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"Salvaging" History: Underwater Cultural Heritage And Commercial Salvage

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“SALVAGING” HISTORY: UNDERWATER CULTURAL HERITAGE AND COMMERCIAL SALVAGE

BEN JUVELIER*

Reconciling the Salvage and Underwater Cultural Heritage Conventions through Differing Applications

“To archeologists, the human past is owned by no one. It represents the cultural heritage of everyone who has ever lived on Earth or will live on it in the future. Archaeology puts all human societies on an equal footing.”

Brian Fagan

“Who controls the past controls the future: who controls the present controls the past.”

George Orwell

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I. INTRODUCTION

Human history owes much of its development to waterways and ocean commerce. However, traversing the seas brings peril in proportion to the benefits: scholars estimate that more than three million shipwrecks currently lie on the ocean floors. Of these, scientists have explored less than one percent.¹ This is a wealth of knowledge for archeologists seeking to understand patterns of human behavior over the centuries, as well as scholars seeking to recover lost elements of history. This vital resource is frequently better preserved than its land-based counterpart, protected from looting and vandalism by sand and water.² Shipwrecks also present a rich target for treasure hunters: billions of dollars in valuables may lie under the waves.³

1. Jay Bennett, *Less than 1 Percent of the World's Shipwrecks Have Been Explored*, POPULAR MECHANICS (Jan. 18, 2016), <http://www.popularmechanics.com/science/a19000/less-than-one-percent-worlds-shipwrecks-explored/>.

2. Terence P. McQuown, *An Archaeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks*, 26 WM. MITCHELL L. REV. 289, 290 (2000).

3. Rob Goodier, *What's the Total Value of the World's Sunken Treasure?*, POPULAR MECHANICS (Feb. 22, 2012), <http://www.popularmechanics.com/technology/infrastructure/a7425/whats-the-total-value-of-the-worlds-sunken-treasure/>.

The sheer quantity of submerged human history has led historical wrecks to be considered in terms of “cultural heritage” rather than mere shipwrecks. The terminology used is important – cultural heritage implies something worth preserving, whereas the term shipwreck is more in line with a problem that may be rectified through recovery of the vessel. This tension drives competition between States over which legal regime(s) should govern shipwrecks and the treasures they hold, whether commercial or archeological. By 2001, three different international legal regimes governed underwater ships: the 1982 UN Convention on the Law of the Sea (UNCLOS), the 1989 Salvage Convention, and the 2001 UNESCO⁴ Convention on the Protection of the Underwater Cultural Heritage (UCH Convention). Each convention had differing purposes and means of accomplishing those purposes. Additionally, each convention required a different degree of protection – if any – for underwater cultural heritage.

This essay will address the inconsistencies and conflicts between the conventions, in particular the Salvage and UCH Conventions. It will determine that the seeming conflict between the Salvage and UCH Conventions is resolvable. Part II of this paper will begin by defining “cultural heritage” in the context of the law of the sea, and Part III will lay out in detail the competing provisions of the UNCLOS, Salvage Convention, and UCH Convention. Part IV will analyze the discord between the Salvage and UCH Convention, and identify ways in which they may be read together as compatible and applying to two separate spheres of action.

II. A DEFINITION OF UNDERWATER CULTURAL HERITAGE

A. INTERNATIONAL DEFINITION

Cultural heritage is a slippery concept with a multi-faceted definition. The 2001 UNESCO UCH Convention, which provides the most specific international definition applying to underwater cultural heritage, drew broadly from preceding international and domestic attempts to define the concept.⁵ defines “underwater cultural

4. United Nations Educational, Scientific, and Cultural Organization.

5. *See, e.g.*, United Nations Convention on the Law of the Sea art. 149, Dec.

heritage” as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years.”⁶ It goes on to elaborate, including examples such as (a) sites, structures, and human remains, (b) vessels or aircraft and their cargo, and (c) prehistoric objects.⁷ Importantly, objects designated as cultural heritage are included “together with their archaeological and natural context.”⁸

The 2001 UCH Convention includes both temporal and significance criteria in its definition of underwater cultural heritage.⁹ First, the temporal criterion requires a 100-year threshold for objects to be considered UCH. Importantly, the convention neither explicitly allows States to define objects less than 100 years old as cultural heritage, nor does it allow States to exclude objects over 100 years old from protection.¹⁰ Although this decision to make 100 years a cut-off date is, in part, arbitrary, it represents one part of a compromise with those States desiring a significance-driven definition, because in many cases objects which are over 100 years

10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (defining UCH as “objects of an archaeological and historical nature”); see Roberta Garabello, *The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage*, in *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION* 89, 103-04 (Roberta Garabello & Tullio Scovazzi eds., 2003) (quoting the Council of Europe Draft Convention on the Protection of Underwater Cultural Heritage Art. 1 (1985), which introduces 100 years as the key cut-off age for culturally significant objects); see also European Convention on the Protection of the Archeological Heritage art. 1, Jan. 16, 1992, 143 E.T.S. 2 [hereinafter Valletta Convention] (defining “archaeological heritage” as “all remains and objects and any other traces of mankind,” but subjecting objects to three criteria in order to be protected: (i) objects originated from “past epochs;” (ii) their preservation and study must benefit mankind; and (iii) the primary sources of information must come from “excavations or discoveries”). See generally SARAH DROMGOOLE, *UNDERWATER CULTURAL HERITAGE AND INTERNATIONAL LAW* 65-95 (2013) [hereinafter DROMGOOLE, *UNDERWATER CULTURAL HERITAGE*].

6. Convention on the Protection of the Underwater Cultural Heritage art. 1(a), Nov. 2, 2001, 41 I.L.M. 37 [hereinafter UCH Convention].

