The question of ownership obviously has a bearing on any obligations to mitigate the danger inherent in such ordnance.

6.1. Ownership of ordnance - general

Conceptually, we will have to distinguish between two types of ordnance: expended and unexpended ordnance. *Expended ordnance* is that type of ordnance which has been propelled by any kind gun or tube or has dropped by any kind aircraft or missile against a given target. *Unexpended ordnance* is that type of ordnance which has been stockpiled in a given place or is or was in transit to such place with the purpose to be propelled or dropped against a target at a later time.

6.1.1. Ownership of “expended” ordnance - located on land

In general, it can be argued that a person shooting off a naval shell, launching a torpedo or missile/rocket or releasing an air-

borne bomb, or a person authorized to command other persons to do so, divests himself of this particular piece of property and, furthermore, knowingly and intentionally abandons the ownership of that property “with the intention of not claiming future possession or resuming the ownership, possession, or enjoyment.”³⁴¹ Following from the fact of intent, it is unlikely that this property can be classified as “lost” or “misplaced” property³⁴²

It can also be argued that all ordnance, shot or dropped, is intended for imminent destruction, that is to explode and thereby destroy itself and other property in the vicinity of the point of impact.³⁴³ It can further be argued that the person divesting himself of such property can reasonably expect that by detonating, the property destroys itself beyond recovery. However, *de facto* not all ordnance detonated, either because the fuse settings were wrong or because the shells or fuses were faulty in one way or another.³⁴⁴

Therefore, property abandoned with intent and with the expectation of disappearance is still present. *Who owns it?* The original owner, the person on whose land the property is now located, or the finder? And, furthermore, given that the property is potentially very dangerous, what are the obligations, if any, of the original owner to the finder, or the person on whose land the property is now located?

If one argues that the moment the property was shot off or dropped, it was abandoned for all purposes of the law, then the unexploded naval shell represents abandoned property and is therefore the possession of the first taker or finder. However, if

one argues that the property was abandoned with the expectation of imminent destruction, then since the destruction of the property did not take place, the abandonment was incomplete and therefore the ownership is still vested with the person shooting or dropping the shell or bomb.

6.1.2. Ownership of “expended” ordnance - submerged

A variation of the above theme is the ownership of that piece of expended ordnance which is found under water. This applies to mines, torpedoes and bombs. As of present, no such item has been found or located in the waters of the Republic of the Marshall Islands, but given that archaeological research and survey-work underwater are just developing, it is possibly just a matter of time until such ordnance be discovered.

6.1.3. Ownership of “unexpended” ordnance - located on land

It can be reasonably argued that any unexpended ordnance, which has been stockpiled on land, either in bomb/ammunition dispersal areas, next to gun-emplacements or elsewhere, has been deposited there intentionally with the intent to use it. After the need to use the ordnance had become obsolete, *i.e.* with the surrender of Japan on September 3, 1945, the owners had forgotten about its existence.

Thus, it can be argued that the principle of “mislaid property” applies, because the ordnance had been deposited by “the owner voluntarily and intentionally. in a place where he can again resort to it, and then forgets [forgot] where he puts [put] it”³⁴⁵. Therefore, if the principle of mislaid property applies, then the property is still in the possession, and to some extent also the responsibility of the former owner.

6.1.4. Ownership of “unexpended” ordnance - submerged

Another aspect of the ownership of unexpended ordnance is the ownership of unexploded ordnance encountered in shipwrecks. For example, the Japanese merchant vessel *Toreshima Maru*, sunk by U.S. planes in January 1944 off Taroa Island, Maloelap Atoll, has a large number of unexploded depth charges, still sitting in the tracks at the stern of the vessel.³⁴⁶

When the Republic of the Marshall Islands, for the people of Bikini, acquired ownership of all vessels of the “Bikini Fleet” sunk during the nuclear weapons testing, the agreement between the U.S. government and the Republic of the Marshall Islands entailed that by

*”acceptance of such right, title and interest, the Government of the Marshall Islands shall hold harmless the Government of the United States from loss, damage and liability associated with such vessels, ordnance, oil and cable”*³⁴⁷

Effectively, therefore, not only the ownership, but also the responsibility for the unexploded ordnance now rests with the people of Bikini.

6.2. Applications: ownership of Japanese and U.S. ordnance

For the purposes of this discussion, we will have to distinguish between the Japanese ordnance and U.S. ordnance: while the former has been left on the islands/atolls after surrender, the latter has been propelled or dropped onto the island or atoll with an intent to explode and destroy.

6.2.1. Ownership of Japanese ordnance

The determination of the ownership of Japanese ordnance is fairly straightforward:

At the time the ammunition was brought onto the atolls it was obviously the property of the Imperial Japanese Government and at the disposal of the Imperial Japanese Navy, or by extension of command, of the Imperial Japanese Army.³⁴⁸ After surrender, and covered under the terms of surrender as laid down by the U.S. Commander of the Marshall and Gilbert Islands Area, almost all unexpended ammunition and ordnance, as well as all weaponry was stockpiled by the Japanese and surrendered to the U.S. forces.³⁴⁹ Concurrent with the formal act of surrender rights and title to the property, stockpiled or not, was vested in the hands of the U.S. Armed Forces and, by extension, the U.S. Government. Any Japanese ordnance still remaining on the islands or atolls is owned by the U.S. government and, in legal terms, can be regarded either as lost or mislaid property. Since, under the *Compact of Free Association*, the U.S. government transferred its property to the Government of the Republic of the Marshall Islands,³⁵⁰ all unexploded Japanese ordnance is owned by the Republic. Consequently, it is the responsibility of the REPMAR government to ensure that such ammunition does not endanger the public at large in general and the landowners, upon whose property the ammunition is located, in particular

The unexploded ammunition found in submerged resources such as ships, as well as isolated submerged ordnance is still property and also responsibility of the Japanese government

6.2.2. Ownership of U.S. ordnance

The ownership of U.S. ordnance is a slightly different matter: *any* unexpended ordnance, be it submerged, or found on land, for example on former U.S. bases in the Marshall Islands, such as on Majuro Atoll, was the property of the U.S. government; both under the assumption of lost or mislaid property

and under the principle of sovereign immunity. Thus, with the signing of the compact, has become the property of the government of the Republic

6.3. The ethics of the removal of unexploded ordnance

While the signing of the Compact transferred the ownership of and thus responsibility for all unexploded ammunition to the hands of the REPMAR government, the ethics of such a transfer are doubtful.

The document facilitating the transfer of the ownership of the vessels in Bikini lagoon specifically mentions that “the Government of the Marshall Islands shall hold harmless the Government of the United States from loss, damage and liability associated with such. *ordnance*.”³⁵¹ It appears feasible, therefore, that the U.S. government, although having transferred the ownership of all property to the Republic of the Marshall Islands, can still be held liable for any unexploded ordnance

7. Ownership of human remains found in the Marshall Islands

Although a “touchy topic” in view of recent politicised discussions on the ownership of American Indian and Australian Aboriginal Human remains, the issue needs to be addressed in the light of repeated bone-collecting missions by Japanese bereaved families associations.

7.1 The nature of the bones

Human remains, contained in burials and cemeteries are either marked with headstones, or unmarked. While the former not only indicate the age of the burials³⁵² but sometimes also indicate the individual³⁵³ or the affiliation of the individual buried there,³⁵⁴ most early historic and prehistoric burials are unmarked. The unmarked human remains encountered in the Marshall Islands stem from the following sources: pre-historic cemeteries, early historic, non-Christian cemeteries, war graves of World War II and miscellaneous dead

Under normal circumstances burials or human remains become exposed by the means of construction activities, such as trenching or road construction,³⁵⁵ or by erosion.³⁵⁶ In addition, bones are sometimes encountered in war-time structures.³⁵⁷

7.2. The Japanese bone collecting missions

7.2.1. Background

As a result of the Pacific War, a great number of Japanese war dead were buried in the Central Pacific Islands. Since it was of paramount importance to the Japanese to be created and the ashes to be buried in a

Shinto shrine in Japan, the burial in the Central Pacific islands represented an unsatisfactory arrangement. permits regarding the visit of war graves were flatly refused in the 1950s, then permitted with limitations in the 1960s³⁵⁸, and finally permitted in the 1970s. In addition, permits were issued to collect bones and even to excavate them with a bulldozer and backhoe, provided that “identification of grave sites occurs by documentation of the period”.³⁵⁹ Occasionally bone recovery also conducted under water, as in case of the Japanese submarine *I-169* resting in Chuuk lagoon.³⁶⁰ These bone collecting missions, which mainly concentrated on the Marianas, Chuuk and Belau,³⁶¹ were sponsored by the Japanese national or local governments

7.2.2 Official bone collecting missions in the Marshall Islands :

A mission to the Marshalls was planned for 1971. but did not eventuate.³⁶² Proposed was a comprehensive mission in 1973 to Majuro, Mejit, Kwajalein, Enewetak, Rongelap, Maloelap, Mile, Ailinglaplap and Jaluit, spending in total 70 days in the Marshall Islands).³⁶³ A later amendment omitted Kwajalein and Enewetak because of objections by the U.S. Army operating the military facilities, but included also Utirik, Wotje, Ujae, and Ebon).³⁶⁴ The mission was to be conducted in October to December 1973.³⁶⁵

It appears, that with the exceptions of the islands utilised by the U.S. Armed Forces, the bone collecting missions were carried out.³⁶⁶ By far the largest number of Japanese war dead, however, was on just these islands. The fierce and bloody battles for Roi-Namur, Kwajalein and Enewetak re-

sulted in enormous Japanese casualties, who were buried in mass graves³⁶⁷ on Roi-Namur and Kwajalein.³⁶⁸ A single grave was encountered on Ebeye.³⁶⁹ Since the bone collecting mission could not be carried out, memorials were erected on all three islands and occasional memorial visits were granted. After the military objections against visits to Enewetak had become obsolete when Enewetak was given up as a US facility, interest in bone collecting missions resurfaced. A memorial visit to Enewetak took place in 1977.³⁷⁰

7.2.3 Inofficial bone collecting missions in the Marshall Islands

Apart from the authorised missions, some voluntary work was also undertaken: a Peace Corps Volunteer in the Marshall Islands also exhumed bodies, apparently unasked and unauthorised by authorities. Seven bodies, said to be Japanese war dead,³⁷¹ were exhumed on Mejit³⁷² by a PCV who then enquired what to do with the bones.³⁷³ No determination regarding the accuracy of the identification as war dead is given.

7.2.4. Bone collecting missions: ramifications for the archaeology

One of the major problems encountered is that the bones recovered may well not be those of Japanese soldiers but those of prehistoric people.³⁷⁴ Since the bone collecting missions were carried out by personnel untrained in archaeological recovery techniques, this is well possible.

7.3.The legal provisions of the Republic of the Marshall Islands

No pertinent law has been enacted by the Republic of the Marshall Islands which defines the ownership of human remains. The *Marshall Islands' Revised Code of 1987* stipulates that

"Every local government Council shall make ordinances with respect to, but not limited to, demarcating land solely for use as cemeteries and prohibiting the use of any other lands for cemeteries except upon written permission of the council".³⁷⁵

To date no such regulations have been enacted.³⁷⁶ The Code also empowers the Ministry of Health to issue regulations regarding (i) interments and dead bodies, (ii) disinterments of dead human bodies and (iii) cemeteries and burying grounds.³⁷⁷ Again, to date no such regulations have been enacted.³⁷⁸

7.4.The legal provisions of the former Colonial and Mandatory powers and Trustees

7.4.1.The German regulations

Under German Colonial Law, which is derived from the German common law, human bodies need to be buried and graves may not be defiled or disturbed.

7.4.2.The Japanese regulations

Under the regulations of the Japanese South Seas Bureau it was a police offense to defile a grave yard or a tombstone.³⁷⁹ As far as the limited sources go, no information on the legal possession of corpses could be collected.

7.4.3.The regulations of the T.T.P.I.

Under the regulations issued by the Trust Territory, defilement of human graves is an offense.

7.5.Ethical considerations

From an ethical point of view, the human remains of a deceased person remain to be that person's personal property³⁸⁰, regardless

whether the owner is still around to claim it³⁸¹ or not. Therefore,

*“unmarked human remains [which] are recovered from time to time.in the course of archaeological activities [and] which may be of persons with different cultural associations should be treated with dignity and respect consistent with the cultures of they were members”.*³⁸²

Following from this, the bone collecting missions are ethically sound, provided, of course, that onbly Japanese bones are removed. Exhumation and export of human remains cannot be granted if it is in doubt, whether the bones actually belong to the group of people claimed.

In view of prehistoric or historic burials, where no close relatives and lineage members are around to claim association, it becomes the responsibility of the public at large to protect the rights of the deceased against those who threaten them. Therefore, although outright title cannot be claimed, the human bones of past generations, which are not claimed by relatives, are to be kept in protective custody by the government.³⁸³

8. Ownership of Cultural Resources - a summary

In the foregoing section we have seen that the issue of ownership of the cultural heritage of the Republic of the Marshall Islands is complex that no general, uniform rule can be applied to any given case. To facilitate decision making, a table has been compiled. This table is based on the discussion set out above.

All those cases where the question of ownership appears straight forward are marked by tickmarks, while the cases which may be disputed are marked by ☒ symbols. In case of doubt, the discussion should be consulted.

Synopsis of the ownership of cultural resources in the Republic of the Marshall Islands

	RMI Govt.	Local Govt.	Private		Other Foreign Owner		
			"Clan"	Person	U.S	Japan	Person
Land							
<i>Traditional ownership of land</i>			☑				
<i>Leased land</i>	☒	☒	☒	☑			
<i>Formerly owned by the German Government</i>	☑						
<i>Formerly owned by the Japanese Government</i>	☑						
<i>Formerly used by the Japanese Navy, Jaluit</i>	☑		☒				
<i>Formerly used by the Jap. Navy, Maloelap</i>	☑						
<i>Formerly used by the Japanese Navy, Majuro</i>	☒		☒				
<i>Formerly used by the Jap. Navy, Enewetak</i>	☒		☒				
<i>Formerly used by the Jap. Navy, Kwajalein</i>	☑						
<i>Formerly used by the Jap. Navy, Mile</i>			☑				
<i>Formerly used by the Japanese Navy, Wotje</i>	☑		☒				

Synopsis of the ownership of cultural resources in the Republic of the Marshall Islands

	RMI Govt.	Local Govt.	Private		Other Foreign Owner		
			"Clan"	Person	U.S	Japan	Person
Inter-tidal resources							
<i>Fishtraps</i>	☒		☑				
<i>Shipwrecks</i>	☒			☒			☒
<i>Aircraft wrecks (land-based)</i>	☒			☒			
<i>Aircraft wrecks (seaplanes)</i>	☒			☒			☒
<i>Tanks and other war materiel</i>	☒			☒			
<i>Amphibious tanks</i>	☒			☒			
<i>Other equipment (non-government)</i>				☒			

Synopsis of the ownership of cultural resources in the Republic of the Marshall Islands

	RMI Govt.	Local Govt.	Private		Other Foreign Owner		
			"Clan"	Person	U.S	Japan	Person
Submerged resources (ships)							
<i>Ships sunk prior to German colony</i>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
<i>Ships sunk during period of German colony</i>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
<i>Ships sunk during period of Japanese mandate</i>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
<i>Japanese navy units sunk during World War II</i>	<input checked="" type="checkbox"/>					<input checked="" type="checkbox"/>	
<i>Japanese merchant vessels sunk during WW II</i>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<i>U.S. units sunk during World War II</i>	<input checked="" type="checkbox"/>						
<i>U.S. ships sunk during testing on <input checked="" type="checkbox"/>ikini</i>	<input checked="" type="checkbox"/> 384	<input checked="" type="checkbox"/>					
<i>Sunk after the end of World War II</i>				<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
Submerged resources (aircraft & other)							
<i>Japanese aircraft</i>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>			
<i>U.S. aircraft</i>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>					
<i>U.S. war material</i>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>					
<i>Japanese war materiel</i>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>			
<i>Post- World War II materiel</i>				<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>

Synopsis of the ownership of cultural resources in the Republic of the Marshall Islands

	RMI Govt.	Local Govt.	Private		Other Foreign Owner		
			"Clan"	Person	U.S	Japan	Person
Immoveable resources pre-dating WW II							
<i>Prehistoric sites</i>			<input checked="" type="checkbox"/>				
<i>Buildings of the German Government</i>	<input checked="" type="checkbox"/> 385		<input checked="" type="checkbox"/>				
<i>Buildings of the civilian Japanese Government</i>	<input checked="" type="checkbox"/> \$6\$		<input checked="" type="checkbox"/>				
<i>Buildings of private people</i>			<input checked="" type="checkbox"/>				<input checked="" type="checkbox"/>
Immoveable resources of WW II							
<i>Buildings and structures, general</i>			<input checked="" type="checkbox"/>				<input checked="" type="checkbox"/>
<i>Japanese military buildings and structures</i>			<input checked="" type="checkbox"/>				<input checked="" type="checkbox"/>
<i>U.S. military buildings and structures</i>			<input checked="" type="checkbox"/>				<input checked="" type="checkbox"/>

Synopsis of the ownership of cultural resources in the Republic of the Marshall Islands

	RMI Govt.	Local Govt.	Private		Other Foreign Owner		
			"Clan"	Person	U.S	Japan	Person
Moveable resources (artefacts) pre-dating WW II							
Property, general			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
on private land, precious (Gold/Silver)				<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
on private land, not precious, on surface				<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
on private land, not precious, in ground			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			
on public land, precious (Gold/ Silver)				<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
on public land, not precious, on surface				<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
on public land, not precious, in ground	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>					
on public land, not precious, in ground	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>					
Moveable resources dating to WW II							
<i>Property, general</i>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
<i>Arms and ammunitions</i>	<input checked="" type="checkbox"/>						
<i>Japanese war materiel</i>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
<i>U.S.war materiel</i>	<input checked="" type="checkbox"/>						
<i>Japanese aircraft</i>	<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
<i>U.S. aircraft</i>	<input checked="" type="checkbox"/>						

Synopsis of the ownership of cultural resources in the Republic of the Marshall Islands