7. UCH Convention art. 1(a)(i)-(iii).

8. UCH Convention art. 1(a)(i)-(ii).

9. *Id.*

10. See DROMGOOLE, *UNDERWATER CULTURAL HERITAGE*, *supra* note 5, at 90.

old may be presumed to be significant.¹¹ Second, the significance criterion is also a result of compromise in the negotiations,¹² and requires that protected objects be of “a cultural, historical, or archaeological character.”¹³ The first draft of the convention contained no significance criterion and mirrored the Valletta Convention;¹⁴ however, this elicited strong protests from the United States, United Kingdom, and other States.¹⁵ Ultimately, the final text illustrates a compromise between the two camps because there is no explicit requirement of “significance,” and the convention suggests only that objects must have a certain “character.”¹⁶

Lastly, the convention makes explicit exceptions for two types of underwater objects: pipelines and cables on the seabed, and “installations” which are still in use.¹⁷ Neither of these categories may be considered as underwater cultural heritage, regardless of their age or significance.¹⁸ The UCH Convention does not further define an “installation” placed on the sea bed, and neither does the UN Convention on the Law of the Sea offer any guidance on the matter.¹⁹ An ‘installation’ may be juxtaposed with the concept of ‘equipment,’²⁰ and, although both are used for a particular purpose, there are elements of both time and size in the analysis.²¹ Thus, an installation, within the context of the UCH Convention, can be

11. CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 335 (2010) [hereinafter FORREST, INTERNATIONAL LAW].

12. Garabello, *supra* note 5, at 106-09.

13. UCH Convention art. 1(a).

14. See Garabello, *supra* note 5, at 107 (discussing how the first and second drafts of the convention applied to “all traces of human existence”).

15. During which these States brought up the evocative example of forcing protection on a “can thrown out of a boat.” See Garabello, *supra* note 5, at 107.

16. *Id.* at 107-08.

17. UCH Convention art. 1(b)-(c).

18. *Id.*

19. See DROMGOOLE, *supra* note 5 at 89, footnote 98 (noting that the UNCLOS refers, at different times, to cables, pipelines, and installations, as well as to “structures” and “equipment”).

20. See, e.g., UNCLOS, at Part XIII Sec. 4 (using both “installation” and “equipment” with reference to scientific research operations).

21. FLORIAN H. TH. WEGELEIN, MARINE SCIENTIFIC RESEARCH: THE OPERATION AND STATUS OF RESEARCH VESSELS AND OTHER PLATFORMS IN INTERNATIONAL LAW 138 (2005) (stating that “installations” are understood to be permanent or long-term fixtures whereas “equipment” is normally quickly deployed and temporary).

interpreted as a structure on the seabed, which serves a specific purpose and is intended to remain in place for an extended period of time.²²

B. DOMESTIC DEFINITIONS

In addition to the international definitions of cultural heritage, each State also legislates a domestic definition of cultural heritage in the course of protecting those objects or locations within its internal waters, territorial seas, and contiguous zone.²³ Many of these definitions are similar, but provide variations in both the temporal and significance criteria. For instance, Australia provides for the blanket protection of shipwrecks older than 75 years, which are then declared to be “historic.”²⁴ Australia has no explicit significance criteria, but relies solely on the age of the vessel.²⁵ Similarly, Finland also requires no significance criteria and protects all vessels older than 100 years.²⁶ In contrast, France has a broad definition of its “maritime cultural assets,” and protects all “deposits, wrecks, remains or, in general, all assets of prehistoric, archaeological, or historical interest.”²⁷ Lastly, Norway provides for both types of protection: Under the Culture Heritage Act, the State holds

22. See, e.g., *id.*; see also UCH Convention art. 1(c).

23. See generally Sarah Dromgoole, *Editor's Introduction*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001 xxvii-xxxviii (2006) [hereinafter Dromgoole, *Editor's Introduction*] (highlighting the difficulty of getting important coastal States to eschew their domestic definitions and agree to a single international legal principle, such as that embodied in the UCH Convention).

24. *Historic Shipwrecks Act 1976*, (Cth) pt. II s 4A(1) (Austl.); see Bill Jeffery, *Australia*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001 1, 3 (Sarah Dromgoole ed., 2006) (noting that the Historic Shipwrecks Act provides blanket protection for “historic” ship remains 75 years or older, even if they are no longer on the seabed).

25. See Jeffery, *supra* note 24, at 3 (highlighting the Historic Shipwrecks Act's focus on the age and location of the ship remains for determining whether they are protected).

26. Antiquities Act (Act No. 295/1963) §20 (Fin.) (“The wrecks of ships and other vessel discovered in the sea or in inland waters, which can be considered to be over one hundred years old, or parts thereof, are officially protected.”).

27. Gwenaelle Le Gurun, *France*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 2001 59, 64 (Sarah Dromgoole, ed., 2006).

ownership over (and protection of) vessels older than 100 years old, and the State may also declare a shipwreck to be a “significant historical site” even if it is younger than 100 years old.²⁸

III. THE THREE TREATIES GOVERNING UNDERWATER CULTURAL HERITAGE

The three different treaties which govern underwater cultural heritage encompass a diverse set of overlapping signatories, purposes, and jurisdictions. Few States have ratified all three,²⁹ although both the Law of the Sea Convention and the Salvage Convention draw from customary international law binding on all States.³⁰ This section will first discuss the impact of passing references to underwater cultural heritage in the Convention on the Law of the Sea. It will then compare the overlapping provisions in the Salvage Convention and the UNESCO Convention on Underwater Cultural Heritage.