	RMI Govt.	Local Govt.	Private		Other Foreign Owner		
			"Clan"	Person	U.S	Japan	Person
Ordnance							
Japanese ordnance on land	<input checked="" type="checkbox"/>						
Japanese ordnance, submerged						<input checked="" type="checkbox"/>	
U.S. ordnance on land	<input checked="" type="checkbox"/>						
U.S. ordnance, submerged	<input checked="" type="checkbox"/>						

Synopsis of the ownership of cultural resources in the Republic of the Marshall Islands

	RMI Govt.	Local Govt.	Private		Other Foreign Owner		
			"Clan"	Person	U.S	Japan	Person
Human remains							
Human remains, prehistoric	<input checked="" type="checkbox"/>						
Human remains, German Colonial Period				<input checked="" type="checkbox"/> 386			<input checked="" type="checkbox"/>
Human remains, Japanese Mandate Period				<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>
Human remains, Japanese War dead							<input checked="" type="checkbox"/>
Human remains, U.S. war dead							<input checked="" type="checkbox"/>
Human remains, unknown affiliation	<input checked="" type="checkbox"/>						

Appendix: Property in the Marshall Islands in the hands of foreigners in 1913.³⁸⁷

Ser. N°	Property/wato	Island	Atoll	Size		Owner
				ha	a	
1	Northern tip	Jabwor	Jaluit	4	95	Jaluit Gesellschaft
2	A parcel of land	Jabwor	Jaluit	-	41	Jaluit Gesellschaft
3	parts of the wato Kwo-ai-en Lakutak Badto Lojekar	Jabwor	Jaluit	8	-	Jaluit Gesellschaft See also Entry N°53
4	Majamidak	Jabwor	Jaluit	5	22	Jaluit Gesellschaft
5	whole island	Devet	Jaluit	16	171.4	Jaluit Gesellschaft
6	whole island	Bogelablab	Jaluit	24	245.5	Jaluit Gesellschaft
7	whole island	Djar	Jaluit	15	79.7	Jaluit Gesellschaft
8	whole atoll		Providence			Jaluit Gesellschaft
9	whole atoll		Bikar			Jaluit Gesellschaft
10	whole island	Tokowa	Mile	33	35.1	Jaluit Gesellschaft
11	whole island	Enirear	Mile	1	38.3	Jaluit Gesellschaft
12	Lejalik	Ine	Arno	-	69.2	Jaluit Gesellschaft
13	Lotadjeing	Ine	Arno	-	63.7	Jaluit Gesellschaft
14	Maneketak	Ine	Arno	1	32	Jaluit Gesellschaft
15	Andak	Ine	Arno	-	82.8	Jaluit Gesellschaft
16	Kidjur	Taroa	Maloelap	-	30	Jaluit Gesellschaft
17	Jegar	Taroa	Maloelap	2	20	Jaluit Gesellschaft
18	Lebeigien	Wollet	Maloelap	-	63.6	Jaluit Gesellschaft
19	Lotoin	Majuro (Laura)	Majuro	-	42.9	Jaluit Gesellschaft
20	Maluk	Majuro (Laura)	Majuro	-	11.8	Jaluit Gesellschaft
21	Lajurik	Jaroj (Rita)	Majuro	4	16	Jaluit Gesellschaft
22	northern tip	Juridj	Epoon	13	90	Jaluit Gesellschaft
23	western part	Medj	Epoon	-	25	Jaluit Gesellschaft
24	western part	Namorik	Namorik	-	40	Jaluit Gesellschaft
25	northwestern tip	Namorik	Namorik	-	10	Jaluit Gesellschaft
26	a wato	Medjejurik	Jaluit	-	1	Jaluit Gesellschaft
27	Likenlandil	Namorik	Namorik	-	1	Jaluit Gesellschaft
28	wato	Ebon	Epoon	-	1	Jaluit Gesellschaft
29	Jabein	Madjen	Mile	-	60	Jaluit Gesellschaft
30	a wato	Namorik	Namorik	-	6.3	Jaluit Gesellschaft

Ser. N°	Property/wato	Island	Atoll	Size		Owner
				ha	a	
31	whole island	Taongi	Taongi			Jaluit Gesellschaft
32	whole island	Edjit	Majuro	8	0	Jaluit Gesellschaft
33	whole island	Enearmij	Majuro	2	2	Jaluit Gesellschaft
34	Manak	Anil	Majuro	-	6.8	Jaluit Gesellschaft
35	a wato	Rongrong	Majuro	-	9.6	Jaluit Gesellschaft
36	northern tip	Arno	Arno	10	-	Jaluit Gesellschaft
37	Leeingi	Arno	Arno	-	20	Jaluit Gesellschaft
38	Jitakin	Arno	Arno	-	6	Jaluit Gesellschaft
39	Tabutiki	Molu	Mile	-	20	Jaluit Gesellschaft
40	Monak	Namorik	Namorik	6	7	Jaluit Gesellschaft
41	Bukanealap	Namorik	Namorik	-	36	Jaluit Gesellschaft
42	Nomonomonajit	Malakou	Mile	-	10	Jaluit Gesellschaft
43	a wato	Kuwajleen	Kuwajleen	-	9.3	Jaluit Gesellschaft
44	Meirej	Imrodj	Jaluit	-	2	Boston Mission
45	Rube	Epoon	Epoon	3	43.5	Boston Mission
46	a wato	Majuro (Laura)	Majuro	0	69.6	Boston Mission
47	Minidjilidjeling	Taroa	Maloelap	1	6.5	Boston Mission
48	Mileno	Mile	Mile	0	20	Boston Mission
49	Manbat	Mile	Mile	0	25	Boston Mission
50	Labago	Ine	Arno		10.8	Boston Mission
51	whole atoll		Likiep			heirs of A.Capelle & Jose de Brum
52	Lukelap	Jabwor	Jaluit	-	80	Catholic Mission Jaluit
53	Lakutajk Kwo-ai-en Badto Lokejar	Jabwor	Jaluit	-	52.5	Catholic Mission Jaluit
54	Kinle	Namorik	Namorik	-	94.5	Catholic Mission Jaluit
55	a wato	Jabwor	Jaluit	2	28.4	State Domain Marshall Islands District
56	a wato	Jabwor	Jaluit	-	34.5	State Domain Marshall Islands District
57	whole island	Kili	Kili		163.32	O. Bock
58	Roerigen	Jabwor	Jaluit	3	75	Burns Philp & Co.

Endnotes

- 1 The legality of each land acquisition may need to be assessed on an individual basis, although a few general rules can be laid down (see below).
In general, however, the courts repeatedly decided that it is now too late in the day to right the wrongs or the perceived wrongs of previous administrations.
- 2 The following standard abbreviations have been used in the legal quotations: ALR 2d – American Law Reports, 2nd edition; Am. Jur. 2d – American Jurisprudence 2nd edition; F. – Federal Reporter; F. 2d – Federal Reporter, 2nd edition; F. Supp 2d – Federal Reporter, Supplement, 2nd edition; FR Serv. 2d - Federal Reporter, Court Service, 2nd edition; L ed - United States Supreme Court Reports, Lawyers edition; L ed 2d- United States Supreme Court Reports, Lawyers edition, 2nd edition; S Ct – U.S. Supreme Court Reporter; T.T.R.– Trust Territory Reports; US – United States Supreme Court Reports; USCS -United States Code Service.
- 3 Cases heard by the Trial and the Appellate Divisions of the High Court of the Trust Territory sitting in the Marshallese Islands District obviously possess a stronger persuasive value than cases adjudged for other districts of the T.T.P.I.; nevertheless, the following discussion also presents cases heard in the Mariana, Palau, Truk, Ponape, Kosrae and Yap districts, if the issues discussed therein have merit for the overall argument and are indicative of the reasoning of the T.T.P.I. courts.
- 4 Q.Wright, *Mandates under the League of Nations*. Chicago, University of Chicago Press 1930.
- 5 Which is the general precondition for a change in custom (*Lalou v. Aliang* 1 T.T.R.95,100; 1954). see` also Section 3.1.2.3.
- 6 Spoehr, A., 1949, Majuro, a village of the Marshall Islands. *Fieldiana: Anthropology* 39. Chicago: Chicago Natural History Museum.
Milne, C. & M.Steward, 1967, The inheritance of land rights in Laura.In: L.Mason (ed.), *The Laura Report. A field report of training and research in Majuro Atoll, Marshall Islands*. Honolulu: University of Hawaii. Pp.1-45. (pagination in volume is not consecutively numbered).
Tobin, J. 1952, Land tenure in the Marshall Islands. *Atoll Research Bulletin* 11.
- 7 An exception is formed by the *Kotra*;lands, where the *irooj laplap* holds the *irooj laplap* ,*alap* ;and *dri-jerbal* rights. (*Anjouij v. Wame* 5 T.T.R. 337). The *irooj/leeroj laplap* is thus free to dispose of this land in any way (s)he may deem fit. Often, the utilisation of the land is ensured by assigning *dri-jerbal* rights (*ibid.*).
- 8 *Henos v. Kaiko* 5 T.T.R. 352; *Jetnil v. Buonmar* 4 T.T.R. 420.
- 9 Or that of the *irooj elap* in the Ralik Chain. In the following, all references to the *irooj laplap* include the *irooj elap* wherever the issue is general and also applies to the Ralik chain.
- 10 *Jetnil v. Buonmar* 4 T.T.R. 420.
- 11 *Labina v. Lainej* 4 T.T.R. 234.
- 12 unless the contrary is shown. Cf. *Binni v. Mwedriktok* 5 T.T.R. 374; *Henos v. Kaiko* 5 T.T.R. 458;
- 13 Cf. *Limine v. Lainej* (1 T.T.R. 107, 111, 112) where the court has held that “[d]eterminations made by an *irooj lablab* [sic] with regard to his lands are entitled to great weight, and it is to be supposed that they are reasonable unless it is clear that they are not” and that they “act reasonably as responsible officials and not simply to satisfy their own personal wishes.” See also *Ishoda v. Jejon* 5 T.T.R. 497; *Edwin v. Thomas* 5.T.T.R. 326; *Likinono v. Nako* 3 T.T.R. 120; *Rilometo v. Lanlobar* 4 T.T.R. 172; *Bulele v. Loeak* 4 T.T.R. 5; *Lota v. Korok* 8 T.T.R. 3.
- 14 Cf. *Bina v. Lajoun* 5 T.T.R. 366. The Appellate division of the T.T.P.I. High Court passed various, slightly conflicting rulings in this matter: If an *Irooj/leeroj laplap* positions falls vacant, and the *alap* do not recognise the rights of the pretending *irooj/leeroj laplap*, then the *alap* have the right to refuse obedience even if this refusal as such is against Marshallese custom (*Bina v. Lajoun* 5 T.T.R.

- 366-373). If one or more *alap* do not recognise an *irooj laplap*, this does not constitute a fact that the appointment of the *irooj* is invalid as long as the majority of the *alap* recognises the *irooj*. Following from this, the *irooj* can demand the respect of *all alap* (*Nenjir v. Laibinnij* 5 T.T.R. 477, 480). However, a succession to the position of an *irooj laplap* cannot occur, if the person is opposed by the majority of the people holding rights to the land (*Labina v. Lanej* 4 T.T.R. 234).
- 15 Today, the size of the lease is determined by the *irooj laplap*.
- 16 *Bulele v. Loeak* 4 T.T.R. 5.
- 17 *Rjinno v. Dick* 5 T.T.R. 557.
- 18 *Muller v. Maddison* 5 T.T.R. 471.
- 19 It is well within within the existing and perceived powers
- 20 After the death of the “initial” *alap*, that is the oldest female sibling in one generation, the next *alap* is commonly chosen - in chronological order – from the younger brothers or sisters. Once all these siblings are exhausted, the *alap*-ship is transferred to the next younger generation, starting with the oldest female child of the oldest female sibling of the previous generation (the “initial” *alap*). If all these are exhausted and no younger generation is in existence, then the *alap*-ship is transferred to the next senior *bwij*, that is to the oldest female of a smaller, *i.e.* lesser, *bwij*. (*Tobin op. cit.* [footnote 4])
- 21 *Labina v. Lainej* 4 T.T.R. 234; *Jekron v. Saul* 4 T.T.R. 128. The approval of an *irooj laplap* is considered sufficient to validate a will designating a successor *alap* (*Linidrik v. Main* 7 T.T.R. 231).
- 22 *Makroro v. Benjamin* 5 T.T.R. 519; A *dri-jerbal*, once vested, can only be cut-off by an *alap* with good cause and approval of the *irooj laplap*. (*Lajian v. Likebelok* 5 T.T.R. 417).
- 23 *Chilli v. Lanadra* 5 T.T.R. 318. Provided that the *irooj laplap* approves: *Edwin v. Thomas* 5 T.T.R. 326.
- 24 *Binni v. Mwedriktok* 5 T.T.R. 374; *Riolometo v. Lanlobar* 4 T.T.R. 172; *Likinono v. Nako* 4 T.T.R. 483; *Motlok v. Lebeiu* 7 T.T.R. 359. What constitutes a good cause? For example, the non-payment of the *irooj*'s share of the corpra-sales (*Nenjir v. Laibinnij* 5 T.T.R. 478, 481); or the non-recognition of the *irooj laplap*'s authority (*Nenjir v. Laibinnij* 5 T.T.R. 478); Errors in the initial appointment of the *alap*, however, do not constitute good cause (*Langjo v. Neimoro* 4 T.T.R. 115).
- 25 *Tikoj v. Liwaikam* 5 T.T.R. 483.
- 26 *Binni v. Mwedriktok* 5 T.T.R. 374; What constitutes a good cause? For example, the non-payment of the *irooj*'s or *alap*'s share of the corpra-sales (*Nenjir v. Laibinnij* 5 T.T.R. 478, 481; *Jekkeni v. Bilimon* 5 T.T.R. 442); disregard of the *alap*'s authority and failure to pay respect to the *alap* (*Alek S. v. Lomjeik* 3 T.T.R. 112). However, if an *alap* disregards the *dri-jerbals*'s rights, then the *dri-jerbal* may disregard his obligations towards the *alap* (*Alek S. v. Lomjeik* 3 T.T.R. 112)
- 27 *Jabwe v. Henos* 5 T.T.R. 458
- 28 The following acts have been regarded as “working the land”: clearing, planting, harvesting (*Tikoj v. Liwaikam* 5 T.T.R. 483, 488). Working the land, however, does not automatically imply acquisition of rights of ownership in the land (*Tikoj v. Liwaikam* 5 T.T.R. 483, 488; *Anjetob. v. Taklob* 4 T.T.R. 120, 122).
- 29 *Tikoj v. Liwaikam* 5 T.T.R. 483.
- 30 *Makroro v. Benjamin* 5 T.T.R. 519.
- 31 *Cf. Tobin op. cit.* (footnote 4); *Milne & Stewart op. cit.* (footnote 4).
- 32 *Jitiam v. Litabtok* 5 T.T.R. 513; *Amon v. Makroro* 5 T.T.R. 436; *Bwinni v. Mwedriktok* 5 T.T.R. 451. However, a father can designate a younger daughter as the successor *leeroj* (*Linidrik v. Main* 7 T.T.R. 231).
- 33 *Kitre*, the present or gift or goods and real property by a husband to his wife (*Makroro v. Kokke* 5 T.T.R. 465; *Wena v. Maddison* 4 T.T.R. 194). If the land is lineage land, however, then it cannot be given away (*Motlok v. Lebeiu* 7 T.T.R. 35).
Tolemour, land given to a commoner for successful services in nursing an *irooj* (*Anjouij v. Wame* 5 T.T.R. 337).
- 34 This custom has been codified in a number of court cases during the Trust Territory period: *Limine v. Lainej* 1 T.T.R. 231; *Lalik v. Elsen*, 1 T.T.R. 134; *Lajeab v. Lukelan*, 2.T.T.R. 563; *Muller v. Maddison*, 5.T.T.R.471; *Ladrik v. Jakeo* 6 T.T.R. 391,393; *Lanki v. Lanikieo* 6 T.T.R. 396; *Tikoj v. Liwaikam* 5 T.T.R. 483; “*Irooj*” on

- Jebdrik's side v. Jakeo* 5 T.T.R. 672; *Makroro v. Kokke* 5 T.T.R. 465; *Neikabun v. Mute* 5 T.T.R. 493; *Motlok v. Lebeiu* 7 T.T.R. 359,
- 35 This custom has been codified in a number of court cases during the Trust Territory period: *Makroro v. Kokke* 5 T.T.R. 465; *Neikabun v. Mute* 5 T.T.R. 493,495; *Linidrik v. Main*, 5 T.T.R. 561,565; *Likinono v. Nako* 4 T.T.R. 483; *Ladrik v. Jakeo* 6 T.T.R. 391,391 (1973).
- 36 *Marshall Islands Revised Code of 1989. Constitution of the Republic of the Marshall Islands*. Article X. Traditional Rights § 1(2).
- 37 *Lojob v. Albert* 2 T.T.R. 338 (1962).
- 38 *Marshall Islands Revised Code of 1989*. Title 24 Property, Chapter 1: Real and Personal Property §13 Restrictions upon ownership.; Chapter 2: Real Property Trust Instruments, §7 (3) Power of Sale
- 39 The basis for this regulation goes back to German Colonial law to avoid a sell-out of the Marshall Islands to the Europeans and others. The law was kept intact, more or less, by the Japanese (see footnote 61) and the government of the T.T.P.I. (TTC 1966 §900).
- 40 Whereby all parties holding land rights need to give their consent: *Marshall Islands Revised Code of 1989. Constitution of the Republic of the Marshall Islands*. Article X. Traditional Rights § 1(2).
- 41 *Marshall Islands Revised Code of 1989*. Title 24 Property, Chapter 3: Real Property Mortgage, §2 (c) Establishment of mortgages on leasehold interest.
- 42 Previously known as the “American Board (of Commissioners) for Foreign Missions” and commonly called the “Boston Mission”.
- 43 The “*Verzeichnis der Grundstücke die im Eigentum von Nichteingeborenen sind.*” (*List of real estate owned by non-natives*). Dated: Jaluit 24 August 1913. Signed: *Scharnbourg* (?) for Imperial German Stationchief”. German Colonial document. Ms. contained in Reichskolonialamt Volume 3077, document 5. Ms on file, Australian Archives Canberra, G-2, Y40) list seven parcels of land owned by the Boston Mission and three by the Catholic Mission Jaluit.
- 44 Again the land transfer was enabled by the execution and power of an *irooj laplap*, in this case *irooj laplap* Jurtaka, who controlled the northern part of the Ratak Chain (A.Kraemer & H.Nevermann 1938, Ralik-Ratak [Marschall Inseln]. In: G.Thilenius [ed.], *Ergebnisse der Suedsee-Expedition 1908-1910. II. Ethnographie, B: Mikronesien*. Vol. 11: Hamburg: Friedrichsen & de Gruyter; Page 81).
- 45 30 *Am. Jur.* 205; INTERNATIONAL LAW, § 48. See also *Urrimech v. Trust Territory* 1 T.T.R. 535, 540 (1958).
- 46 *Brownsville v. Cavazos*, 100 U.S. 138, 25 L.Ed.574; *Protestant Mission v. Trust Territory* 3 T.T.R. 26; While commonly only Japanese or German land decisions had been challenged in retrospect, occasionally also a Spanish land case was challenged: *Raimato v. Trust Territory* 3 T.T.R. 269. The principle that the legality of an act should be decided according to the law as it was at the time the act was done also applies if the legality of a land confiscation by a former sovereign is to be determined in hindsight (*Christopher v. Trust Territory* 1 T.T.R. 150, 151
- 47 Based on a decision by Pope Alexander VI, and formalised by the Treaty of Tordesillas;(1494), Spain; was vested with the ownership of all land west of the meridian 100 leagues west of the Cape Verde Islands, thus including Micronesia in its entirety. Although Micronesia was owned by Spain, she did little to establish administrative control or even develop the eastern parts of Micronesia, such as the Marshall Islands.
- After the Spanish-American war of 1898 Spain lost right to her possessions in Micronesia and the Philippines. Although under the then existing international law the United States had the right to annex all of Micronesia, only the Philippines and Guam were made colonies of the United States
- 48 For example: A white trader for Thomas Farrell’s trading company was put ashore on June 17, 1876 by the English brig *Vision* (Hezel 1979:133); on the same occasion, the island of Anil was purchased for U.S.\$ 100. The trading station was wound up a year later, on September 28, 1877 (Hezel 1979:135).
- Another case would be Tokowa Island on Mile Atoll. “The land contains 1 dwelling house with warehouse, 1 copra house and three buildings of Marshallese style. The islands was sold