A. THE UN CONVENTION ON THE LAW OF THE SEA

The UN Convention on the Law of the Sea forms the backbone of modern international maritime law but addresses cultural heritage and underwater archaeology only tangentially. Drafters of the Convention inserted duties related to cultural heritage in Articles 149 and 303. Neither article was integral to the drafting of the convention, but both form the first international treaty language that addressed the specific issue of underwater cultural heritage.³¹

Article 149 raises two primary points, each fraught with

28. Culture Heritage Act (Act No. 50/1978) §14 (Nor.); see Frode Kvalø & Lyder Marstrander, *Norway*, in *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION* 201, 223 (Sarah Dromgoole ed., 2006).

29. Only the following States have ratified all three: Australia, China, Egypt, Greece, India, Italy, Jordan, Mexico, Nigeria, Norway, Russia, Saudi Arabia, and Tunisia. See FORREST, *INTERNATIONAL LAW*, *supra* note 11, at 359 n.278.

30. *Id.* at 320, 330.

31. See Craig Forrest, *Historic Wreck Salvage: An International Perspective*, 33 TUL. MAR. L.J. 347, 367 (2009) [hereinafter Forrest, *Historic Wreck Salvage*] (noting the relative unimportance of Article 149, relating to cargo, and Article 303, relating to sunken vessels, in comparison to other issues addressed in the Convention).

ambiguity.³² Article 149 stipulates that objects found in “the Area”³³ should (1) be preserved or disposed of “for the benefit of mankind,” while (2) giving preferential rights to three conceivably different entities: the State of origin, the State of cultural origin, and/or the State of archaeological origin.³⁴ Questions under the first point include (a) what constitutes objects, (b) what is the relationship between preservation and disposal, and (c) how to “benefit” mankind.³⁵ Under the second point, the Convention similarly fails to elaborate on how to balance the three different States which could be capable of claiming preferential rights, nor does it explain what those preferential rights ought to be.³⁶ Article 149 represents an unenforceable starting point to understanding underwater cultural heritage, but it does begin to clearly manifest the international community’s desire to protect and preserve underwater cultural heritage.

Article 303 of UNCLOS contains much more specific language pertaining to underwater cultural heritage, and introduces the primary tension between legal regimes for UCH.³⁷ Article 303 addresses archaeological and historical objects at sea, and elaborates on three primary principles: (1) it bestows a duty on states to cooperate to protect archaeological objects found at sea; (2) it requires that the rights of “identifiable” owners cannot be infringed; and (3) it suggests that no duty in UNCLOS affects rights under the

32. See EKE BOESTEN, *ARCHAEOLOGICAL AND/OR HISTORIC VALUABLE SHIPWRECKS IN INTERNATIONAL WATERS: PUBLIC INTERNATIONAL LAW AND WHAT IT OFFERS* 50-52 (2002) (identifying numerous questions about the meaning of the duty to preserve/dispose objects “for the benefit of mankind” and to whom the duty to give preferential rights refers).

33. See UNCLOS art. 1(1) (defining the “Area” as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”).

34. UNCLOS art. 149 states in full:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

35. See BOESTEN, *supra* note 32, at 51 (arguing that the use of “objects” is meant to differentiate man-made objects from natural resources).

36. See *generally id.* at 54 (claiming that the purpose of Article 149 is less to specify what these claims are than to assure interested States that their claims will not be invalidated).

37. See *id.* at 56-57 (highlighting the multiple proposals states have put forward to change which States have sovereign rights to objects on the seabed).

law of salvage “or other rules of admiralty.”³⁸ Similar to Article 149, UNCLOS acts to introduce starting points for the international community when it comes to protecting underwater cultural heritage. Each of these three points has been elaborated on through State practices, domestic laws, and subsequent conventions. Specifically, principles two and three of Article 303 introduce the defining conflict surrounding underwater cultural heritage: to what extent are shipwrecks subject to salvage and finds as opposed to the *in-situ* preservation required by archaeological practice?³⁹

B. THE SALVAGE CONVENTION

The law of salvage, as a concept, is frequently considered part of customary international law.⁴⁰ There are typically three elements

38. UNCLOS art. 303 states in full:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose. 2. In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article. 3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges. 4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

39. See, e.g., BOESTEN, *supra* note 32, at 62-63 (highlighting the dispute over whether Article 303 applies to salvage operations and whether salvage laws deal only with modern-day wrecks or with all shipwrecks on the seabed, including archaeological or historical finds).

40. E.g., *The Belgenland*, 114 U.S. 355, 362 (1885) (“For salvage is a question of *jus gentium*.”); see *Mason v. Blaireau*, 6 U.S. 240, 249 (1804) (Marshall, C.J.) (“The question of salvage . . . is a question of the *jus gentium*.”); see generally Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658 [hereinafter “1910 Salvage Convention”] (attempting to unify domestic rules of salvage with an international treaty). *But see* Garabello, *supra* note 5, at 123 (“Those principles [of salvage law] are commonly applied also with respect to underwater cultural heritage in some countries of common law, where they are even considered very old principles of general international law. On the contrary, they are completely unknown in countries of civil law that therefore deny any status of international principles.”). James A.R. Nafziger, *The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck*, 44 HARV. INT’L L.J. 251, 261 (2003) (“There is little evidence that the law of salvage and finds has been accepted by more than a few common law systems. There is no general maritime law in the international sense, let alone a *jus gentium*, to support the law of salvage and finds.”).

required for a successful claim of salvage: (1) “marine peril” from which the salvors act to save a vessel; (2) voluntary service; and (3) success in the salvage operation.⁴¹ Upon proving those three elements, a salvor’s claim may be awarded on the basis of a variety of factors, including the level of success, the amount of danger the salvors faced, and the value of the vessel and property saved.⁴² The 1989 Salvage Convention, which was negotiated in order to modernize and update the earlier 1910 Brussels Convention, governs private law relationships between salvors and those with whom they enter into contracts – it does not address issues of public law.⁴³ Likewise, it only applies to underwater cultural heritage indirectly: Article 30(1)(d) of the Salvage Convention allows State parties to make a reservation not to apply the convention to “maritime cultural property of prehistoric, archaeological, or historic interest . . . situated on the sea-bed.”⁴⁴ As of 2009, fourteen countries had explicitly entered such a reservation.⁴⁵ Considering that the Convention explicitly notes States may make a reservation in order to exclude cultural heritage from the scope of salvage, the drafters of the Salvage Convention seemed to intend the convention cover activities surrounding historic wrecks.⁴⁶