- in 1866 by irooj laplap Rimone to Captain Pease. From him it went to Hayes ['Bully' Hayes] and from his [Hayes'] executor to A.Capelle & Co.. On 13 November 1883 transferred to the Deutsche Handels & Plantagen-Gesellschaft. On 21 December 1887 transferred to Jaluit Gesellschaft [according to creation of joint company]." Entry N° 12 in the "Grundbuch der Marshall Inseln und Nauru" [Land register of the Marshall Islands and Nauru]. Signed by Imperial German District Commissioner, dated 18 February 1890. German Colonial document contained in Reichskolonialamt Volume 3077, document 5. Ms on file, Australian Archives Canberra, Record Group G-2, Y40.
- 49 "Mile Atoll, Eninear Island, north end. The land contains 1 dwelling house, 1 copra house and 1 cook house. Through agreement on 26 December 1879 irooj laplap Rimone granted this land to HERNSEIM & Co. in return for a piece of land which belonged to them on Mile [Island?] and the payment of 300 Marks. On 21 December 1887 transferred to Jaluit Geseellschaft [according to creation of joint company]." Entry N°13 in the "Grundbuch der Marshall Inseln und Nauru" [Land register of the Marshall Islands and Nauru]. Signed by Imperial German District Commissioner, dated 18 February 1890. German Colonial document contained in Reichskolonialamt Volume 3077, document 5. Ms on file, Australian Archives Canberra, Record Group G-2, Y40.
- 50 An exception seem to have been the uninhabited atolls of Bikar and Taongi (Bokak), which were traditionally used to fish for turtle and to collect sea-fowl and eggs. The German authorities, based on the uninhabited status of the atolls, declared them *terra nullius* and incorporated the land into their body of public lands. Given that the atolls remained uninhabited and given hat the Marshalllese continued to utilise these atolls for their traditional fishing and birding, it appears doubtful, whether the Germans ever legally reduced the property to possession (👉 further below, Abandoned property).
- 51 In 1876 a trader working for Thomas Farrell's trading company, put ashore by the English brig *Vision* bought the island of Anel (Anil) in Majuro lagoon for \$100 (Hezel 1979: 133). It remains unclear as to whether compensation was paid specifically to all three major parties, that is irooj, alap and dri-gerbal (see section IV.3.1.1.2. Transfer of land) or not. More likely than not, this was not the case, and more likely than not only the irooj was compensated. It can be asserted that the purchasers assumed that the irooj took care of the compensation of the other parties holding rights to the land. In either case, however, it would now too late in the day to rect any wrongs committed over a century ago. Any such claims - if any - should have been made at the time of the German occupation, who operated a land court, sitting in Jaluit every so often and who also operated a moving court by the district officer. Often the district officers reports contain references to the effect that Marshalllese asked the German authorities to settle land ownership claims (cf. Biermann, 1891, Von den Marshallinseln. *Deutsches Kolonialblatt* 2, 321-332).
- 52 At the cost (then) of \$4.5 million.
- 53 👉 footnote 4.
- 54 The Jaluit Gesellschaft was formed by merging the trading interests of The Deutsche Handels- und Plantagen Gesellschaft (DHPG, which had bought the property and stock of the bankrupt Godeffroy & Co.), the HERNSEIM & Co trading company of Hamburg, and A.Capelle & Co from Likiep Atoll.
- 55 Formerly kept in Rabaul (New Britain, Papua New Guinea), now in the National Archives of Papua New Guinea, with copies in the Australian Archives, Canberra, Australia.
- 56 For example the purchase of Enewetak. Where the purchase price asked for was too steep, the German government declined the offer (cf. *Letter from the Imperial German Station Chief, Merz, Jaluit Station, to the Imperial German Governour General at Rabaul, New Guinea, dated 29 August 1912.*; German Colonial document. Ms. contained in Reichskolonialamt Volume 3077, document 5. Ms on file, Australian Archives Canberra, G-2, Y40).
- In addition, the German government attempted to purchase land where either no one lived at the time, or where the population was very limited. An exception from this rule is formed by Ujlang Atoll, where after the purchase for a copra plantation for the Jaluit Gesellschaft, the remaining 20 or so people were moved to Enewetak and Jaluit. (Tobin *op. cit.* [footnote 4] 4).
- 57 Yanaihara comments that the average sum for each hectare of land was less than 10 Gold marks. The total extent of land owned by the

German Government and leased to the Jaluit Gesellschaft amounted to 5,662 hectares spread over many atolls (Yanaiharu, T., 1940, *Pacific Islands under Japanese Mandate*. Oxford: Oxford University Press; Page 52).

Among the documents kept at the Australian Archives (Reichskolonialamt Volume 3077, document 5. Ms on file, Australian Archives Canberra, G-2, Y40) is a German Colonial document entitled "*Verzeichnis der Grundstuecke die im Eigentum von Nichteingeborenen sind.*" (Inventory of all pieces of land which are in the possession of non-natives). Dated: Jaluit 24. August 1913. Signed: Scharnbourg (?). which lists all property held in private hand by August 1913. In addition, there is the official German land cataster, the "Grundbuch", wherein all real property is registered with the (Imperial German) courts. The High Court of the T.T.P.I. in one of its rulings (Civil Action 313, *Sandbargen v. Gushi* 7 T.T.R. 471, 473) ruled that the "Grundbuch, published in 1913, during the German administration, is strong, although not conclusive evidence of ownership of land". This statement of the court, however, needs to be qualified in view of the fact that the Grundbuch is of 1913 and not of 1914, the outbreak of World War I; were it if the latter date, it could be assumed to be of greater value as evidence.

- 58 *Treaty of Versailles* of June 28, 1919; Article 119.
- 59 Washington Naval Treaty for Limitations in Naval Tonnage (1922) Article 19 prohibits the construction of fortifications west of Hawaii.
- 60 *Convention between the United States of America and Japan with regard to the rights of the two Governments and their respective nationals in the former German Islands in the Pacific Ocean lying north of the equator, in particular the island of Yap*. Concluded February 11, 1922.
- 61 That is, the former German colonies of the Caroline Islands, the Mariana Islands and the Marshall Islands, excluding Nauru.
- 62 *Covenant of the League of Nations*, Article 22.
- 63 *Cf. Wasisang v. Trust Territory* 1 T.T.R. 14 (1952). The Japanese Government left all those German regulations in place, or placed them on their own books, which were either beneficial for Japanese interests, or were politically advisable for arguments in the international arena of

the League of Nations: "With regard to the land system, no detailed Regulations have as yet been enacted, but rights already acquired on land in accordance with old customs or German Laws are generally recognized irrespective of whether their owners are natives or not and owners are free to dispose of their land in whatever way they choose. However, a policy adopted under the German regime to protect native land-owners is still followed, placing restrictions upon the disposal of land, the property of natives, until a definite land system will be established" (*Annual report to the League of Nations on the administration of the South Sea Islands under Japanese Mandate for the year 1929*. [Tokyo]: Japanese Government; CHAPTER VII. Land System; Pp. 78-81).

- 64 *Treaty of Versailles*, Articles 120 and 257, § 2. The following represents the Japanese government's view on the ownership and use of government land: "(a) Government Land. (State Domain). With regard to the legal nature of the State domain in the territory the Japanese Government fully explained its attitude in its Annual Report for 1924. In its opinion, the State Domain in the mandated territory may be divided into two classes. The first class consists of those parcels of land which were transferred to Japan under article 257, paragraph 2 of the Treaty of Versailles, and the second of those which have been purchased by the Japanese Government or are exploited by it at its own expense. The former class is to be regarded as property belonging to the Government in its capacity of Mandatory. The same right may be said of the latter class. When, however, this second class of land is examined, it is found that it includes properties which have been purchased or exploited by the Government on its own account, and which may, therefore, be regarded as the actual domain of the Government. An instance of this is the land purchased from the German South Sea Phosphate Company. The mandated territory is administered by the Japanese Government as an integral part of its own territory, in accordance with the Covenant of the League of Nations. For this reason all State domains in the mandated territory are treated just like other State domains of the Japanese Empire, no discrimination whatever being set up between them.

"And land in the territory except such as is the property of private persons is considered part of the State domain, and no party other than the Government can exercise the right of occupa-

tion by priority. With regard to the management of the State domain, a South Seas Bureau Rule, promulgated in July, 1922, declares that the Law on State Property of the Japanese Empire shall apply *mutatis mutandis* to the territory. According to this law, State domain is classified into the following four classes and for each class an appropriate procedure for its disposition and management is provided.

1. Domain for public use. (Property for public use) - Properties assigned or decided to be assigned by the Government directly for public use.

2. Domain for Government use. (Property for Government use) - Properties assigned or decided to be assigned by the Government for Government business or undertakings or for residences of officials and others in Government service.

3. Domain for forestry. (Forest property) - Properties assigned or decided to be assigned by the Government for Government dendrological enterprise.

4. Domain for miscellaneous purposes. (Miscellaneous property) - Properties not coming under any of the above-mentioned categories.

“With the exception of No. 4, these species of State Domain may not be transferred nor be made objects of private rights. This rule, however, does not apply to permission for the use or exploitation of properties by private persons so long as it does not prejudice their use by the Government or the purpose for which the Government possesses them. As regards miscellaneous properties, these may not be transferred or leased gratuitously except in cases in which the Government or the public require them for public or Government use and in a few other cases” (*Annual report to the League of Nations on the administration of the South Sea Islands under Japanese Mandate for the year 1929*. [Tokyo]: Japanese Government; CHAPTER VII. Land System; Pp. 78-81).

65 Such as in the case of Pakaein Atoll, Ponape State, FSM, confiscated by the German government as a result of the Sokaes rebellion of 1910/11 (see *Christopher v. Trust Territory 1 T.T.R.* 150).

The same applies to the atolls of Bikar and Taongi (Bokak) (see footnote 49 for background).

66 NBK - Nan'yo Boeki Kaisha (South Seas Trading Company).

67 Yanaihara *op. cit.* [footnote 55] 174. Thus, for all practical purposes, the NBK became the successor of the Jaluit Gesellschaft in the Marshall Islands. The Japanese government stated its position as follows “Contracts for the lease or purchase of Government land are governed by the provisions of the “Civil Code of the Empire” and come entirely within the domain of private law, the only exception being the reservation to the Government, for the sake of Government or public interests, of the right of rescinding the contract or of purchasing property on leased land, as is provided for in the “Law of State Property.” According to the provisions of the “Law of State Property,” the term of lease of Government land shall be within the maximum of eighty years in the case of land to be used for afforestation and within the maximum of thirty years in other cases. The Government land now leased in the South Sea Islands includes palm forests, plantations, meadows and building ground, the palm forests being usually leased for a term of 30 years and other land for one of 20 years. The rates of rent are calculated upon taking into account the fact whether the land is reclaimed land or not and various other circumstances” (*Annual report to the League of Nations on the administration of the South Sea Islands under Japanese Mandate for the year 1929*. [Tokyo]: Japanese Government; CHAPTER VII. Land System; Pp. 78-81).

68 In keeping with international law; see Section 3.1.2.1.General.

69 Such as the plantations of the Jaluit Gesellschaft to the NBK and the phosphate mines on Angaur, Palau, owned by the Deutsche Suedsee Phosphat Compagnie (German South Seas Phosphate Company) first to the Japanese Government itself and then to the Japanese Government-controlled Nan'yo Takuchoku Kabushiki Kaisha (South Sea Colonial Company; Yanaihara *op. cit.* [footnote 55]; vii, 56-57).

70 *Decision of the Council of the League of Nations relating to the Application of the principles of Article 22 of the Covenant to the North Pacific Islands*, Article 2. The laws of Japan were applicable from December 17, 1920, onwards, when the legality of her position under the mandate was confirmed by the League of Nations.

However, as far as the land rights were concerned, the Japanese Government attempted -

at least in the beginning - to respect local customary law as far as possible and feasible within the framework of Japanese commercial interests: "In 1922, the "Regulations concerning the Management of Judicial Affairs in the South Sea Islands" were promulgated, by virtue of which civil cases are to be dealt with in accordance with the Civil Code of Japan, but an exception was made in the case of rights concerning land, to the effect that for the time being old customs should be respected and no registrations should be required. This arrangement was made in consideration of the fact that land surveys as well as the investigation of legal usages concerning land had not as yet been completed, and accordingly the time had not as yet arrived for instituting special legislation concerning the land system or for making registration of land" (*Annual report to the League of Nations on the administration of the South Sea Islands under Japanese Mandate for the year 1929*. [Tokyo]: Japanese Government; CHAPTER VII. Land System; Pp. 78-81).

71 *Catholic Mission v. Trust Territory* 2 T.T.R. 251, 254 (1961).

72 The High Court of the T.T.P.I ruled in a decision of 1967 that "[w]hile power of eminent domain is attribute of sovereignty, this does not mean it can only be exercised by body which is recognised as sovereign in international sense" (*Trust Territory v. Ngiralois* 3 T.T.R. 303). Thus, by inference, the Japanese government had also the right to claim land under the principle of eminent domain. And since eminent domain is an attribute of sovereignty, it also "inherent in government" and "implied without being specified" (*Ngiralois v. Trust Territory* 4 T.T.R. 517).

73 See *Catholic Mission v. Trust Territory* 2 T.T.R. 251 (1961).

74 Both the ownership in land and the food resources represented by it (*cf. Yanaihara op.cit.* (footnote 55) 75-76; Ishoda 1928).

This also becomes evident from the following formulation in the *Annual reports to the League of Nations*: "In respect to the land belonging to natives in the district within the jurisdiction of the Jaluit Branch Bureau, there exists a usage which is quite different from that obtaining in other district. This land is in the exclusive ownership of tribal chiefs and the people in general have the right of exploiting them, subject to an obligation to render to the chiefs part of the profit arising from the palm

groves which constitute the principal portion of such land. With regard to the legal nature of this usage, no detailed account is here given, as it requires further investigation (*Annual report to the League of Nations on the administration of the South Sea Islands under Japanese Mandate for the year 1929*. [Tokyo]: Japanese Government).

Apparently in the mid-1930s the Japanese had made up their mind and introduced innovative land management rules in order to facilitate the growth of their colonial economy (under the mantle of the Mandate) and to facilitate the acquisition of land for military bases. The Japanese seem to have introduced a concept that the land rights of the three parties involved are not comparable, but that they can be split up: the *Irooj* owns the land outright, while the *ka-jur*, that is the *alap* and the *dri-gerbal* own the produce on it, the fruit of their labour, such as plants and trees. (*cf. Tobin op. cit.* [footnote 4] 14).

75 According to traditional Marshallese custom the *Irooj laplap* must approve or acquiesce in any transfer of land interest before it is valid (see above). The position of the *Irooj laplap* of Majuro had become vacant with the death of the *Irooj laplap* Jebrik Lukotworok in 1919. The Japanese government consistently refused to bring the two resulting lines (of "Jebrik's side") together under one leadership. The powers of the *Irooj laplap* were exercised by Jebrik's *drouloul*, which during the Japanese administration and with their expressed approval, was represented by the committee of 14, seven *irooj eriks* and seven *alaps*. The Japanese administration of Majuro also had a say in the decisions of this committee. This group was replaced after World War II at the beginning of the American administration by the 20-20 committee. The issue is discussed in detail in the case of *L. Levi, et al. versus Kumtak, et al.*. Combined Civil Action No.1; 1 T.T.R. 36 (1953); See also *Jatios v. Levi*, H.C.T.T.App.Div. 1 T.T.R. 578,583 (1953); *Lazarus v. Tomijwa* 1 T.T.R. 123 (1954); *Jatios v. Levi* 1 T.T.R. (1954); *Joab v. Labwoj* 2 T.T.R. 172, *Lojob v. Albert* 2 T.T.R. 338 *Tikoj v. Liwaikam* 5 T.T.R. 483; "*Irooj*" on *Jebdik's side v. Jakeo* 5 T.T.R. 672; *Wena v. Maddison* 4 T.T.R. 194 *Lanki v. Lanikeo* 7 T.T.R. 533; *Nashion v. Litira* 8 T.T.R. 357; and *Lanki v. Lanikeo* 6 T.T.R. 397. The initial ruling of *Levi v. Kumtak* was upheld in similar circumstances in *Ladrik v.*

- Jakeo* T.T.H.C.Tr.Div. 6 T.T.R. 389, 396 (1973). In the case *Levi v. Kumtak* the American administration formalised the Japanese pattern; the courts, however, set out clearly that any reversal of the *status quo* would be a decision for the law makers and not the courts (see *Levi v. Kumtak*, reconfirmed in *Lazarus v. Tomijwa* and *Ladrik v. Jakeo*). the Japanese administrative decision, on which *levi v. Kumtak* was based was subsequently declared null and void by the *Customary Law (Restoration) Act 1986* passed by the Nitijela in 1986 shortly after the *Compact of Free Association* (see below) had come into effect.
- 76 *Henry v. Eluel* 5 T.T.R. 58. In the same case the High Court of the T.T.P.I. ruled that the determinations made by the Japanese surveyors were correct (see also *Malarme v. Ligor* 4 T.T.R. 204).
- 77 Prior to the U.S. attack on the Marshall Islands regulations concerning handling of enemy and alien property, as well as claims for war damages were prepared by the U.S. government (Proclamation No.5; see also CinCPOA letter serial No. 0318 dated 26 January 1944; quoted in Richard, D.E., 1957, *United States Naval Administration of the Trust Territory of the Pacific Islands*. (2 vols. Washington, D.C.: U.S. General Printing Office(Volume 1, Page 424).
- 78 “*Trusteeship Agreement for the Trust Territory of the Pacific Islands*”, Preamble.
- 79 *Charter of the United Nations* Chapter XI: Declaration regarding Non-self Governing Territories, Articles 73- 76; Chapter XIII: International Trusteeship System. See also “*Trusteeship Agreement for the Trust Territory of the Pacific Islands*” (in Heine, C., 1974, *Micronesia at the Crossroads. A reappraisal of the Micronesian Political Dilemma*. [Honolulu: East-West Center, University Press of Hawaii]. Pp. 188-191).
- At the San Francisco Conference on April 25, 1945, Micronesia was placed under the International Trusteeship System of the United Nations. The draft agreement between the U.S. to act as trustee and the United Nations was approved by the Security Council on April 2, 1947, and Micronesia was turned over to the U.S.Navy administration on July 19, 1947 (Heine *op.cit.*:4-5).
- 80 *Code of the Trust Territory of the Pacific Islands 1966*. § 23.
- 81 Just in the same way as the Japanese government had regarded itself as the succeeding sovereign and thus as the successor to all title previously held by the Imperial German government.*Cf.* sequence of arguments in *Ochebir v. Municipality of Angaur* 5 T.T.R. 162.
- The TTPI government also assumed control of the atolls of Bikar and Taongi (Bokak) which had been annexed by the Germans (see footnote 49) and had been kept as public land by the Japanese. Anthropologists working in the pay of the TTPI government urged the TTPI government to withdraw its claims on the atolls (Tobin *op cit.* [footnote 4]) 12) without stating who the owner (in modern times) should be.
- 82 *Code of the Trust Territory of the Pacific Islands 1966*. § 24; Or December 8, 1941 as in *Ibid* §900.
- In a previous determination, which is superseded and invalidated by the Revised T.T.Code of 1966, the cut-off date for the validity of land transfers during the period of the Japanese Mandate was taken as March 27, 1935 (Land management regulation No.1; Trust Territory Policy Letter P-1 of December 29, 1947).
- The Policy Letter stipulates that “Land transfers from non-Japanese private owners to the government, Japanese corporations or Japanese nationals since March, 27, 1935, will be subject to review. Such transfers will be considered valid unless the former owner (or heirs) established that the sale was not made of free will and just compensation was not received. In such cases, title will be returned to the former owner upon his paying in to the Trust Territory government for the amount received by him.” “Policy letter P-1, and administrative policy letter issued in 1947... was a mere statement of policy, and does not have the force and effect of law.” (*Ogarto v. Johnston* 8 T.T.R. 62).
- The significance of the date, March 27, 1935, rests in the fact that on this date the Japanese delegation walked out of negotiations regarding the renewal of the Washington Naval Limitations Treaty of 1922. Following Japans refusal to renew it, the treaty itself expired on January 1, 1937. From when on, as far as the —then already powerless — League of Nations ws concerned, the Japanese Mandate of Micronesia was no longer fully legal.
- Peattie, M.R., 1988, Nanyo. The rise and fall of the Japanese in Micronesia, 1885-1945.(*Pacific Islands Monographs Series*,

- No.4. Honolulu: University of Hawaii Press) Page 244.
- 83 *Code of the Trust Territory of the Pacific Islands 1966*. § 24. (☞ also 1 TTC § 105); At another location (§ 900) the Trust Territory Code stipulates that “only citizens of the Trust Territory may hold title to land in the Trust Territory; provided, however, that nothing herein shall be construed to divest or impair the right, title or interest of non-citizens or their heirs or devisees, in lands in the Trust Territory held by such persons prior to December 8, 1941 [the date of the Japanese attack on Pearl Harbor], and which have not been vested in the Area Property Custodian by vesting order dated September 27, 1951.” In this context refer to a discussion of the Japanese land management decisions on Majuro Atoll in the previous section.
- 84 The courts commonly held that it was then (in the 1950s, 1960s and 1970s) too late in the day to right the wrongs of a former administration and, furthermore, that “a nation which takes over land from another nation is not required to correct alleged wrongs done by the nation formerly holding the land or by others while the land was in the hands of the first nation” (*Ochebir v. Municipality of Angaur* 5 T.T.R. 160, 180). Only if the alleged wrong took place so shortly before the take-over of the land that it could not be redressed in the courts of the first nation, then the courts of the second nation may attempt to redress the wrongs (*Ibid.* 160).
- In *Lazarus v. Tomijwa* (1 T.T.R. 123, 127-128; 1954) the High Court of the T.T.P.I. specifically stated that “Marshallese custom does not control over clearly expressed and firmly maintained determinations of Japanese Administration” and that a “[d]etermination of Japanese Administration concerning land law, which deviated substantially from Marshallese custom, effectively changed law so far as land in question is concerned”.
- 85 *Code of the Trust Territory of the Pacific Islands 1966*. § 925. See also: Trust Territory Policy Letter P-1 of December 29, 1947.
- Similar to Japan, in the area of property rights, the Trust Territory Government claimed to be in a position like that of a succeeding sovereign taking over government of land conquered by it or ceded to it by another nation. Such a sovereign, the Trust Territory government claimed, is entitled to rely upon and respect official acts of the preceding administration. *Wasisang v. Trust Territory* 1 T.T.R. 14 (1952); *Raimato v. Trust Territory* 3 T.T.R. 269.
- 86 Vesting Order dated September 27, 1951. Issued under T.T.P.I. Interim Regulation No. 4-48 and amended by Interim Regulation Nos. 6-48 and 3-50.
- 87 *Code of the Trust Territory of the Pacific Islands 1966*. Sections 532 and 533. *Alien property* was defined as all “property situated in the Trust Territory formerly owned by private Japanese national, by private Japanese organisations, or by the Japanese Government, Japanese Government organisations, agencies, Japanese Government quasi corporations or government-subsidized corporations” including “tangible and intangible assets” (*Ibid.* Section 532). See confirmatory rulings of the High Court of the T.T.P.I. in *Ngirkelau v. Trust Territory* 1 T.T.R. 544, 548 (1958).
- 88 By executing and delivering quitclaim deeds (*Cf. Ochebir v. Municipality of Angaur* 5 T.T.R. 162).
- 89 ☞ above, footnote 73
- 90 *Compact of Free Association between the Government of the United States of America and the Government of the Republic of the Marshall Islands 1982*. Article VII, Section 171.
- 91 The United Nations as well as other international organisations, such as the EEC, take another view to the matter and do not recognise the until the last part of the Trust Territory Pacific Islands, Palau, has been led to complete independence. In the eyes of these organisations the Trust Territory is still in existence.
- 92 *Compact of Free Association between the Government of the United States of America and the Government of the Republic of the Marshall Islands 1982*. Title 2: Economic relation; Article 3: administrative provisions; § 234. see also United States Public Law 96-597 (94 Stat. 3477).
- 93 *Agreement concluded pursuant to Section 234 of the Compact of Free Association*.
- 94 *Ibid.* The list referred to was to be published as annex A (not available).
- 95 *Revised Code of the Republic of the Marshall Islands* , Title 9: Public Lands and Resources,

Chapter 1: Public Lands; §2 Public Lands defined.

- 96 The *Trust Territory Code*, § 21, states that the customary law of various parts of the Trust Territory is in effect only so far as not changed by laws promulgated in the T.T.C. (see also *Lazarus v. Tomijwa* 1 T.T.R. 124, 127) that “if a local custom is firmly established and known the High Court [of the T.T.P.I.] will take judicial notice of it” (*Lajutok v. Kabua* 3 T.T.R. 630) and that in a case where there is a conflict between the written law and the customary law, the written law prevails (*Ngirasmengesong v. Trust Territory* 1 T.T.R. 616 [1958]; *Ngiramulie v. Merii* 2 T.T.R. 631 [1961]) and that a criminal cannot use custom as a shield from prosecution (*Ngirmekur v. Municipality of Airai* 7 T.T.R. 477). However, in the absence of written law, local customary is held to have as having precedence over common law (*Ngiramulei v. Rideb* 2 T.T.R. 370 [1962]).

The Marshallese land law has been carried over under the American Administration, under general principles of International Law and Trust Territory Law. (*Limine v. Lainej* 1 T.T.R. 107 [1954]).

However, “[w]hen there is a dispute as to the existence or effect of local custom, and the court is not satisfied as to either its existence or its applicability such custom becomes a mixed question of law and fact, and the party relying upon it must prove it to the satisfaction of the court” (*Lajutok v. Kabua* 3 T.T.R. 630; *Bulele v. Loeak* 4 T.T.R. 5; *Ngirmekur v. Municipality of Airai* 7 T.T.R. 477).

Also, the court ruled that “[d]elving into the past of a culture with unrecorded history requires reliance upon legend and lore handed down from one generation to another and interpreted in accordance with the predilections of interested parties and such hearsay has probative value only as to the broad outlines over which there is very little dispute” (*Oneitam v. Suain* 4 T.T.R. 62).

- 97 See definition of “Custom” as “such usage as by common consent and uniform practice has become law of place, or subject matter, to which it relates” and “Custom is a law established by long usage”, which “may change gradually, and changes may be started by some of people agreeing to some new way of doing things” (*Lalou v. Aliang* 1 T.T.R. 95, 99; [1954] based on Bouvier’s *Law Dictionary*

[Third revision]; 55 *Am. Jur.* 267, USAGES AND CUSTOMS § 5 and 272, § 11.;

According to the second edition of *Am. Jur.*, custom is defined as “a practice which has by its universality and antiquity acquired the force and effect of law, in a particular place or country, in respect to the subject matter to which it relates.” (21A *Am. Jur.* 2d, 717, CUSTOMS AND USAGES §1).

See also ruling in *Ychitaro v. Lotius* 3 T.T.R. 3.

- 98 “New ways of doing things do not become established and legally binding or accepted customs until they have existed long enough to have become generally known and have been peaceably and fairly uniformly acquiesced in by those whose rights would be naturally affected” (*Lalou v. Aliang* 1 T.T.R. 95, 100; 1954). See also ruling in *Ychitaro v. Lotius* 3 T.T.R. 3 and in *Ngirmekur v. Municipality of Airai* 7 T.T.R. 477 (Tr.Div.). See also 21A *Am. Jur.* 2d, 721, CUSTOMS AND USAGES §5.

However, the High Court of the T.T.P.I ruled in *Ngirmekur v. Municipality of Airai* 8 T.T.R. 231 (App. Div) that “a custom is not abrogated merely because of the relative infrequency of its implementation”.

- 99 *Lazarus v. Tomijwa* 1 T.T.R. 123, 127-128; 1954. See also *Aneten v. Olaf* 1 T.T.R. 606 (1957).
- 100 *Compact of Free Association between the Government of the United States of America and the Government of the Republic of the Marshall Islands* 1982.
- 101 *Marshall Islands' Revised Code of 1989*. Title 39: Customs and Traditions; Chapter 2: Customary Law, §1-§2.
- 102 *Levi v. Kumtak*; 1 T.T.R. 36 -45 Combined Civil Action No.1 (1953).; Case also discussed in *T.Ladrik et al. versus Labilet et al.*; Civil Action No. 449. 6 T.T.R. 389-396 (1973).
- 103 *Marshall Islands' Revised Code of 1989*. Title 39: Customs and Traditions; Chapter 2: Customary Law, § 2 (1).
- 104 *Marshall Islands Journal* Volume 21, No. 20, June 1, 1990. Page 13,
- 105 *The Marshall Islands Revised Code of 1989*. Title 9. Public Lands and Resources, Chapter 1, § 2. Based on *Code of the Trust Territory of the Pacific Islands 1966*. Section 925.

- 106 *Ibid.* § 4. ¶ also Chapter 2 “Land Acquisition”.
- 107 ¶ below, Section 3.1.3.3.
- 108 Trust Territory Policy Letter P-1 of December 29, 1947. See footnote 80 for further discussion on the reasoning.
- 109 See footnote 83.
- 110 Rita in the U.S. terminology.
- 111 Cf. Ryenkevich, M.A., 1981, Traders, Teachers and Soldiers: An anthropological study of Colonial Era sites on Majuro Atoll, Marshall Islands. *Micronesian Archaeological Survey Report* 8. Saipan: Historic Preservation Office, Trust Territory of the Pacific Islands.
- 112 Adams, W.M., R.E.Ross & B.L.Krause, 1990, *Archaeological Survey of Taroa islands, Maloelap Atoll, Republic of the Marshall Islands*. Report prepared for the Micronesian Endowment for Historic Preservation. March 10, 1990.
- 113 According to information received from interviews with eyewitnesses. L.Poyer, *Final Report Micronesian Resources Study, Republic of the Marshall Islands, Ethnography component*. Report prepared for the Micronesian Endowment for Historic Preservation. February, 1990.
- 114 With the NE-SW runway fully and the NW-SE runway half completed. See enclosures in M.M.Hughes, Defense Attache, Australian Embassy Tokyo, to Robert Tyson, Consul General, Australian Consulate General, Honolulu, 5 March 1990, Ref.Tokyo DEF/100/15/9, Ref. Honolulu 608/1/2/3 in response to enquiry Dirk Spennemann, Alele Museum, to Robert Tyson, Consul General, Australian Consulate General, Honolulu, 22 November 1989, with request for assistance and enquiry with the Japanese Defense Agency. Ms. on file, Republic of the Marshall Islands National Register of Historic Sites, Majuro. File: Taroa I. , Japanese period.
- 115 Poyer *op. cit.* [footnote 111].
- 116 It is included in the German property list 1913 (Table III.@, entry N° 10.
- 117 Cf. Dirk H.R.Spennemann, *World War II Archaeology of Mile*. Report prepared for the Historic Preservation Office, Republic of the Marshall Islands. In preparation.
- 118 Cf. United States Strategic Bombing Survey, 1947 *The American campaign against Wotje, Maloelap, Mille and Jaluit*. Washington: Naval Analysis Section, United States Strategic Bombing Survey
- 119 Cf. Spennemann *op. cit.*[footnote 115].
- 120 ¶ in line with the proceedings regarding the land on Taroa, Maloelap (¶ above).
- 121 See section IV.3.1.2.2. Land confiscated by the Japanese Government before said date under the principle of eminent domain is considered to be property of the Japanese Government and thus belongs to the Trust Territory even if the initial legality of the possession by the Japanese government is debated (*Catholic Mission v. Trust Territory* 2 T.T.R. 251 [1961])
- 122 Trust Territory Policy Letter P-1 of December 29, 1947. See footnote 80 for further discussion on the reasoning.
- 123 As outlined above (Section 3.1.2.1.General), the validity of any right is to be determined by the laws under which those rights arose and exist
- 124 As discussed before, the High Court of the T.T.P.I ruled in a decision of 1967 that “[w]hile power of eminent domain is attribute of sovereignty, this does not mean it can only be exercised by body which is recognised as sovereign in international sense” (*Trust Territory v. Ngiralois* 3 T.T.R. 303). Thus, by inference, the Japanese government had also the right to claim land under the principle of eminent domain.
- 125 *Decision of the Council of the League of Nations relating to the Application of the principles of Article 22 of the Covenant to the North Pacific Islands* Article 2: “The mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Empire of Japan and may apply the laws of the Empire of Japan to the territory, subject to such local modifications as circumstances may require”. (¶ Wright 1930 *op. cit* [Footnote 4] Page 620).
- 126 *Decision of the Council of the League of Nations relating to the Application of the principles of Article 22 of the Covenant to the North Pacific Islands* Article 4 - “The military training of natives, otherwise than for purpose of internal police and the local defense of the territory, shall be prohibited. urthermore, no