C. THE UNESCO CONVENTION ON UNDERWATER CULTURAL HERITAGE

The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, which originated in a 1994 draft convention by the International Law Association, came into force in January 2009.⁴⁷ The Convention provides for the protection of underwater cultural heritage, and expands on the duties identified in Articles 149 and 303 of UNCLOS. The UCH Convention also

41. *The Sabine*, 101 U.S. 384, 384 (1879).

42. For a full list of factors, see International Convention on Salvage art. 13, Apr. 28, 1989, 1953 U.N.T.S. 165 (1989) [hereinafter Salvage Convention].

43. See FORREST, INTERNATIONAL LAW, *supra* note 11, at 331.

44. Salvage Convention art 30(1)(d).

45. Those countries are Australia, Canada, China, Croatia, France, Greece, Iran, the Netherlands, Norway, the Russian Federation, Saudi Arabia, Spain, Sweden, and the United Kingdom. Forrest, *Historic Wreck Salvage*, *supra* note 31, at 371.

46. *Id.*

47. *Id.* at 372.

includes a set of rules intended to guide States in the protection of cultural heritage, and represent requirements that States should include in domestic systems governing underwater cultural heritage.⁴⁸ Importantly, one of the primary purposes of the UCH Convention is to preserve cultural heritage for archaeological use and study, rather than to treat it as an undersea resource.⁴⁹

The UCH Convention has two particularly important clauses relevant to uses of underwater cultural heritage in relation to other bodies of law: (1) the salvage clause⁵⁰ and (2) the non-commercialization clause.⁵¹ Article 4 of the UCH Convention provides that activities related to UCH may not be subject to the law of salvage or law of finds, unless those activities are (a) properly authorized, (b) in compliance with the UCH Convention, and (c) capable of ensuring “maximum protection” for any UCH involved.⁵² This seemingly self-contradictory provision begins with a straightforward rule preventing the application of salvage law, yet then backtracks and provides exceptions engineered to specifically *allow* the application of salvage law for underwater cultural heritage.⁵³ This provision is written in conflictingly because it represents an attempt at compromise between civil law countries, which overwhelmingly rejected the application of the law of salvage to UCH, and common law countries, which supported salvage.⁵⁴ Primarily, the United States represented the salvage friendly countries in part because its delegation was intensely lobbied by the salvors’ community.⁵⁵ Italy responded on behalf of the civil law

48. UCH Convention art. 33, Annex I.

49. *Id.* at pmbl. (including clauses dedicated to promoting the value of the educational and recreational benefits of UCH as well as statements of deep concern about the growing commercialization of UCH).

50. *Id.* art. 4.

51. *Id.* at Annex r.2.

52. *Id.* art. 4, stating:

Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

53. *Id.*

54. See Garabello, *supra* note 12 at 124-125.

55. See *id.* at 124, n.64 (identifying vehemently worded letters and opinions opposing the UCH Convention sent to the U.S. Department of State on behalf of

countries,⁵⁶ and the final text in the UCH Convention was the result of a compromise reached by a small working group.⁵⁷

The non-commercialization clause was another source of conflict about the application of salvage law to underwater cultural heritage.⁵⁸ The clause, which prohibits the “trade . . . or irretrievable dispersal” of cultural heritage, softened somewhat during negotiations from the unyielding stance of the ICOMOS charter, which declares that commercial exploitation is incompatible with responsible preservation efforts.⁵⁹ A primary purpose of this clause was to prohibit “treasure hunters” from stealing and selling valuable historical artifacts looted from wrecks.⁶⁰ While the compromise provision is carefully worded to allow certain commercial actors access to underwater cultural heritage, it emphasizes the controversial question about the extent of State supervision and control over salvors, treasure hunters, and contractors.⁶¹

the salvage industry).

56. *See id.* at 125-26 (stating that Italy denied international status to the principles of salvage and proposed a blanket ban on salvaging UCH).

57. *Id.* at 125.

58. *See* UCH Convention, at Annex r.2. (“The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods. This Rule cannot be interpreted as preventing: (a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities; (b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34; and is subject to the authorization of the competent authorities.”).

59. Forrest, *Historic Wreck Salvage*, *supra* note 31, at 374.

60. Garabello, *supra* note 5, at 184-85.

61. *Id.*

IV. OVERLAP AND DISCORD BETWEEN THE TREATIES: THE SALVAGE CONVENTION AND UNDERWATER CULTURAL HERITAGE CONVENTION ARE COMPATIBLE

A. INCONSISTENCIES BETWEEN THE CONVENTIONS' PURPOSES

Each of the three conventions which has a bearing on underwater cultural heritage anticipates a contradiction between them.⁶² The Law of the Sea Convention explicitly states that the provisions concerning cultural heritage cannot infringe on the existing law of salvage,⁶³ the Salvage Convention anticipates States needing to exempt cultural heritage property from the private law regime,⁶⁴ and the UCH Convention argues its compliance with the existing rules of salvage, while simultaneously stating that salvage does not apply.⁶⁵ States have thus manifested a great deal of concern about both (a) unifying the law of the sea regime cohesively and (b) carving out specific areas where only certain types of law may apply.⁶⁶

The reason for these conflicts is the competing purposes behind salvage and protection of UCH. The purpose of salvage law is clear: It employs rewards for saving life and property at sea in order to incentivize the return of that vessel and/or cargo to the stream of commerce on behalf of its owners.⁶⁷ There are three key concepts that drive salvage law: first, success in the face of danger to a ship or its property; second, the vessel and/or cargo as a commercial object; and third, that salvors act on behalf of the owners of marine property.⁶⁸ To consider a vessel and its cargo as a commercial object is to focus exclusively on the economic gain and use of that vessel and its cargo. This is a key part of the reward for a claim of salvage, because it's a mutually beneficial system on which commercial ship-

62. *See supra* Section III.

63. UNCLOS art. 303(3).

64. Salvage Convention art. 30(1)(d).

65. UCH Convention art. 4.

66. *See* UCH Convention art. 4 (mandating that salvage law does not apply to UCH unless certain circumstances are present).

67. *E.g.*, Joseph C. Sweeney, *An Overview of Commercial Salvage Principles in the Context of Marine Archaeology*, 30 J. MAR. L. & COM. 185, 188-89 (1999) (citing *The Blackwall*, 77 U.S. 1 (1869)).

68. *Id.*

owners depend in order to protect their investments from danger.⁶⁹

Consider, however, the case of ancient pottery vessels known as amphorae.⁷⁰ An amphora is not valuable in itself; typically, they were filled with agriculture products, and were made out of materials which were not particularly valuable.⁷¹ To a salvor, an amphora means nothing because it can neither be reinserted into the stream of commerce nor does it represent a great deal of wealth by which to justify a large salvage reward.⁷² By contrast, amphorae are among the most valuable objects for marine archaeologists because they can indicate the health and scale of an ancient economy, they can help date a shipwreck, and they can help researchers track the path of ships to learn more about trade routes.⁷³ This example illustrates a stark difference between the purpose of salvage law and the purpose of exploring underwater cultural heritage shipwrecks. The reason archeologists and other experts find underwater cultural heritage is not to extract economic benefit, but rather to study it and to preserve a vital historical record.⁷⁴

The UCH Convention represents the joint purposes of preservation and study. The preamble to the convention explicitly notes that the goal of the convention is to aid States in “protecting and preserving” UCH.⁷⁵ It also identifies, multiple times, the importance of education, research, and careful study of UCH.⁷⁶ Finally, the preamble evidences a deep concern for “commercialization” of

69. See Salvage Convention art. 13 (listing criteria to help determine the amount for a reward); see also *The Blackwall*, 77 U.S. 1, 13-15 (1869) (stating that by saving the Corporation one hundred thousand dollars by rescuing the ship and its cargo, the rescuers were entitled to a reward).

70. Deborah N. Carlson, *The Seafarers and Shipwrecks of Ancient Greece and Rome*, in THE OXFORD HANDBOOK OF MARITIME ARCHAEOLOGY 379, 383 (Alexis Catsambis, et. al., eds. 2011).

71. *Id.*

72. *Id.*

73. *Id.*

74. See generally McQuown, *supra* note 2 (explaining the reasoning behind archaeological interest in underwater cultural heritage).

75. UCH Convention, Preamble (“*Realizing* the importance of protecting and preserving the underwater cultural heritage . . .”).

76. UCH Convention, Preamble (noting, “the importance of research, information and education;” “the public’s right to enjoy the educational and recreational benefits” of UCH; and “value of public education to contribute to awareness, appreciation and protection” of UCH).

UCH, reasoning that commercialization is incompatible with not just the UCH Convention but also the protection of cultural heritage in general.⁷⁷

Any international convention must be interpreted in light of its object and purpose.⁷⁸ The object and purpose drive the application of the treaty as well as evidence the true intent of states parties to be bound by its provisions.⁷⁹ In this case, the objects of States in protecting UCH and promoting salvage are not simply at odds, but point to the inapplicability of salvage to UCH entirely.⁸⁰

B. RESOLVING THE CONFLICTS

If the UCH and salvage regimes are separate, then each may fulfill its purpose without infringing or conflicting with the other. This section will argue that beyond simply having different a different purpose from what is appropriate for UCH, salvage is definitionally not applicable to shipwrecks which are historically important and/or are over 100 years old. Such shipwrecks are not in marine peril, due to circumstances existing on the ocean floor. Salvors also cannot act in the best interest of the ships' owners, frequently States, by salvaging historic wrecks.

77. UCH Convention, Preamble (“*Deeply concerned* by the increasing commercial exploitation of underwater cultural heritage, and in particular by certain activities aimed at the sale, acquisition or barter of underwater cultural heritage . . .”); *see generally* UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, 823 U.N.T.S. 231 (1970) (attempting to stop and provide reparations for current practices that deprive countries of their cultural heritage).

78. *See* Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”)

79. *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 209 (2013) (“If an interpretation is incompatible with the object and purpose, it may well be wrong.”).

80. *Compare* Sweeney, *supra* note 67, at 188-89 (describing the purposes of salvage law as the reintroduction of objects of value into the stream of commerce) *with* UCH Convention, Preamble (noting purposes of protection, preservation, research, and education).

1. Questions of "Marine Peril"

i. What Constitutes Marine Peril?

Marine peril, or simply "danger," is one of the three elements that must be present for a valid claim of salvage.⁸¹ Typically, marine peril refers to a chance that a vessel will sink, run aground, or be threatened with complete or partial loss due to any number of reasons.⁸² In the United States, courts have looked to whether property was exposed to a risk of loss, or the reasonable apprehension of such a risk.⁸³ Regardless, it is an inherently fact-based inquiry and sufficient peril must be established in each and every salvage case.⁸⁴

ii. Cultural Heritage Property is Not in Marine Peril

Although courts in the United States have frequently held that historic wrecks are by definition existing in a state of marine peril,⁸⁵ this view is at odds with many other States applying salvage law⁸⁶ as well as the scientific assessment of threats faced by underwater cultural heritage.⁸⁷

U.S. courts typically apply the law of salvage to sunken ships, and assume that any ship which has sunk is constantly existing in a state of marine peril.⁸⁸ For instance, in *Treasure Salvors, Inc. v.*

81. See Salvage Convention art. 1(a); see also *The Sabine*, 101 U.S. at 384 (listing the elements required for a valid claim of salvage).