- military or naval bases shall be established or fortifications erected in the territory” (Wright 1930 *op. cit* [Footnote 4] Page 620).
- 127 A list of real estate in the Marshall Islands owned by foreigners in August 1913 (German Colonial document “*Verzeichnis der Grundstuecke die im Eigentum von Nichteingeborenen sind.*” (*List of real estate owned by non-natives*)). Dated: Jaluit 24 August 1913. Signed: *Scharnbourg (?)* for Imperial German Stationchief”. Ms. contained in Reichskolonialamt Volume 3077, document 5. Ms on file, Australian Archives Canberra, G-2, Y40.) lists the entire northern tip of Jabwor, Jaluit Atoll, as well as parts of other watos on Jabwor as owned by the Jaluit Gesellschaft and hence German Government property (See *Ibid.*, entries N° 1, 2, 3, 4; in addition, the Jaluit Gesellschaft owned the whole islands of Bokelaplap, Djar and Devet, and a wato on Medjejurik I. [*Ibid.* entries N° 5, 6, 7, 26]. In addition, there were two watos on Jabwor, held as state domain by the Imperial German Government, most likely the locations of the Imperial German District Headquarters [*Ibid.* entry N° 55 and 56]).
- A similar situation exists on Taroa and Wollet, Maloelap Atoll (Watos Kidjur and Jegar, Taroa Island, and wato Lebeigien on Wollet [*ibid.* entries N° 16, 17, 18]), Djarrit, Majuro Atoll, where some watos were Japanese Government domain and Tokowa I., Mile Atoll (wato Lajurik; *ibid.* entry N° 21), which completely owned by the Japanese (The entire island was initially in the possession of the Jaluit Gesellschaft; *ibid.* see entry N° 10).
- 128 Section 3.1.2.2.
- 129 *Oneitam v. Suain* 4 T.T.R. 62. The burden of proof, however, rests with the person claiming the land rights, not with the original owner (*Ochebir v. Municipality of Angaur* 3 T.T.R. 159; *Sandbargen v. Gushi* 7 T.T.R. 471; *Tasio v. Yesi and Niéisich* 3 T.T.R. 598).
- 130 *Oucherechar Clan v. Termeteet* 4 T.T.R. 62. “Presumptive rights in land arising from long possession and use, together with delay on the part of the lawful owner in asserting his title, have often found to be sufficient grounds for taking title from a legal owner and granting it to the user (*Ibid.*). The question to be settled is which period of time constitutes “long possession” (100 years in the case of *Sehk v. Sohn* 3 T.T.R. 420).
- 131 *Giyal v. Guot* 4 T.T.R. 294, 297.
- 132 Temporarily submerged resources are covered in the section intertidal resources (Section 3.3).
- 133 For definition : *Marshall Islands Revised Code of 1989*. Title 33: Marine Resources; Chapter 2: Marine Zones; § 5.
- 134 For definition : *Ibid.* § 6.
- 135 For definition : *Ibid.* § 7.
- 136 See for example provisions in *Marshall Islands Revised Code of 1989*. Title 34: Admiralty and Maritime Affairs; Chapter 1: Admiralty and Maritime Act.
- 137 This is not surprising, as the *Code of the Trust Territory of the Pacific Islands* upon which the *Marshall Islands Code* is largely modelled, does not contain a statement to that effect either.
- 138 The *Marshall Islands' Revised Code of 1989*. Title 34: Admiralty and Maritime Affairs; Chapter 3: Maritime Act; Part X: Wrecks and Salvage; §§ 93-99. The act does not specify the rights of the salvors nor does it specify which law be used in lieu of non-existent provisions. In keeping with the general legal set-up it is assumed that in case of a lack of law of the Trust Territory applies (which contains no provisions on the issue of wrecks and salvage) or, failing that, the U.S. law.
- 139 For definition of internal waters : *Ibid.* Title 33: Marine Resources; Chapter 2: Marine Zones; § 5.
- 140 For definition of archipelagic waters : *Ibid.* § 6.
- 141 For definition of territorial waters : *Ibid.* § 7.
- 142 The *Marshall Islands Revised Code of 1989*. Title 4: Local Government; Chapter 1: Local Government Act; §7 Local Government areas, subsection 1.
- 143 *Constitution of the Republic of the Marshall Islands*, Article IX Local Government; § 1: Right to a system of Local Government, Subsections (2) and 1(3). “(2) The system of local Government shall in each case extend to the sea and the seabed of the internal waters of the atoll or island and to the surrounding sea and seabed to a distance of five miles from the baselines from which the territorial sea of that atoll or island is measured. (3) The whole of the island and sea areas to which any system of

- local government extends shall lie within the jurisdiction of a local government; and, where there is more than one local government, the land and sea boundaries of their respective jurisdictions shall be defined by law.”
- 144 The *Marshall Islands Revised Code of 1989*. Title 4: Local Government; Chapter 1: Local Government Act; §7 Local Government areas, subsection 1.
- 145 45 *Am. Jur.* 414-415, INTERNATIONAL LAW §§77-78. “Law of flag. Under the doctrine of “law of flag”, certain maritime matters are determined pursuant to the law of the state or nation whose flag the vessel flies. That doctrine is perhaps the most venerable and universal rule of maritime law bearing on the question of conflict of laws.” (2 *Am. Jur.* 2d, 770, ADMIRALTY § 90). “Jurisdiction and the laws of the nation accompany the ship, not only over the high seas, but also in the ports and harbors, and wherever else it may be waterborne”. (*Ibid.* footnote 8). “The law of the flag, not the law of the forum, is generally applied in matters of substantive law....”(*Ibid.* text)
- 146 ¶ 2 *Am. Jur.* 2d, 770, ADMIRALTY §90, footnote 8.
- 147 ¶ 2 *Am. Jur.* 2d, 735, ADMIRALTY §23 (footnote 13). In case action is brought, commonly the *lex loci delicti* (law of the place of wrong) applies to aircraft in domestic flights (8 *Am. Jur.* 2d, 442-444, AVIATION §77). However, if the aircraft was on an international flight, the jurisdiction is restricted to the member countries of the Warsaw Convention or, more specifically, to the countries involved, that is that of the carrier and that where the accident occurred. (*Ibid.* 527, §136). In maritime law, where it applies, the *lex loci delicti* has to yield to the law of flag (2 *Am. Jur.* 2d, 770, ADMIRALTY §89).
- 148 2 *Am. Jur.* 2d, 739, ADMIRALTY §31; the decisions as to what constitutes a “dead vessel” (*i.e.* “a vessel permanently withdrawn from use for navigation purposes” [*ibid.*]) vary.
- 149 45 *Am. Jur.* 2d, 414, INTERNATIONAL LAW §77
- 150 2 *Am. Jur.* 2d, 742, ADMIRALTY §36.; It has been held that “personality of a public vessel is merged with that of a sovereign” *United States v. Jardine* (CA5 Fla) 81 F2d 745.; ¶ also cases quoted therein.
- 151 45 *Am. Jur.* 2d, 391-392, INTERNATIONAL LAW § 49. ¶ also 2 *Am. Jur.* 2d, 743, ADMIRALTY §39.
- However, as far as the internal jurisdiction of a power is concerned, the sovereign immunity extends to those vessels taken by that power as a prize of war. Thus the power can claim sovereign immunity towards its own subjects laying claims on the prize vessel.
- 152 *Constitution of the Republic of the Marshall Islands*, Article I, § 4 (c).
- 153 Claims for sovereign immunity can be “raised by the foreign government itself, its duly accredited diplomatic representative, or any other authorised official” (2 *Am. Jur.* 2d, 744, ADMIRALTY §40).
- 154 2 *Am. Jur.* 2d, 743, ADMIRALTY §39. In an act of war, a belligerent nation is authorised to confiscate all property, including vessels in port (78 *Am. Jur.* 2d, 53, WAR §45). This act of confiscation includes all property, not only that held in the belligerent nation, but also that (Government) property held in a captured area, although the arts are commonly excluded.
- The question arises whether sovereign immunity over a ship wreck can be claimed by a foreign power/sovereign which had been hostile at the time the vessel sank (possibly even due to enemy action of the belligerent or cobelligerent nation), but by the time the claim is filed, is [again] considered a friendly power. If the doctrine is held that the case should be decided on the basis of the law in existence at the time the event(s) took place, then the foreign sovereign in question was hostile, and therefore sovereign immunity cannot be claimed.
- 155 That is, pre-December 8, 1941 (attack on Pearl Harbor, Marshallese date).
- 156 For the U.S: 2 *Am. Jur.* 2d, 742, ADMIRALTY §37. “Unless congressional consent is given, the admiralty court has no jurisdiction to try an issue whether the [US] government is the rightful owner of a public vessel claimed as its own” (*Ibid.*). ¶ also: *United States v. Jardine* (CA5 Fla) 81 F2d 745. The sovereign immunity extends, within the U.S. also to the individual states of the Union (2 *Am. Jur.* 2d, 742, ADMIRALTY §38).
- The *Public Vessels Act* , however, applies as far as U.S. vessel are concerned and contains certain provisions under which a libel can be brought against the United States in admi-

- rality. (70 *Am. Jur.* 2d, 791-720, SHIPPING § 120). None of these, however, has any greater bearing on the issue at hand. The *Public Vessels Act* provides that no suit may be brought by a national of a foreign government unless it is alleged and proved to the satisfaction of the court in which the suit is brought, that such government, under similar circumstances, allows nationals of the United States to sue in its courts. (☞ 2 *Am. Jur.* 2d, 736, ADMIRALTY §236; and 70 *Am. Jur.* 2d, 791-720, SHIPPING § 120).
- 157 *Flying W.* 160 S.E. 2d 492.; ☞ also *State of Florida by Ervin v. Massachusetts Co* (63 ALR 2d 1363)(decision, however, not consistent with sovereign immunity on other grounds); *Platoro v. Unidentified Remains of Vessel* ([CA5 Tex.] 518 F..Supp. 820 [1981])
- 158 In the case *State of Florida by Ervin v. Massachusetts Co (Fla)* the court ruled that, with the evidence provided by the Navy being ambiguous, the battleship U.S.S. *Massachusetts*, scuttled in 1922, was an abandoned vessel in 1956 (63 ALR 2d 1363).
☞ also *Russell v. Proceeds of Forty Bales of Cotton* 21 Fed. Cas. 42 (SD Fla. 1872) Case No 12,154.
- 159 *Ngirmekur v. Municipality of Airai* 7 T.T.R. 477. “Sovereign immunity doctrine did not apply to bar suit against municipality by possessor of land in the community, for wrongful forcible eviction not in accordance with law or custom”
- 160 “In a technical sense, 'wreck' or 'wreck of the sea', 'shipwrecked good' and the like, are defined to be such goods as after a shipwreck are cast on land by the sea, and left within that country.” 70 *Am. Jur.* 2d, 1075, SHIPPING §973. They do not include those vessels and parts or goods thereof which sank. Likewise, “Abandoned sunken vessels are not “wrecks of the sea” (80 CJS, SHIPPING §§ 258-259). “Derelict vessels” are defined below.
In the context of this paper, the terms “wreck”, “shipwreck” and “aircraft wreck” are used synonymously with a submerged or intertidal resource of that kind which can no longer be used for navigational purposes and which cannot be towed away without extensive salvage operations. Therefore, the term “wreck” as used in this management study includes “derelict vessel” (☞ below).
- 161 Such as a fair remuneration for vessel, cargo or accessories.
- 162 68 *Am. Jur.* 2d, 331, SALVAGE §§25-30.
- 163 68 *Am. Jur.* 2d, 318, SALVAGE §5. Required, however, are the following conditions: “(1) a marine peril; (2) service voluntarily rendered when not required as an existing duty; and (3) success in whole or in part, or the result that the service rendered contributed to such success” (*Ibid.*). Salvage compensation is only to be paid if there is a benefit for the owner of the vessel (*Ibid.* 319).
In the case *Platoro v. Unidentified Remains of Vessel* ([CA5 Tex.] 518 F..Supp. 820 [1981]) it is argued by the State of Texas that no marine peril exists and that therefore no salvage reward can be claimed. The court held that the vessel had been lost for a long time. According to the court, actual loss and subjection to the elements constitutes “Marine peril” for the purpose of making a valid salvage claim. ☞ also: *Thompson v. One anchor and two chains* (WD Wis.) 221 F. 770 (1915).
- 164 Moreover, the salvors “are required by the nature of their undertaking,..., to be vigilant in preventing, detecting and exposing every fact of plunder upon the property saved, and the right of salvage may be forfeited by spoilation, smuggling or other gross misconduct” such as embezzlement. (68 *Am. Jur.* 2d, 331, SALVAGE §25).
- 165 68 *Am. Jur.* 2d, 334, SALVAGE §28.
- 166 A body of water is navigable if it is navigable-in-fact. In other words, the body of water must be capable of being used by the public as a highway for transportation and commerce. For example a lake on a shooting course is not a navigable water (*Baldwin v. Erie Shooting Club* 87 N.W. 59; quoted after *Crandall op. cit.* [footnote \$MM\$] 986).
- 167 68 *Am. Jur.* 2d, 317, SALVAGE §3; 70 *Am. Jur.* 2d, 1075-1077, SHIPPING §§973-974
- 168 68 *Am. Jur.* 2d, 335, SALVAGE §30.
- 169 See 14 USCS §86 (Coast Guard's power to mark sunken vessels); 14 USCS §88 (Coast Guard's Power to destroy sunken or floating dangers to navigation or tow them into port); 14 USCS Appendix §738 (International agreements to patrol and assure destruction of derelicts in the North Atlantic Ocean).
- 170 78 *Am. Jur.* 2d, 550, WATERS §§106-107.

- 171 See Dirk H.R. Spennemann, *World War II Archaeology of Mile*. (In prep.) for a compilation of all such vessels stationed in the Marshall Islands. Report prepared for the Historic Preservation Office, Republic of the Marshall Islands. In preparation.
- 172 This assumption was arrived at by inference: These vessels, if they survived the war, were taken into U.S. possession as prize vessels. After the surrender of Japan and the disarmament of the vessel, these were commonly returned to their previous owners by the U.S. administration of Japan (Jentschura, H., D.Jung & P.Michel, 1977, *Warships of the Imperial Japanese Navy 1869-1945*. [London: Arms & Armour Press] list of vessels in the back of the volume).
- It is, at present, unclear whether the Japanese owners of these vessels during the Pacific War received any payments for providing the vessels to the Imperial Japanese Navy.
- 173 Only for vessels which have been “acquired, manned and operated by friendly foreign governments (2 *Am.Jur.* 2d, 743, ADMIRALTY §39)
- 174 2 *Am.Jur.* 2d, 743, ADMIRALTY §39; “A merchant vessel requisitioned by a foreign government and employed in its service at a fixed rate, but which remains under the control and management of the owner who employs and pays officers and crew, is not exempt from suit in rem in a court of the United States” (*The Attualita* [CA5 Va] 238 F 909). But, in deviation from this, see the ruling in *The Roseric* (DC NY) 254 F 154.
- 2 *Am.Jur.* 2d, 743, ADMIRALTY §39; ☞ also *Republic of Mexico v. Hoffman*, 324 U.S. 30; 89 L ed 729; 65 S Ct 530 (quoted in *Am.Jur.*).
- 175 63 ALR 2d 1370. ☞ also 29 Am. Jur. INSURANCE §1208.
- 176 As a further twist, all insurance policies of any given company of underwriters commonly exclude the liability in case of war. Hence, the vessels sunk during World War II would be owned by their original owners; however, if they were compensated for the loss by the Japanese Government, the vessels would be owned by the Japanese Government (☞ below).
- 177 *Nippon Shosen Kaisha, K.K. v. U.S.* (DC Cal) 238 F. Supp. 55
- 178 “By the ancient Roman law and the early common-law of England, the right of the sovereign to wrecked and derelict property on the seas was absolute, to the exclusion of the owner, but by the time of Edward I. [1275, DHRS] this harsh rule had been softened and the owner could reclaim his property within a year and a day” (*State of Florida by Ervin v. Massachussets Co* [Fla] 95 So 2d 902; 63 ALR 2d 1365). ☞ also other English cases quoted on 63 ALR 2d 1376 §5.
- The statute of Westminster, 3 Edward I, Chapter 4 (enacted 1275), provides that “Concerning wrecks of the sea, it is agreed that where a man a dog, or a cat escape quick out of the ship, that such ship nor barge, nor anything within them, shall be adjudged wreck’; (2) but the goods shall be saved and kept by view of the sherriff, coroner or the King’s bailiff, and delivered into the hands of such as are of the Crown, where the goods were found; (3) so that if any sue for those goods, and after prove that they were his, or perished in his keeping, within a year and a day, they shall be restored to him without delay; and if not, they shall remain to the King, and be seized by the sheriffs, coroners, and bailiffs, and shall be delivered to them of the town, which shall answer before the Justices of the Wreck belonging to the king.”
- The statute of 17 Edward II, Chapter 11 (enacted 1324) provides that “Also the King shall have wreck of the sea [*wreccum maris*] throughout the realm”.
- For detailed history of Roman and French medieval salvage law ☞ also Norris *op. cit.*
- 179 Two major cases are seen pertinent in this regard: *Platoro v. Unidentified Remains of Vessel* and *State of Florida by Ervin v. Massachussets Co (Fla)*
- Platoro v. Unidentified Remains of Vessel*: The case relates to the salvage of artefact from a Spanish galleon off the Texas coast. The vessel rests in navigatable waters territorial waters. *Platoro v. Unidentified Remains of a Vessel* (SD Tex) 371 F.Supp.350 (1970) the court established jurisdiction in admiralty and then passed a salvage judgement 371 F.Supp. 356. (1973); reversed (CA5 Tex) 508 F2d 1113 (1975); (1976); (CA5 Tex) 614 F 2d. 1051 (1980); reversed and remanded ruling that ownership rests with the State of Texas, but the salvor is entitled to a reward (CA5 Tex.) 518 F..Supp. 816 (1981)

State of Florida by Ervin v. Massachussets Co (Fla): The case revolves around the wreck of the battleship U.S.S. Massachussets, scuttled and sunk in 1922 after it had been used as a target-ship for coastal batteries. The vessel rests in shallow water in the territorial waters of the State of Florida. Salvage Operations commenced in 1956 and are the focus of the court case. In his brief, Attorney General R.W. Ervin argued for the State of Florida that: “[t]he public, by its prior and actual entry upon, and use of the wrecked Massachussets, as fishing grounds, first took possession of the same after its abandonment by the U.S. Navy and the public rights therein are superior to any claim of the defendants” (63 ALR 2d 1361). The court ruled that “with respect to an abandoned, sunken wreck of a ship lying in navigable waters within the territorial limits of a state, the state has, in its sovereign capacity, a possessory right or title that cannot lawfully be interfered with by one seeking to salvage the vessel for its own purposes” (95 So 2d 902; 63 ALR 2d 1360); certiorari denied 355 US 881; 2 L Ed 2d 112

180 *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*: A protracted court case revolved around the ownership of an abandoned vessel thought to be a Spanish vessel sunk in 1622 and discovered by American citizens outside territorial waters – as it was determined by the courts – , 40 miles off the coast of Florida. The State of Florida had contended that since the vessel was in within the boundaries it was entitled to possession due to the vessel being on the submerged bottomlands of the state. A salvage contract was entered into – under coercion by the state, as was contended in the court case. At a later stage, the U.S. entered into the court cases by also claiming ownership (☞ below). In the long last, the court held, with amendments at various points in the trial history, that the salvors have complete title and possession of the vessel and the artefacts salvaged thereof. *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel* (SD Fla) 408 F.Supp. 907; (CA5) 569 F 2d 330 (1978); (SD Fla.); (SD Fla.) 459 F. Supp.507; (SD Fla.) FR Serv. 2d 12; affirmed (CA5 Fla) 621 F2d 1340 (1980); rehearing denied (CA5 Fla) 689 F2d 1350 and affirmed in part and revised in part on other grounds 458 US 670, 73 L ED 2d 1057; (CA5 Fla) 640 F2d 560 (1981).