82. See Sweeney, *supra* note 67, at 190 ("The action of natural elements such as the near presence of rocks, shoals, sands, surf, wind, current, fire, hurricane, or blizzard are among the many incidents that can put a vessel in peril, but the marine peril need not be solely caused by natural forces. Human ignorance, stupidity, and violence, including the traditional crimes of piracy, barratry, and insurance fraud, may produce situations where the natural or artificial actions of the seas produce the appearance of danger.").

83. See, e.g., *The Saragossa*, 21 F. Cas. 425, 426 (S.D.N.Y. 1867).

84. See, e.g., *Fort Myers Shell & Dredging Co. v. Barge NBC 512*, 404 F.2d 137, 139 (5th Cir. 1968); see also Renee Elisabeth Torpy, *Grave Robbers or Archaeologists? Salvaging Shipwrecks*, 46 J. MAR. L. & COM. 83, 86 (2015) (explaining the necessity of a fact-based, case-by-case inquiry).

85. See, e.g., *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 614 F.2d 1051, 1055-56 (5th Cir. 1980).

86. Such as Canada, Finland, Singapore, and Ireland. Cases discussed *infra*.

87. See DROMGOOLE, *supra* note 5, at 174.

88. See *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978).

Unidentified, Wrecked and Abandoned Sailing Vessel,⁸⁹ the Fifth Circuit stated that even after discovery of a ship on the ocean floor, “it is still in peril of being lost through the actions of the elements.”⁹⁰ Similarly, in *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*,⁹¹ a U.S. District Court simply stated that the sunken ship was “still in marine peril of being lost through the actions of the elements.”⁹² Some U.S. courts have gone even further, and have held that marine peril exists as a matter of law where a ship’s location is unknown; thus, every lost historic shipwreck automatically becomes a target for salvage.⁹³ Still as befits a discipline with so much ambiguity, there have also been U.S. courts which have conducted a far more nuanced analysis. For instance, in *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, the 11th Circuit extended the concept of “marine peril” to include damage caused to the archaeological and historic value of the shipwreck.⁹⁴ The court acknowledged that salvors can frequently exacerbate any danger that may exist by harming the historic value of objects they seek to salvage.⁹⁵

Despite the majority of U.S. practice, findings of marine peril for sunken wrecks are in the minority across the world. At least one U.S. jurisdiction has joined with other countries and found that no state of danger exists for historic wrecks.⁹⁶ In Canada, courts have held that not only are historic wrecks not in marine peril, but also that the improper recovery of historic artifacts presents a far greater danger than do the underwater elements.⁹⁷ Finland also refused to apply

89. 569 F.2d 330 (5th Cir. 1978).

90. *Id.* at 337.

91. 549 F. Supp. 540 (S.D. Fla. 1982).

92. *Cobb Coin Co. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 561 (S.D. Fla. 1982).

93. *See Platoro Ltd.*, 614 F.2d at 1055-56.

94. *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1515 (11th Cir. 1985).

95. *Id.*

96. *See Subaqueous Exploration & Archaeology Ltd. v. The Unidentified, Wrecked and Abandoned Vessel*, 577 F. Supp. 597, 611 (D. Md. 1983) (holding that the “marine antiquities which have been undisturbed for centuries” at issue were not in imminent marine peril and thus not subject to salvage).

97. *See Her Majesty The Queen in Right of Ontario v. Mar-Dive Corp. et al.*, 1997 AMC 1000, 1062-63 (Canada 1997) (holding that salvage attempts can “upset the equilibrium achieved over time . . . and actually create peril” where

salvage law to a historic Dutch wreck because the ship was not in danger after having been underwater for centuries.⁹⁸ Singapore and Ireland have each refused to apply salvage law to sunken ships because of issues with the definition of marine peril and also because of the inherent inapplicability of a commercial law concept to an archaeological excavation.⁹⁹ Indisputably, “marine peril” is not universally applicable to sunken ships and States do not evidence a common practice in applying salvage law.

In the face of disagreements by international court systems, scientists and marine archaeologists have maintained an unwavering stance that sunken wrecks are not in any danger while they remain on the sea floor.¹⁰⁰ For instance, archaeologist James Parrent describes the underwater process of “danger” and deterioration as follows:

Objects that come to rest on the sea floor initially start to deteriorate while at the same time becoming covered with concretions consisting of corrosion products and marine organisms. Eventually the concretion forms a protective barrier greatly reducing further deterioration. After the artifacts have acclimated to their underwater environment they are impervious to currents, tides and storms. Any wooden sailing vessel that has lain on the sea bed for a few hundred years has long since reached a stage of equilibrium with its environment and it has the potential to remain preserved for hundreds if not thousands of years.¹⁰¹

none had previously existed).

98. See Maija Matikka, *Finland*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 43, 52-54 (Sarah Dromgoole ed., 2006) (describing the court’s analysis of the marine peril issue in the case of the *Vrouw Maria* and the relevant provisions of the Finnish Antiquities Act).

99. See *Simon v. Taylor* [1980] 56 Int’l. L. Rep. 40 (Singapore High Court 1974); see also Nessa O’Connor, *Ireland*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: NATIONAL PERSPECTIVES IN LIGHT OF THE UNESCO CONVENTION 127, 133-34 (Sarah Dromgoole ed., 2006) (quoting *In Re La Lavia, Juliana, and Santa Maria de la Vision* [1996] 1 Irish Law Reports Monthly 194).