Halfway through the series of court cases, the U.S. filed, on other grounds on another occasion, a separate case against the State of Florida regarding the extent of the State of Florida’s boundaries on the seaward side and claimed possession of all natural resources etc, outside the territorial waters but within the continental shelf. (*U.S. v. State of Florida* 420 US 531; 43 L.ed 2d 375; 95 S Ct. 1165 [1975], confirmed 425 US 791, 48 L. Ed. 2d 388; 96 S Ct 1840 [1976]).

In a later development of the protracted case *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel* the U.S. government then continued to argue in the case and claimed ownership on the grounds that since the vessel was on the continental shelf, the U.S. rather than the State of Florida or the Treasure Salvors was in possession and title of the wreck , that the ownership should be decided on the terms of the law valid at the time of the event and that therefore the U.S. was entitled to possession and title of the wreck as successor to prerogative rights of the English crown. This claim was rejected by the court ([CA5 Fla] 689 F2d 1254).

181 *Cf. Klein v. Unidentified Wrecked & Abandoned Sailing Vessel* (SD Fla) 568 F.Supp. 1562 (1983).

182 ☞ below, Section 3.4.4. Legal provisions-property embedded in earth and Section 3.4.2. legal provisions - abandoned property.

183 While a vessel may be a derelict so as to be fit object of salvage, it may not be an abandoned vessel in the sense that its owners or the owners of the cargo have abandoned their ownership thereof. (63 ALR 2d 1372).

184 68 *Am. Jur.* 2d, 334, SALVAGE §28.

185 It needs to be taken to a safe harbour and the question of ownership needs to be adjudged. (68 *Am. Jur.* 2d, 338, SALVAGE §2. ☞ also *Brady v. S.S.African Queen* (ED Va.)179 F.Supp. 321 (1960).

“Under law of finds, finder acquires title to lost or abandoned property by occupancy, that is, by taking possession of property and exercising dominion and control over it; finder does not acquire title merely on strength of his discovery of lost or abandoned property.” and “Under the principles of law of finds, persons who actually reduce lost or abandoned objects to possession and persons who are actively and ably engaged in efforts to do so, are legally protected against

interference from others, whereas persons who simply discover or locate such property, but do not undertake to reduce its possession, are not.” *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel* (CA5 Fla.) 640 F2d 560 (1981).

186 In the case *State of Florida by Ervin v. Massachusetts Co (Fla)* the defendants argued that he “took possession of the ship by marking it with buoys and lines” (63 ALR 2d 1361). The court held that this method is of doubtful ancestry to be of use for a claim.

See also *Eads v. Brazelton* 22 Ark. 499 (1861) quoted in *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel* (CA5 Fla.) 640 F2d 571-572 (1981). In that case a line and a buoy had been attached to a sunken barge in the Mississippi River. Other salvage business as well as a rising river prevented the salvor from continuing his effort. In the following year he was beaten by another salvor, who by being earlier on the scene, succeeded in taking possession of the property. The fact that the wreck had been marked by a buoy was of no consequence in attaining possession of the wreck.

See also *The Port Hunter* (DC Mass) 6 F Supp. 1009 (1934), where a salvor had placed a buoy and weight over a partially submerged vessel, the barrel containing a copy of a formal document reciting an intention to seize and take possession of the wrecked vessel in consequence of an alleged abandonment by the owner. It was held that the salvor had acquired no title by marking the wreck and commencing salvage operations, because the vessel had been acquired by a person from the underwrites shortly after it had sunk, and the owner had shown constant intention to salvage the vessel.

187 *De Bardeleben Coal Co. v. Cox* 16 Ala App. 172, 76 So 409 (1917); certiorari denied 200 Ala App.553; 76 So 911; 63 ALR 2d 1370-1371

188 70 *Am. Jur.* 2d, 1075, SHIPPING §973. ☞ the cases referred to in 63 ALR 2s 1370.

Also: “Salvage of vessel or goods at sea, even when goods have been abandoned, does not divest original owner of title or grant ownership rights to salvor, except in extraordinary cases as where property has been lost or abandoned for a very long time; under these unusual circumstances maritime law of find supplements the possessory interest normally granted to salvor and vests title by occupancy in who dis-

covers such abandoned property and reduces it to possession” *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel* (CA5 Fla) 640 F2d 560 (1981).

189 70 *Am. Jur.* 2d, 1076, SHIPPING §974. “Whether a vessel or its contents have been abandoned by the owners is generally considered a question of fact to be determined from all the circumstances. A valid abandonment may be accomplished by either express or implied act of leaving or deserting property without hope of recovering it and without intention of returning to it. (*Ibid.*)

Other courts have also held that the abandonment has to be voluntary and not forced by outside influences, such as peril to life etc: *Wilkie v. Twohundred and five boxes of sugar* (DC SC) Bee Adams F Case N° 17662 (1862), quoted in 63 ALR 2d 1373 §4.

190 See *De Bardeleben Coal Co. v. Cox*, case cited in previous footnote.



191 The statutory period is 30 days.

192 *Murphy v. Dunham* (DC Mich) 38 F. 503 (1889); *De Bardeleben Coal Co. v. Cox* 16 Ala App. 172, 76 So 409 (1917); certiorari denied 200 Ala App.553; 76 So 911; 63 ALR 2d 1370-1371. ☞ also *F.E.Grauwiller Transport Co. v. King* (DC N.Y.) 131 F.Supp 630 (1955), affirmed *F.E.Grauwiller v. The Jeanne* (CA2 NY) 229 F2d 153.

193 See *Wyman v. Hurlburt* 12 Ohio 81 (1843); 40 *Am. Dec.* 461; quoted in 63 ALR 2d 1373.

194 In this case, an entirely different body of law applies. The concept of lost property is the exact opposite of abandoned property, although in both cases the owner no longer has the property in his or her possession. Property that is involuntarily lost or left by the owner without the hope and expectation of again acquiring it, however, becomes the property of the finder, subject to the superior rights of the owner. Moreover, the finder and taker (salvor) of the property becomes a quasi-bailee. Once (s)he takes the property into his or her custody, (s)he assumes the obligations of a gratuitous bailee and may be liable for negligence in keeping the property (see *Crandall op. cit.* [footnote \$MM\$] 984).

195 Thus the fact of a captain and crew abandoning a sinking vessel or of a pilot parachuting out of a crashing plane does not constitute an act of abandonment of the ownership of the property.

- 196 *Wiggins v. 1100 tons, more or less, or Italian marble* 186 F.Supp. 456.
- 197 *Steinbraker v. Crouse* 169 Md 453 (1936); 182 A 448 (quoted in 63 ALR 2d 1373 §4);  also *Smiley v. United States* (CC Cal.) 6 Sawy 640 F Case N° 16317 (1864) (also quoted in 63 ALR 2d 1373 §4).
- 198 *Thompson v. United States* 62 Ct.Cl. 516 (1926) (quoted in 63 ALR 2d 1373 §4).
- 199 68 *Am. Jur.* 2d, 317-318, SALVAGE §3. “The character of a vessel as derelict is likewise unaffected by the fact that some of the officers and crew return to it for a temporary purpose and leave it again when this purpose is accomplished.” (*Ibid.*).
- An intention on the part of the owners of a wrecked vessel ultimately to rescue it does not affect its character as a derelict, where it has been allowed to remain in wrecked condition for some time.” (70 *Am. Jur.* 2d, 1075, SHIPPING §973).cf. *Eads v. Brazelton* 22 Ark. 499 (1861) (quoted in 63 ALR 2d 1374 §4).
- 200 70 *Am. Jur.* 2d, 1076, SHIPPING §974 says that “[t]he most significant factor indicating abandonment appears to be the passage of a considerable length of time without effort on the part of the owners to secure repossession of their property.” (Apparently quoted after 63 ALR 2d 1374 §3). It is obvious, then, that the longer the property is in a state of nonuse, the greater the weight of argument for considering the property abandoned. However, the original owner has the opportunity to explain the inaction and show that (s)he did not abandon the property.
- 201 33 USCS § 409.
- 202 *Rickard v. Pringle* (DC NY) 293 F Supp 981 (quoted in 68 *Am. Jur.* 2d, 317, SALVAGE §3, footnote 21).
- 203 *Creevy v. Breedlove* (1857) 12 La Ann. 645 (quoted in 63 ALR 2d 1374 §4).
- 204 *Eads v. Brazelton* 22 Ark. 499 (1861) (quoted in 63 ALR 2d 1374 §4).
- 205 *Deklyn v. Davis* (1824, NY) 1 Hopkins Ch 135, (quoted in 63 ALR 2d 1374 §4).
- 206 *Wiggins v. 1100 tons, more or less, of Italian marble* (DC Va) 186 F. Supp. 452.
- 207 *Collins v. Lewis* 149 A 668 (quoted after Crandall *op. cit.* [footnote \$MM\$] 982; see also *Wiggins v. 1100 tons, more or less, or Italian marble* 186 F.Supp. 456.
- 208 *Wiggins v. 1100 tons, more or less, or Italian marble* 186 F.Supp. 456.
- 209 *ibid.*; see also *Nippon Shosen Kaisha v. United States* 238 F.Supp. 55 (ND Cal. 1964).
- 210 *Baltimore, Crisfield, Onanock Line, Inc. v. United States* 140 F2d 230; *Somerset Seafood Co. v. United States* 95 F.Supp. 298 (D.Maryland 1951).
- 211 *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel* (SD Fla) 568 F.Supp. 1562 (1983).
- 212 *Colombus-America Discovery Group v. The Unidentified and abandoned Sailing Vessel SS Central America* (ED Va.) (1987) (Civil action No. 87-363N).  also article on the case “The case with the Midas touch”, *American Bar Association Journal* 76 (5), 1990, 50-55.
- The vessel SS *Central America* sank in 1864 and rests 160miles of Charleston, Va. , well outside the territorial waters of the U.S., in over 1000 feet of water.
- 213 Quoted after *American Bar Association Journal* 76 (5), 1990, 54.
- 68 *Am. Jur.* 2d, 331, SALVAGE §25 says that salvors “are required by the nature of their undertaking,... , to be vigilant in preventing, detecting and exposing every fact of plunder upon the property saved, and the right of salvage may be forfeited by *spoliation*, smuggling or other gross misconduct” (Emphasis added)
- 214 M.J.Norris, Marine Salvage for Fallen aircraft?*New York University Law Review* 30, 1951, 1208-1223. J.J.Crandall., Extending admiralty jurisdiction over nonmaritime property; ascertaining the salvor's possessory and proprietary rights to sunken aircraft. *Pacific Law Journal* 15, 1984, 977-1012.
- 215 *Kimes v. United States* 207 F.2d 60 (2d Cir. 1953) involving a case where a military transport vessel, transporting among other materiel, assembled aircraft, was torpedoed and beached with flooded holds. The salvor of the aircraft was entitled a salvage award.
- 216 *The Crawford Bros. No. 2*, 215 Fed. 269 (WD Wash. 1914) where the court refused to act on a salvage claim — the first of its kind given the

early date — on a landbased aircraft fallen into Puget Sound.

- 217 8 *Am. Jur.* 2d, 375, AVIATION § 26; ☞ also cases quoted therein. ☞ also 68 *Am. Jur.* 2d, 316, SALVAGE §2 and 334, §28 footnote 18. However, as in 2 *Am. Jur.* 2d, 739, ADMIRALTY §32, “[a] means of transportation useable exclusively in the air is not a vessel, in terms of admiralty law. Nor is a seaplane a vessel, in terms of admiralty jurisdiction, while it is stored for repair in a hangar on dry land, although a seaplane when on sea is a maritime object subject to maritime law of salvage”.

The provisions contained in the *Marshall Islands Revised Code of 1989*. (Title 34: Admiralty and Maritime Affairs; Chapter 3: Maritime Act; Part IX: Rules of Navigation, § 87) also implicitly recognise seaplanes as falling under maritime law as long as the planes are on the water.

- 218 Although commonly confined to vessels and their cargo excepting bills of exchange (*The Emblem*, 8 Fed. Cas. 611, No. 4434 [D.Me. 1840]) and the mails (*The Merchant*, 17 Fed. cas. 35; no. 9435 [SD Fla. 1851]) all sorts of objects of maritime and non-maritime nature have been held to fall under the jurisdiction of the Admiralty courts: rafts of lumber (*Fifty thousand feet of timber*, 9 Fed. Cas. 47 No. 4783 [D.Mass. 1871]); spars (*Raft of spars*, 20 Fed. Cas 173, No. 11,529 [SD NY 1849]); a whale (*Tabor v. Jenny*, 23 Fed. Cas. 605, No. 13270 [D.Mass. 1856]); a bathhouse built on floats (but not permanently moored to land; *The Public Bath No.13*, 61 Fed. 692 [SD NY 1894]); fishtrap frames (*Colby v. Todd Packing Co.*, 77 F.Supp. 956 [D.Alaska 1948]); a steam derrick without propulsion (*Maltby v. Steam Derrick Boat*, 16 Fed. Cas. No 9000 [D.Va. 1879]) and a hopper barge to transport mud (English law; *The Mac.*, 7 P.D. 126 [1882] quoted after Norris op. cit [footnot e 212] 1216-1217)

On the other hand, the following have not been held to be objects of maritime nature: a dry dock permanently moored to land (*Cope v. Valette Dry Dock Co.*, 119 U.S. 625 [1887]); a light beacon (or gas float; English law; *The Gas Float Whitton No.2* [1895] P. 301 cf. Norris op. cit [footnote 212] 1214 FN 47.).

Apart from commercial salvage operators, the following have been permitted to claim salvage awards: passengers (*Towle v. The Great Eastern*, 24 Fed.Cas. 75, No. 14110 [SD NY

1864]); deep sea divers (*Atlantic Refining Co. v. Merrit & Chapman D & W Co.*, 300 Fed 901 [3rd Cir 1924]); lighthouse keepers (*The Ottawa* , 18 Fed. Cas. 908, No.10,617 [D.Mass. 1868]); crew of a navy warship (*Hamburg-America Line v. United States*, 168 F 2d. 47 (1st Cir. 1948); slaves (*Small v. The Messenger*, 22 Fed. Cas. 366, No. 12,961 [D.Pa.1807]); and airplane pilots (*The American Farmer*, 80 Ll.L.rep. 672 (Adm. Div. 1947);

Compiled from *Am.Jur.* 2d, Norris op. cit. (footnote 212) and Crandall op. cit. (footnote 212).

- 219 *Reinhardt v. Newport Flying Service Corp.* 232 N.Y. 115; 133 N.E. 371 (1921); quoted in Norris
Gydenia-America Shipping Lines, Ltd. v. Lambros Seaplane Base, Inc. 115 F.Supp. 796 (SD NY 1953); *Lambros Seaplane Base, Inc., v. The Batory*, 215 F.2d 228 (2d Cir. 1954).

- 220 *Noakes v. Imperial Airways*, 29 F.Supp. 412 (SD NY 1939); *Dollins v. Pan-American Grace Airways*, 27 F.Supp. 487 (SD NY 1939); *United States v. Peoples*, 50 F.Supp. 462 (1952).

English law: *Watson v. R.C.A.Victor Co.*, 50 Ll.L.Rep. 77, 1935 Am. Mar. Cas. 1251 (Aberdeen Sherrif Ct. 1934)





- 221 The Air Commerce Act of 1926 stipulates that navigation and shipping laws of the U.S. shall not be construed to be appliable to seaplanes. ☞ also amendments to the navigation-law (65 Stat. 408 [1951], 33 U.S.C. §144(c) (1952) where seaplanes are specifically excluded.


However, under English law, seaplanes and airplanes fasllen in to the sea are subject to Admiralty court jurisdiction and salvage law (cf. Norris op. cit. [footnote 212] 1218 FN 70).

- 222 *The Emoulous* 8 Fed. Case. 704, No. 4480 (C.C.D. Mass. 1832). Here, Mr. Justice Story held that "[it can be taken] to be very clear, that wherever the service has been rendered in saving property from the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service".

See also Marvin, *Law of Wreck and Salvage* § 97 (1858), where "salavge is a compensation for maritime services, rendered in saving property or rescuing it from impending peril, on the

- sea, or wrecked on the coast of the sea, or on a public navigatable river or lake, where interstate or foreign commerce is carried on." Both quoted after Norris op. cit. (footnote 212).
- 223 16 Fed. Cas. 564, No 9000 (D.Va. 1879).
- 224 Cf. Crandall op cit. (footnote 212) 988
- 225 *Mark v. South Continental Insurance Agency, Inc.* 1978 A.M.C. 519; *Notarian v. Trans World Airlines* 244 F.Supp. 874 (WD Pa. 1965); *Horton v. J&L Aircraft, Inc.* 257 F.Supp. 120 (SD Fla.1966); *Choy v. Pan American Airways, Inc.* 1941 A.M.C. 483; *Weinstein v. Eastern Airlines* 316 F.2d. 758 (3rd Cir. 1963); *Scott v. Eastern Airlines* 399 F.2d. 14 (3rd Cir. 1968); *Hornsby v. Fish meal Co.* 431 F.2d. 865 (5th Cir. 1970).
- The *Maltby Locality Test* was seen inapplicable for land-based planes in the following cases: *Executive Jet Aviation v. City of Cleveland* 409 U.S. 249 (1972), where a jet taking off Cleveland airport fell into Lake Erie. The court held that the fact that the plane happened to fall into the lake to be a coincidence and "wholly fortuitous" and lacking any maritime nexus.
- Ferry flights to and from ships or oil-drilling platforms, however, have the necessary nexus: *Ledoux v. Petroleum Helicopters, Inc.* 609 F.2d 824 (5th Cir. 1980); *Barger v. Petroleum Helicopters, Inc.* 514 F.Supp. 1199 (ED. Tex. 1981). Therefore, aircraft-carrier-based or temporarily carrier-base land planes would have the required maritime nexus for Admiralty jurisdiction to apply.
- 226 A case in point was the discovery and successful salvage of a World War II Grumman TBF "Avenger" torpedo bomber from the bottom of Lake Michigan. The plane had crashed during the war on occasion of training exercises of simulated landings on carrier decks. The planes were still legal property of the U.S. Navy and permission for salvage had to be obtained. (J.Albergo, Wreck facts: Lake Michigan's Avengers. *Skin Diver* 39 [2], February 1990, pages 14 & 158-160).
- 227 Contemporary law — of the early 1800s — had held that a vessel stranded on the shore of a Pacific reef, was considered to be abandoned as the owner could not possibly retain possession of it. (*The Holder Borden* (1847, DC Mass) 1 Sprague 144, F case N°. 6600; quoted after 63 ALR 2d 1371 §2.).
- 228 If the wood survived the destruction of the marine organism, such as the wood worms.
- 229 Although their existence is somewhat unlikely, this section also applies to all aircraft crashed or sunk in the waters of the Marshall Islands during the German and Japanese period. It has been asserted several times that Amelia Earhart went missing over the Marshall Islands. Lore has it that her plane rests somewhere in Mili Lagoon. If this would prove to be true, then the wreck of her plane, a Lockheed Electra, would form a historical resource of world-wide importance.
- 230 The High Court of the T.T.P.I. has ruled similarly in case of more recent maritime disputes: *Lakemba v. Milne* 4 T.T.R. 44.
- 231 45 *Am. Jur.*2d, 414, INTERNATIONAL LAW §77.
- 232 ☞ relevant case *Thompson v. United States* 62 Ct.Cl. 516 (1926) where it was ruled that the US had no title to a German oil tanker which sank in the Mississippi River in 1914, before the US entry into World War I. As the German owners had abandoned their property, and as they had stated so explicitly by stating it in a notice sent to the US agencies, the ownership of the derelict vessel was abandoned for all purposes of the law; hence, the vessel could be reduced to possession by the salvor.
- 233 *Marshall Islands Revised Code of 1989*. Title 34: Admiralty and Maritime Affairs; Chapter 1: Admiralty and Maritime Act.
- 234 Nor does the T.T.P.I. Code, for that matter.
- 235 The Japanese air forces operating in the Marshall Islands were all naval air flotillas and were all under the command of the commander in Chief of the Japanese Navy 4th Fleet headquartered in Chuuk (Truk).
- 236 Such as the Japanese cruiser *Akagai* or the German cruiser *Prinz Eugen*, both received after surrender from Japan and Germany respectively, and both used in the nuclear testing programme (☞ Section 3.2.11.).
- 237 *Compact of Free Association between the Government of the United States of America and the Government of the Republic of the Marshall Islands* 1982. Title 2: Economic relations; Article 3: Administrative provisions; § 234.

- 238 Cf. P.A.Rosenberg, *Shipwrecks of Truk*. 2nd revised edition, 1989. P.A.Rosenberg: Holulualoa, Hawaii.
- 239  *Pacific Islands Monthly*, November 1953. Page 122.
- 240 Unless, however, the vessels were requisitioned Japanese merchantmen for whom the Japanese government had not paid any compensation.
- 241 This objection, re-inforces the question raised above, whether the earlier U.S. refusal to let the ships be salvaged was legal. It appears that the decision may have been influenced and justifiable by the status of Micronesia as a Strategic Trust and the status of Japan as a former enemy and potential threat to the safety of the Strategic Trust.
- 242 Statement of Mr. Stephen M.Schwelbel, Special representative for Micronesian Claims of the Department of State on [Senate] Joint Resolution 189 on Micronesian Claims. (Archives of the Trust Territory of the Pacific Islands, Microfilm N° 178; Frame N° 1).
Only those things were salvaged which could be reached easily. The operation had been only a very limited economic success: U.S. \$ 35,000 were obtained for Trust Territory of the Pacific Islands. This money was used to cover war claims of Micronesians.
- 243 Note N°2 exchanged in relation to the *Agreement between the United States of America and Japan regarding the Trust Territory of the Pacific Islands*. April 18, 1969. (Archives of the Trust Territory of the Pacific Islands, Microfilm N° 178; Frame N° 1). In this agreement Japan undertook to pay - in goods and services - an *ex gratia* compensation worth ¥1,800,000,000, then about \$ 5,000,000, to cover Micronesian war claims.
- 244 The agreement, however, did not give any exclusive right to salvage, but merely allowed Japanese salvage contractors to conduct business within the three year period stipulated.
- 245  Section 3.2.5.
- 246 Any such vessels surviving the war and taken as prize by the U.S. armed forces (cf. Jentschura *op. cit.* (Footnote \$10\$: [List of vessels] for ample examples) were disarmed and at a later date returned by the U.S. to their pre-war owners.
- 247 Unless an insurance claim has been made and the insurance company has paid out the money.
- In such a case, then, the ownership rests with the insurance company. However, in most insurance policies a clause is included specifically excluding the coverage from applicable to acts of war.
- 248 If this holds true, then the actions of the U.S.Army (?) bomb removal team on Maloelap become questionable: unexploded ammunition was collected on Taroa island, a former Japanese airbase, and exploded in the hull of the Japanese merchant vessel *Toreshima Maru*, which had been sunk by U.S. planes in January 1944 off Taroa. ( United States Strategic Bombing Survey, 1947 *The American campaign against Wotje, Maloelap, Mille and Jaluit*. Washington: Naval Analysis Section, United States Strategic Bombing Survey). Under the principle of sovereign immunity, the detonation of the unexploded ordnance, which destroyed parts of the shipwreck, forms a substantial impairment of the cultural resource and, furthermore, an act of violation of the integrity of property of another person. Formalistically, it seems possible that the Japanese government would have been in the position to sue the bomb removal team, especially as the shipwreck did not prove to be a navigational hazard.
- 249 See above, footnote \$99\$.
- 250 2 *Am. Jur.* 2d, 740, ADMIRALTY §33 “Things recognised as vessel”.
- 251 *Ibid.* 739, §32 “Hydroplanes”
- 252 *Ibid.* 739, §31. “Dead vessels”
- 253 *Maltby v. Steam Derrick Boat* 16 fed. cas. 564, No. 9,000 (D.Va., 1879).
- 254  footnote 216.
- 255 *Compact of Free Association between the Government of the United States of America and the Government of the Republic of the Marshall Islands* 1982. Title 2: Economic relations; Article 3: Administrative provisions; § 234.
- 256 Such as the American LVT resting on the bottom of Kwajalein lagoon next to Mellu I., Kwajalein Atoll (Anonymous, *The battles of Kwajalein and Roi-Namur*. 1981; page 36).
- 257 *Compact of Free Association between the Government of the United States of America and the Government of the Republic of the Marshall Islands* 1982. Title 2: Economic re-



- lations; Article 3: Administrative provisions; § 234.
- 258 *Compact of Free Association between the Government of the United States of America and the Government of the Republic of the Marshall Islands* 1982. Title 2: Economic relations; Article 3: administrative provisions; § 234.
- 259 §177 refers to the compensation for the effects of nuclear testing in the Marshall Islands.
- 260 *Agreement between the Government of the United States and the Government of the Republic of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association*. Article VI: Resettlement of Bikini Atoll and Conveyance of Property in respect to Bikini Atoll and Enewetak Atoll; § 2 Bikini Sunken Vessels and Cable.
- 261 *Ibid.* § 3 Enewetak Cable.
- 262 Cf. Bailey, Dan E., 1982, *WWII wrecks of the Kwajalein and Truk Lagoon*. Redding, CA: North Valley Diver Publications.
- 263 *Agreement regarding the Military use and Operating Rights of the Government of the United States in the Marshall Islands concluded Pursuant to Sections 321 and 323 of the Compact Free Association*. Article 9: Miscellaneous.
- “The Government of the United States, pursuant to Section 234 of the Compact, transfers title to the *Prinz Eugen*, the former German warship now located in the Kwajalein Atoll area, to the Government of the Marshall Islands. It is understood that unexpended ordnance and oil remains within the hull of the *Prinz Eugen*, and that salvage or any other use of the ship could be hazardous. The Government of the Marshall Islands shall hold the Government of the United States harmless for any loss, damage or liability associated with the *Prinz Eugen*, including any loss, damage or liability that may result from any salvage operation or any other activity that the Government of the Marshall Islands takes or causes to be taken concerning the *Prinz Eugen*. Any such operation or activity undertaken by or on behalf of the Government of the Marshall Islands shall be conducted at a time and in a manner to be agreed to between the Government of the United States and the Government of the Marshall Islands so as not to interfere with the operation of the defense sites.”
- 264 Cf. Riley, T.L., 1987, Archaeological survey and testing, Majuro Atoll, Marshall Islands. In: T.Dye (ed.), *Marshall Islands Archaeology. Pacific Anthropological Records* 38. Honolulu: Department of Anthropology, Bernice P. Bishop Museum.
- 265 Such as the wreck of a Japanese submarine (*RO-60*) stranded on Kwajalein Atoll (Anonymous, *The battles of Kwajalein and Roi-Namur*. 1981 page 36).
- 266 Such as the wreck of the Japanese Aichi D3A divebomber (“Val”) on the shore of Laura, Majuro Atoll (Site Marshall Islands -Mj-29) or the wreck of the American B-24 Liberator bomber sitting on the reef flat between Laura and Ajola (site MI-Mj-271).
- 267 Such as the wreck of an American M-5 light tank on the reef off Ennumanet, Kwajalein Atoll (Anonymous, *The battles of Kwajalein and Roi-Namur*. 1981; page 37).
- 268 *Constitution of the Republic of the Marshall Islands*, Article IX Local Government; § 1: Right to a system of Local Government, Subsections (2) and 1(3). *Marshall Islands Revised Code of 1989*. Title 4: Local Government; Chapter 1: Local Government Act; §7 Local Government areas, subsection 1.
- 269  Section 3.4.5.
- 270 *The Marshall Islands Revised Code of 1989*. Title 9. Public Lands and Resources, Chapter 1, § 3 (1). Based on *Code of the Trust Territory of the Pacific Islands 1966*. Section 32; which in itself is based on a proclamation of the Japanese Government of 1934 (T.T.C. 1958 §32; *Ngiraibiochel v. Trust Territory* 1 T.T.R. 488 [1958]; *Simiron v. Trust Territory* 8 T.T.R. 615); which in turn is based on German land law applied by the German administration in Micronesia (*Protestant Mission v. Trust Territory* 3 T.T.R. 26). In U.S. common law, title in “soil in the sea” is in the sovereign, but this is not a universal and uniform law (*Simiron v. Trust Territory* 8 T.T.R. 615).
- 271 *Marshall Islands Revised Code of 1989*. Title 9. Public Lands and Resources, Chapter 1, § 3 (1) (c).
- 272 *Trust Territory Revised Code of 1966*, §32.
- 273 *Ngiraibiochel v. Trust Territory* 1 T.T.R. 488; *Protestant Mission v. Trust Territory* 3


- T.T.R. 26; *Simiron v. Trust Territory* 8 T.T.R. 615.
- 274 Cf. Tobin *op. cit.* (footnote) 11. According to Tobin (*ibid.*) the Japanese broke the custom in 1934 when declaring the reefs for public land. However, as far as could be ascertained the Japanese merely did what the Germans already had instituted: declaring the lands below the intertidal zone as public land. Both in the common law of Imperial Germany and in the common law of England (☞ footnote) items washed on the shore, as well as all produce and proceeds from the shorelands, were property of the sovereign.
- Although it may be only a mute point, it should be pointed out that, as such, the Marshallese concept, that the reefs were actually or potentially property of the irooj's is not that dissimilar from the European concept of sovereign possession. Arguing along this line, then, on the same token, the legal "annexation" of the Marshall Islands by the German Government, following the agreement with *Irooj laplap* Kabua in 1876, indicates, that the German Government, as the legal successor of the Irooj's as the sovereign of the Marshall Islands would have been entitled to the reefs and intertidal resources.
- 275 In order to be able to fish with a pole (Tobin *op. cit.* [footnote 4] 12).
- 276 ☞ also provision in *Marshall Islands Revised Code of 1989*. Title 9. Public Lands and Resources, Chapter 1, § 3 (1) (b).
- 277 Floatsam are goods floating from a wrecked or sunken vessel.
- 278 Jetsam are goods cast into the sea to lighten a vessel in peril.
- 279 Ligan are goods cast into the sea to lighten a vessel in peril, whereby the goods have a marker or buoy attached.
- 280 Tobin *op. cit.* [footnote 4] 12; the Japanese claim of all land below the high-tide as Government property was apparently resented because it meant a loss in drift logs and other floatsam.
- 281 *Constitution of the Republic of the Marshall Islands*, Article IX Local Government; § 1: Right to a system of Local Government, Subsections (2) and 1(3). *Marshall Islands Revised Code of 1989*. Title 4: Local Government; Chapter 1: Local Government Act; §7 Local Government areas, subsection 1.
- 282 *Marshall Islands Revised Code of 1989*. Title 9. Public Lands and Resources, Chapter 1, § 3 (1) (a).
- 283 *Ibid.* § 3 (1) (b); ☞ also ruling in *Teresia v. Neikinia* 5 T.T.R. 228.
- 284 *Ibid.*; ☞ also § 3 (1) (e) permitting the absolute utilisation of marine resources and material in the "areas below the ordinary high water mark, subject only to, and limited by, the inherent rights of the Government of the Marshall Islands as the owner of such marine areas". ☞ also ruling in *Simiron v. Trust Territory* 8 T.T.R. 615.
- 285 *Marshall Islands' Revised Code of 1989*. Title 9. Public Lands and Resources, Chapter 1, § 3 (1) (b). Whereas the Government, in this case is the National Government, rather than the Local Government.
- 286 ☞ Section 3.2.5.
- 287 ☞ Section 3.2.5. .Salvage - derelict vessels, merchant vessels
- 288 ☞ below, Section 3.4.
- 289 ☞ Section 3.2.5
- 290 For this scenario ☞ Section 3.3.4.1.
- 291 ☞ above, Section 3.3.4.1. and Section 3.4.2. (Abandoned property).
- 292 ☞ Section 3.2.4.
- 293 As they are used for transportation on water, they can be classified as vessels as stipulated in the Maritime Law.
- 294 1 *Am. Jur.* 2d, 20, ABANDONED PROPERTY § 22. ☞ also ruling in *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel* (SD Fla) 568 F.Supp. 1562 (1983) where this principle was applied to submerged bottom lands.
- 295 In U.S. common law, title in "soil in the sea" is in the sovereign, but this is not a universal and uniform law (*Simiron v. Trust Territory* 8 T.T.R. 615).
- 296 "The United States is the owner of a shipwreck imbedded in submerged lands owned by the United States and administered by the National Parks Service, and shipwreck could thus not be considered lost or subject to finder's claim, where by owning the land, the United States had a constructive ownership of the shipwreck and where by the United States demonstrated its intent to exercise dominion over the shipwreck by enactment of statute designed to protect ar-

- chaeological resources” (70 Am.Jur 2d, 1077, Shipping §974; quoting *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel* [CA11 Fla] 758 F. 2d 1511).
- 297 Following the language used in the Regulations for the preservation and use of cultural and historic properties of the Commonwealth of the Northern Marianas: “Artefact” means any object related to, derived from, or contained in a cultural and historic property that is important in the study, interpretation or public appreciation of such property.
- “Cultural and historic property” means any site, structure, district, landmark, building, object, or combination thereof, that: (1) is included in the National Register of Historic Places; (2) is determined by the Historic Preservation Office or the Keeper of the National Register of Historic Places to be eligible for the National Register, or (3) meets any of the criteria set forth in Appendix I. The term explicitly embraces the terms “historic and cultural property”, “historic or cultural property”, “cultural and historic property”, “cultural or historic property”, “historic property”, and “valuable historic property” as used in the Act. Cultural and historic properties may be recognized as such individually or as members of “groups” of like or unlike properties whose numbers and locations can be specified, or as “classes” of like properties whose characteristics can be specified but whose precise total numbers and locations may not be specifiable.
- 298 In this context, the number of people required to move a property is of no concern.
- 299 In the Republic of the Marshall Islands U.S. law is commonly used as the guiding principle if no directly applicable law exists in the *Marshall Islands Revised Code of 1989*.
- 300 *Abandoned* property needs to be carefully distinguished from the principle of *lost property* or *mislaidd property*. “Lost property is defined in law as property which the owner has involuntarily parted with through neglect, carelessness, or inadvertence, that is, property which the owner has unwittingly suffered to pass out of his possession and of whose whereabouts he has no knowledge”. “... the essential test of lost property in contemplation of law is whether the owner parted with the possession intentionally or casually or involuntarily; only in the latter contingency it may be lost property”. “Mislaidd property is property which the owner voluntarily and intentionally laid down in a place where he can again resort to it, and then forgets where he puts it” (1 *Am. Jur.* 2d, 4, ABANDONED PROPERTY §2).
- 301 1 *Am. Jur.* 2d, 3-4, ABANDONED PROPERTY § 1.
- 302 1 *Am. Jur.* 2d, ABANDONED PROPERTY § 18.
- 303 In this case a shipwreck imbedded in submerged lands owned by the United States.
- 304 70 *Am.Jur* 2d, 1077, SHIPPING §974; quoting *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel* [CA11 Fla] 758 F. 2d 1511).
- 305 1 *Am. Jur.* 2d, 22, ABANDONED PROPERTY § 24.
- 306 *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel* (CA5 Fla.) 640 F2d 560 (1981). However, the same court also ruled that “[o]ne who discovers lost or abandoned property need not always actually have in hand before he is vested with legally protected interest; rather, a finder may be protected by taking such constructive possession of property as its nature and situation permit.”
- 307 1 *Am. Jur.* 2d, 27, ABANDONED PROPERTY § 33. See also §6 (Right of State to Property).
- 308 According to 1 *Am. Jur.* (2d, 9, ABANDONED PROPERTY § 6) “escheat and forfeiture are not favoured by the law, and... any doubt as to whether poperty is subject to escheat is resolved against the state” See also *ibid.* §24 for the rights of the former property owner towards the state who has taken protective custody of abandoned property.
- 309 1 *Am. Jur.* 2d, 16-17, ABANDONED PROPERTY § 16.
- 310 1 *Am. Jur.* 2d, 39, ABANDONED PROPERTY § 36.
- 311 1 *Am. Jur.* 2d, 6, ABANDONED PROPERTY § 4. “Tresasure trove carries with it the thought of antiquity; to be classed as treasure trove, the treasure must have been hidden or concealed so long as to indicate that the owner is probably dead or unknwon” (*Ibid.*).
- 312 Other countries, such as England, for example, have legislation regarding treasure-trove. In England treasure-trove is the sole ownership of the sovereign, that is the crown. Similar legislation exists in Denmark and Sweden.