100. E.g., Guido Carducci, *The Crucial Compromise on Salvage Law and the Law of Finds*, in THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION 193, 202 (Roberta Garabello & Tullio Scovazzi eds., 2003) (stating reasons for why most UCH sites are not in marine peril).

101. James M. Parrent, *Treasure Hunters in the Caribbean: The Current Crisis*, in UNDERWATER ARCHAEOLOGY PROCEEDINGS FROM THE SOCIETY FOR HISTORICAL ARCHAEOLOGY CONFERENCE 32, 35 (James P. Delgado ed., 1988).

Similarly, Ole Varmer, an attorney for the National Oceanic and Atmospheric Administration in the United States, described process with reference to findings of marine peril:

After a ship sinks, it immediately begins a natural process of change through which it adapts to its new underwater environment. The rate of deterioration of a shipwreck depends on a variety of factors, including the ship's composition, the surrounding sea life, the amount of oxygen in the water, and the presence or absence of certain chemicals. As time progresses, the shipwreck becomes part of the marine environment. Once a shipwreck is covered by the seabed, the rate of deterioration becomes very slow due to the lack of oxygen. The shipwreck site is now in a preserved state and is by no means in marine peril. To the contrary, any excavation of the site at this stage will expose the UCH to the water column and oxygen and threaten the stability of the site. Exploration which involves disturbing the seabed as well as any subsequent salvage actually places the site in marine peril.¹⁰²

Additionally, the mere fact that both international scientific and legal organizations tasked with regulating the preservation of UCH, the International Council on Monuments and Sites and UNESCO, have a preference for *in situ* preservation creates a presumption that the UCH is not in peril.¹⁰³ Naturally, there are extraordinary situations in which UCH may require movement or recovery from the sea floor, but the day-to-day presumption is that there is no danger after the ship has come to equilibrium on the sea floor.

Marine peril – the threat that the vessel or cargo face the apprehension or imminent threat of significant harm – is inaccurately applied to UCH when done so without consideration to the scientific nature of a wreck's stability on the ocean floor. Though it is possible that UCH could face danger, the way in which U.S. courts have applied marine peril to historic wrecks is inconsistent with international practice. Salvage law cannot be applied without marine peril; therefore, salvage law does not conflict with the preference for *in situ* preservation and study of the UCH Convention.

102. Ole Varmer, *The Case Against "Salvage" of the Cultural Heritage*, 30 J. MAR. L. & COM. 279, 280-81 (1999).

103. See Carducci, *supra* note 100, at 202.

2. *Questions of Ownership*

Ownership is also a key concept; under salvage law, recovery is presumed to be in the interest of a vessel's owners. However, in the case of UCH, those owners are frequently States which may have manifested a desire for *in situ* preservation of wrecked ships as opposed to the spontaneous salvage acted on by treasure hunters.

i. Ownership as a Function of Salvage Law and the Law of Finds

One of the core principles of salvage law is that the salvor acts not in his or her own interest, but rather in the interest of the owner of a vessel in danger.¹⁰⁴ A grant of salvage does not give the salvor ownership over the wreck.¹⁰⁵ As such, in the case of spontaneous salvage, "the law of salvage presumes that the owner desires the salvage service."¹⁰⁶ This contrasts with the law of finds which is a common law doctrine of "finders, keepers" for property.¹⁰⁷ Under the law of finds, for a finder to gain title to a vessel it must have first been abandoned by its owners.¹⁰⁸ Abandonment, in the context of a sunken vessel, exists where there has been either an express declaration by the owners that they are relinquishing title to the vessel or where it can be implied through desertion of the property with no indication of intent to return.¹⁰⁹ This can be an incredibly fact-intensive inquiry, and at least five different parties may be able to assert a claim of ownership in the face applying the law of finds: the original owner; the successors in interest to the original owner; the passengers, crew, or their descendants; an insurer of the ship, cargo, or both; or the State of origin.¹¹⁰ Under this doctrine, the mere passage of time does not suffice to prove abandonment, which could conflict with many of the concepts of cultural heritage protection.¹¹¹

104. See generally Sweeney, *supra* note 67 (discussing the background and application of maritime salvage law).

105. See FORREST, INTERNATIONAL LAW, *supra* note 11, at 309 (discussing how salvors operate legally on behalf of the ship's owner).

106. RMS Titanic Inc. v. Haver, 171 F.3d 943, 943 (4th Cir. 1999).

107. Boesten, *supra* note 32, at 108-09.

108. *Id.*

109. *Id.* at 110.

110. *Id.* at 110-11 (citing the UNCLOS Art. 149 on preferential treatment, as well as *Zych v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 755 F. Supp. 213 (N.D. Ill. 1990) and *Central America*, 742 F. Supp. (E.D. Va. 1990)).

111. *Id.* at 111.

ii. Ownership of Cultural Heritage Property

In contrast to normal cases of salvaging a vessel in danger, a historic wreck on the sea floor may be abandoned. States have taken different tactics on how to assess the ownership of underwater cultural heritage within their jurisdiction, and Italy and the United States both present valuable examples of the two dominant viewpoints.

In Italy, all archaeological and cultural property¹¹² belongs automatically to the State upon discovery, regardless of any evidence of past or current ownership.¹¹³ Many other States, especially civil law States, mirror this approach.¹¹⁴ In these States, the law of finds does not apply to cultural heritage at all.¹¹⁵ Instead of an economic incentive financed by the sale of the artifacts (as is the case when the law of finds is applied), the Italian model statutorily allows for a prize of up to one quarter the value of a discovered vessel to be paid to the finder.¹¹⁶ Finally, the legislation in many of these countries evidences a strong desire to protect cultural heritage for the public benefit. Maintaining State ownership over UCH can be an effective tool to that end.

112. See Code of Cultural Properties and Landscape Heritage Art. 10, 145 G.U. 45 (It. 2004) [hereinafter Code of Cultural Properties (It.)] (defining cultural heritage property by using a series of significance tests involving factors such as “archaeological interest” and “exceptional historical interest.”)

113. *Id.* art. 91 (providing that cultural heritage property “found underground or in sea beds by whomsoever and howsoever shall belong to the State and . . . shall become part of government property or of its inalienable assets”).

114. Including, for example, Argentina, China, Colombia, Cyprus, Ecuador, Norway, and Vietnam. See Law No. 25.743 on the Protection of the Archaeological and Paleontological Heritage, OFFICIAL BULLETIN, June 26, 2003 (Arg.) [hereinafter Law No. 25.743 (Arg.)]; see also Regulations Concerning the Administration of the Protection of Underwater Cultural Relics, State Council Decree No. 42, Oct. 20, 1989 (China) [hereinafter Regulations Concerning Underwater Cultural Relics (China)]; see also CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 72; see also Antiquities Law (Chapter 31), as amended 1996, DEPT. OF ANTIQUITIES (Cyprus) [hereinafter Antiquities Law (Cyprus)]; see also L. of Cultural Patrimony, Nov. 19, 2004, Codification 27 OFFICIAL REGISTRY, Supp. 465 (Ecuador) [hereinafter Law of Cultural Patrimony (Equador)]; see also Cultural Heritage Act (Norway); see also Detailed Regulations to Implement the Law of Cultural Heritage, Decree #92/2002/ND-CP, Nov. 11, 2002 (Viet.) [hereinafter Regulations to Implement the Law of Cultural Heritage (Viet.)].

115. *E.g.*, Code of Cultural Properties (It.) art. 92.

116. *Id.*

In the United States, there is a conflict between the common law of finds and the Abandoned Shipwreck Act of 1987.¹¹⁷ This approach is exemplified by a presumption of private ownership, and only upon proof that the vessel has been abandoned and in certain special circumstances does title pass to the State.¹¹⁸ Otherwise, title may be given to the finder.¹¹⁹ This approach is mirrored by a handful of other States around the world.¹²⁰ Under the Abandoned Shipwreck Act,¹²¹ wrecks that have been determined to be (a) abandoned and (b) embedded in or resting on coral or submerged lands become the property of the United States, and title is transferred automatically to the government of the State in which the wreck is located.¹²² Although this still requires the high bar of abandonment before the State may act to protect a historic wreck, it is evidence of a greater push by common law states to protect underwater cultural heritage from needless destruction.

The frequency of State-owned vessels found in underwater cultural heritage cases far outpaces what is normal for salvage law. Furthermore, States have evidenced a growing desire for *in situ* preservation of such property through both the UCH Convention and through domestic legislation. In these situations, any prospective salvors could only operate to protect the property, because otherwise they would be acting against the wishes of the vessel's owner. With an owner's desire to protect property according to archeological principles, the UCH Convention allows salvors to operate without

117. Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106 (2006). *See generally* Nathan Murphy, *Scuttle the Abandoned Shipwreck Act: The Unnecessary Unconstitutionality of American Historic Shipwreck Preservation*, 36 TUL. MAR. L. J. 159 (2011) (addressing the conflict between the law of finds and the Abandoned Shipwreck Act, and arguing that the ASA is an "unconstitutional diminution of the federal courts' admiralty jurisdiction").

118. *See* BOESTEN, *supra* note 32, at 108.

119. *E.g. id.*

120. Including, for example, Peru, Slovakia, and Spain. *See* Regulations on the General Law of Cultural Heritage of the Nation, Executive Order No. 011-2006-ED Annex, June 1, 2006 (Peru) [hereinafter Regulations on General Law of Cultural Heritage (Peru)]; *see also* Act 49 on the Protection of Monuments and Historic Sites, Dec. 19, 2001 (Slovk.) [hereinafter Act on the Protection of Monuments (Slovk.)]; *see also* Law on the Spanish Historical Heritage, (1985, 16)(Spain).

121. *See* 43 U.S.C. §§ 2101-2106.

122. DROMGOOLE, *supra* note 5, at 187-88.

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conflict to protect cultural property.

VI. CONCLUSION

“The deep ocean is the largest museum on earth,” according to Dr. Robert Ballard.¹²³ That museum is protected by the underwater cultural heritage regime. The 2001 UCH Convention does not conflict with other, more time-honored principles of maritime law like salvage because of their disparate purposes and applications. Historic shipwrecks are not merely objects of commercial value to be reinjected into a stream of commerce; on the contrary, the historic artifacts recovered from underwater cultural heritage are frequently subject to domestic and international laws preventing such traffic. Further, in order to legally salvage a vessel and collect a reward, a salvor must act in the face of marine peril to the vessel and does so in the interest of the vessel’s owner. For historic wrecks and other underwater cultural heritage, there is neither marine peril nor a confluence of interest between the owner, frequently a State, and the salvor. Courts across the world have acknowledged the risk that salvors pose to underwater cultural heritage. Salvage law, therefore, does not conflict with underwater cultural heritage law because it is inherently inapplicable. Underwater archaeology acts to discover, preserve, and explore the shared heritage of humanity; it is inherently unique, and worth protecting.

123. Dan Vergano, *Titanic Explorer: Ancient Shipwrecks Lost to Trawlers*, USA TODAY (Sep. 13, 2012), <http://usatoday30.usatoday.com/news/world/story/2012/09/13/ballard-team-discovers-ancient-black-sea-shipwreck-destroyed-by-trawlers/57768352/1>.