- 313 1 *Am. Jur.* 2d, 20, ABANDONED PROPERTY § 21.
- 314 ☞ footnote
- 315 1 *Am. Jur.* 2d, 6, ABANDONED PROPERTY § 4.
- 316 1 *Am. Jur.* 2d, 20, ABANDONED PROPERTY § 22. – ☞ also ruling in *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel* (SD Fla) 568 F.Supp. 1562 (1983) where this principle was applied to submerged bottom lands.
- 317 ☞ above, Section 3.4.3.
- 318 *Compact of Free Association between the Government of the United States of America and the Government of the Republic of the Marshall Islands* 1982.
- 319 *Agreement regarding the Military use and Operating Rights of the Government of the United States in the Marshall Islands concluded Pursuant to Sections 321 and 323 of the Compact Free Association.*
- 320 *Ibid.* Article 9: Miscellaneous. Emphasis added.
- 321 The ownership of unexploded ordnance is discussed in Section 3.7.
- 322 But not the gun emplacements (☞ below).
- 323 Scrap metal dealers were particularly interested in the brass fittings and copper wiring of generators, mors and other equipment, as well as in the alloy casings of artillery shells.
- 324 In the Republic of the Marshall Islands U.S. law is commonly used as the guiding principle if no directly applicable law exists in the *Marshall Islands Revised Code of 1989*.
- 325 As is argued in *N.Hermios, C. Lavin & C.Wall versus I.Tartios for himself and his lineage*. H.C.T.T.App.Div. 8 T.T.R. 540 (1986). ☞ below
- 326 *American Jurisdiction* 2d, ABANDONED PROPERTY § 18.
- 327 *Hermios v.Tartios* 8 T.T.R. 540-541.
- 328 “As a general rule, abandonment of, or an intention to abandon, property is not presumed... An abandonment must be made to appear affirmatively by the party relying thereon, and the burden is upon him who sets up abandonment to prove it by clear, unequivocal, and decisive evidence.” (1 *American Jurisdiction* 2d, 29, ABANDONED PROPERTY § 36).
- 329 *Marshall Islands Revised Code of 1989*. Title 12: Aeronautics; Chapter 1: Civil Aviation Safety Act; Part I: Preliminary; § 2(l). ☞ also Part V: Nationality and ownership of aircraft. §26 The code stipulates that the “Director [of Civil Aviation] is... authorized to establish a national system for recording documents which affect title to or any interest in any civil aircraft registered in the Marshall islands and in any aircraft engine, propeller, appliance or spare part intended for use on any aircraft registered in the Marshall Islands”. However, a “certificate of registration... shall not be considered evidence as to ownership in any proceeding under the laws of the Marshall Islands in which ownership of the aircraft by a particular person is or may be the issue”.(*Ibid.* § 25 (7).).
- 330 A Mitsubishi A6M; the actual aircraft is described in volume III, part 3, Item No. Mj-AP-1.
- 331 Taroa is spelt Tarawa in 8 T.T.R. 537 ff
- 332 *N.Hermios, C. Lavin & C.Wall versus I.Tartios for himself and his lineage*. H.C.T.T.App.Div. 8 T.T.R. 5, 36-541 (1986). In the following cited as *Hermios v. Tartios*. 8 T.T.R. Court history: February 1979, parts of the aircraft removed to Majuro; April 16, 1979, complaint and petition for injunctive relief filed by Tartios et. al.; April 12, 1979, temporary restraining order issued; May 14, 1979, preliminary injunction granted; October 6, 1983, Trial Division judgement handed down; April 28, 1986, Appellate Division judgement handed down.
- 333 *Hermios v. Tartios* 8 T.T.R. 540.
- 334 *Cf.* Mile Island, Mile Atoll, cannibalised Aichi D3A (“Val”) divebomber next to the eastern hangar (Spennemann, D.H.R., in prep., *World war II Archaeology of Mile..Extent, preservation and management of the Japanese military installations on Mile Island, Mile Atoll, Republic of the Marshall Islands*. Report prepared for the Historic Preservation Office, Måjro, Republic of the Marshall Islands. Report in preparation. 1990..).
- 335 Despite numerous and repeated calls for a honourable surrender communicated by the U.S. Forces on Majuro Atoll by means of by airborne, dropped surrender leaflets (*cf.* Entries for 27-5-1944, 29-5-1944, 9-6-1944 or 14-6-1944 in the War diary of the Marine Scout Bombing

- Squadron VMSB-231; U.S. Marine Corps 1944e, f).
- 336 *Code of the Trust Territory of the Pacific Islands* 1966 § 532. Alien property was defined as all “property situated in the Trust Territory formerly owned by private Japanese national, by private Japanese organisations, or by the Japanese Government, Japanese Government organisations, agencies, Japanese Government quasi corporations or government-subsidized corporations” including “tangible and intangible assets”.
- 337 📖 *Pacific Islands Monthly* November 1953. Page 122.
- 338 For unexploded ammunition see Section 3.8.
- 339 *Compact of Free Association between the Government of the United States of America and the Government of the Republic of the Marshall Islands* 1982. Title 2: Economic relations; Article 3: Administrative provisions; § 234.
- 340 📖 for example: Dirk H.R.Spennemann, Matthew Holly and Newton Lajuan, 1990, *Report on the occurrence of live ammunition on Mile Island, Mile Atoll*. Report prepared for the Historic Preservation Office, Majuro, the Mile Atoll Local Government, Mile, Mile Atoll, and the Hon.Senator for Mile, Mr. Alele Alik Republic of the Marshall Islands. Report OTIA-TAG-MAR-42-5/90. Report on file, Alele Museum, P.O.Box 629, Majuro, Republic of the Marshall Islands.
- 341 1 *Am. Jur.* 2d, 4, ABANDONED PROPERTY § 1.
- 342 In the sense of 1 *Am. Jur.* 2d, 4, ABANDONED PROPERTY § 2.
- 343 It is most likely a mute point to argue that the fact that the ordnance is propelled or dropped in order to destroy another person's property constitutes an act of intentional vestment of all rights and title of that property with the person against the property is aimed at.
- 344 Of the U.S. naval shells propelled against the Japanese defense systems in the Marshall Islands an alarmingly large number, about 50% did not explode In interviews conducted after the war by the US Strategic Bombing Survey, the Japanese base commander of Taroa, Maloelap Atoll alledged that about 50% of all naval shells fired upon that island failed to detonate (United States Strategic Bombing Survey,1947 *The American campaign against Wotje, Maloelap, Mille and Jaluit*. Washington: Naval Analysis Section, United States Strategic Bombing Survey).
- 345 1 *Am. Jur.* 2d, 4, ABANDONED PROPERTY §2.
- 346 United States Strategic Bombing Survey,1947 *The American campaign against Wotje, Maloelap, Mille and Jaluit*. Washington: Naval Analysis Section, United States Strategic Bombing Survey.
- For the information regarding the existence of the ammunition I am indebted to Matthew Holly, Marshall Islands Aquatics.
- 347 *Agreement between the Government of the United States and the Government of the Republic of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association*. Article VI: Resettlement of Bikini Atoll and Conveyance of Property in respect to Bikini Atoll and Enewetak Atoll; § 2 Bikini Sunken Vessels and Cable.
- 📖 also similar provisions for the transfer of ownership of the *Prinz Eugen*, now in Kwajalein Lagoon (*Agreement regarding the Military use and Operating Rights of the Government of the United States in the Marshall Islands concluded Pursuant to Sections 321 and 323 of the Compact Free Association*. Article 9: Miscellaneous.)
- 348 The Japanese Navy was in charge of command of all Guard Units (“Keibitai”) stationed on the Japanese garrisoned atolls. Those units of the Imperial Japanese Army which were stationed in the Marshall Islands , such as the No.1 South Seas Detachment, were under orders of the Atoll Commander of the individual garrison,, who was always a Navy Officer.
- 349 The pertinent section of the surrender document for the garrison of Mile, which is representative of the other surrender documents, reads as follows:
- ”In preparation for turning over control of the atoll to the American authorities and in accordance with the Japanese Emperor's directive, and the terms of surrender agreed upon by the Japanese and American Governments, the Japanese Commander will:...
- (3) Collect and deposit in one spot to be designated by the American commander, all arms, weapons, ammunition, explosives and implements of war....
- (9) Prepare a map showing the location of all guns, gun emplacements, ammunition, fuel dumps, radio apparatus, transportation

- equipment, boats, shops, generators, etc. and prepare an inventory of all such equipment.
- (10) Take steps to prevent destruction of any useable items on the above list.”
- Instrument of Surrender of Mile Atoll, signed on Augst 22, 1945, by Captain Shiga, Masanari, Japanese Atoll Commander Mile, and Capatin H.B.Grow, Atoll Commander, Majuro, and Representative of the Commander Marshalls Gilberts Area, Commander in Chief U.S.Pacific Fleet, and the U.S.Government. Text visible on photographs 80G-490375 & 490376 (English text) and 80G-490473 & 490474 (Japanese text), held at the U.S. National Archives, Washington.
- 350 *Compact of Free Association between the Government of the United States of America and the Government of the Republic of the Marshall Islands* 1982. Title 2: Economic relations; Article 3: Administrative provisions; § 234.
- 351 Agreement between the Government of the United States and the Government of the Republic of the Marshall Islands for the Implementation of Section 177 of the *Compact of Free Association*. Article VI: Resettlement of Bikini Atoll and Conveyance of Property in respect to Bikini Atoll and Enewetak Atoll; § 2 Bikini Sunken Vessels and Cable. Emphasis added.
- 352 Head-stones were introduced with the Christianisation of the Marshall Islands.
- 353 If the head stone bears a name.
- 354 By association of the location of the grave in relation to existing housing (if the burial is in the backyard) or by association with religious structures, such as in congregational cemeteries.
- 355 Cf. D.H.R.Spennemann, *Osteological analysis of human remains from site Marshall Islands -Mj-242 found at Laura Beach, Måjro Island (Laura), Måjro Atoll, Republic of the Marshall Islands*. Osteological Report DRS 54 (1990) Report presented to the Historic Preservation Office, Majuro, Republic of the Marshall Islands.
- 356 D.H.R.Spennemann, *Eroding cemeteries in the D-U-D area. Report on a brief survey to determine the extent of coastal erosion on the ocean side of Djarrit, Uliga and Delap Islands, Måjro Atoll, Republic of the Marshall Islands*. Geomorphological Report DRS-GEO 5 (1990), Report prepared for the Historic Preservation Office, Majuro, Republic of the Marshall Islands. Report OTIA-TAG-MAR-42-5/90.
- D.H.R.Spennemann, *Report on a human femur from the south-western coast of Torwa Island, Maloelap Atoll, Republic of the Marshall Islands*. Osteological Report DRS 52 (1989). Report presented to the Historic Preservation Office, Majuro, Republic of the Marshall Islands. 4 pp.
- D.H.R.Spennemann, *Report on a human ulna from the south-eastern coast of Taroa Island, Maloelap Atoll, Republic of the Marshall Islands*. Osteological Report DRS 55 (1990). Report presented to the Historic Preservation Office, Majuro, Republic of the Marshall Islands. Report OTIA-TAG-MAR-42-7/90.
- 357 D.H.R.Spennemann, *Report on the skeletal remains from the manshelter of Barracks Building A, Torwa Island, Maloelap Atoll, Republic of the Marshall Islands*. 1989. Osteological Report DRS 51 (1989). Report presented to the Historic Preservation Office, Majuro, Republic of the Marshall Islands.
- 358 Limitations on visits to war graves by Ryukyuan and Okinawans: cf. Lt Gen. F.T.Unger, U.S. Army, U.S. High Commissioner Ryukyu Islands, to W.R.Norwood, High Commissioner Trust Territory of the Pacific Islands, Saipan, 5 May 1967. (Archives of the Trust Territory of the Pacific Islands Microfilm N°98 , Frame N°10 , Document Serial N°1555).
- 359 *Report on Memorial visting [sic] Ryukyuan Grave-yard in in former [sic] the South Sea Islands*. Okinawa Association for repatriates from Foreign Countries. (Archives of the Trust Territory of the Pacific Islands Microfilm N°90 , Frame N°35 , Document Serial N°1488).
- 360  a ream of correspondence in Archives of the Trust Territory of the Pacific Islands Microfilm N°167 , Frame N°113 , Frame N° 2832.. S.Aizawa, Magistrate Tol District, Chuuk, to K.Tanaka, Premier of Japan; September 26, 1973; see also Memorandum from Chief, Marines Resources, High Commissioner Trust Territory of the Pacific Islands to Deputy High Commissioner, Trust Territory of the Pacific Islands; June 28, 1973.
- 361  Archives of the Trust Territory of the Pacific Islands Microfilm N°167 , Frame

- N°113 , Frame N° 2832. Entire file on war graves.
- 362  Archives of the Trust Territory of the Pacific Islands Microfilm N°167 , Frame N°113
- 363 Memorandum Deputy District Administrator, Marianas, to District Administrator, Marianas, May 24, 1973. (Archives of the Trust Territory of the Pacific Islands Microfilm N°167 , Frame N°113).
- 364\ Talking Paper, Government of Japan, Ministry of Foreign Affairs, September 4, 1973. (Archives of the Trust Territory of the Pacific Islands Microfilm N°167 , Frame N°113).
- 365 No information regarding the success of the mission could be located in the archives.
- 366 It should be noted, that the bone collecting missions were not always very systematic, and that some remains were overlooked. (cf. Spennemann op.cit. [footnote]).
- 367 Memorandum from Deputy District Administrator, Marianas, to Director Public Affairs, Trust Territory Headquarters, Saipan, May 2, 1973. (Archives of the Trust Territory of the Pacific Islands Microfilm N°167 , Frame N°113)
- 368 The Japanese cemetery on Kwajalein was moved three times until 1973 (Letter G.Nakinishi, Agriculture Dept. Marshalls District, Trust Territory of the Pacific Islands, to I.Akimoto, Deputy District Administrator, Marianas April 18, 1973; Archives of the Trust Territory of the Pacific Islands Microfilm N°167 , Frame N°113).
- 369 Memorandum from Deputy District Administrator, Marianas, to Director Public Affairs, Trust Territory Headquarters, Saipan, May 2, 1973. (Archives of the Trust Territory of the Pacific Islands Microfilm N°167 , Frame N°113); the memo says that the bones were recovered, but does not specifically state their disposal.
- 370 Although initially approved as a bone collecting mission, this did not happen due to destruction of area by Typhoon *Alice*.. Archives of the Trust Territory of the Pacific Islands Microfilm N°167 , Frame N°113.
- 371 Eight Japanese soldiers were said to have been living on Mejit, all of whom died on April 3, 1942. Letter PCV W.Boyce to E.Johnston, High Commissioner Trust Territory of the Pacific Islands, undated (either 1974 or pre-February 1975) (Archives of the Trust Territory of the Pacific Islands Microfilm N°167 , Frame N°113);
- 372 A Japanese bone collecting mission apparently came to Mejit (possibly during the 1973 mission) but did not exhume the bodies (prior to the PCV's arrival).(Letter PCV W.Boyce quoted above).
- 373 Letter PCV W.Boyce to E.Johnston, High Commissioner Trust Territory of the Pacific Islands, undated (either 1974 or pre-February 1975) (Archives of the Trust Territory of the Pacific Islands Microfilm N°167 , Frame N°113); unfortunately the answers could not be located. (Letter PCV W.Boyce quoted above).
- 374 For example, of the human remains encountered at Taroa (see footnote \$EE\$), only the remains found inside a man-shelter are with any likelihood Japanese (because of the context of finds). As far as the other remains are concerned, none of them was sufficiently numerous enough to permit any investigation of racial affiliation.
- 375 *Marshall Islands' Revised Code of 1989*. Title 10: Planning and economic development; Chapter 2: Planning and zoning; § 9 (e), where the "Council" means a Municipal Council created under the local Government Act 1980 (*vide Marshall Islands' Revised Code of 1989*. Title 4 Local Government; Chapter 1: Local Government Act; § 2 [1] [d]).
- 376 Pers. comm. A.Kabua, Major, Majuro Local Government, May 12, 1990.
- 377 *Marshall Islands' Revised Code of 1989*. Title 7: Public Health, Safety and Welfare. Chapter 1: Public Health and Sanitation. § 4 (f) - (h).
- 378 Pers. comm. M.Maddison, Secretary of Health, May 10th, 1990.
- 379 *Military Government Handbook OPNAV 50E-1 Marshall Islands*. Office of the Chief of Naval Operations August 17, 1943. Section 228. It needs to be understood, however, that this offense ranks at the same as a frightening and animal or annoying the audience of a theatre.
- 380 Even in communist doctrine, the grave is considered to be to only case of private property acquireable. (cf. Friedrich Engel's refusal to be buried on land for the very reason).
- 381 Which is impossible, of course.

- 382 As expressed nicely in the Executive Order N° 89.24 regarding policies for disposition of archaeologically recovered human remains. Territory of Guam. Office of the Governor, September 25, 1989.
- 383 This protective custody should be as close as possible to the original interment, Therefore, burials shall be left in place undisturbed to the extent practical. If such burials cannot practically be left undisturbed, removal shall be done with proper archaeological methods and documentation and in the absence of expressed preferences otherwise by persons with ascertainable relationships to the specific remains involved or other justifying circumstances, re-interment in an appropriate and respectful manner shall be considered the normal treatment of human remains removed from their original burial locations.
- 384 The wreck of the *Prinz Eugen* in Kwajalein Lagoon
- 385 If located on Government/Public land.
- 386 If the relatives are still in the Republic of the Marshall Islands.
- 387 “Verzeichnis der Grundstuecke die im Eigentum von Nichteingeborenen sind.” (List of real estate owned by non-natives”). Dated: Jaluit, 24 August 1913. Signed: Scharnbourg (?) for Imperial German Stationchief”. German Colonial document contained in Reichskolonialamt Volume 3077, document 5. Ms on file, Australian Archives Canberra, Record Group G-2, Y40.

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