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Decolonizing Shipwrecks Through Considerations of Indigeneity in Underwater Cultural Property Decisions

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DECOLONIZING SHIPWRECKS THROUGH CONSIDERATIONS OF INDIGENEITY IN UNDERWATER CULTURAL PROPERTY DECISIONS

*Chelle Haynes**

Abstract

Under current international law, indigenous rights are not considered in ascertaining ownership of underwater cultural property. Indigenous people in Latin America and South America have faced long histories of colonialism, wherein their resources, property, and heritage were appropriated and taken by imperial powers. In this Article, I present the historical context of both the *San José* and *Mercedes* shipwrecks—Spanish colonial ships that were sunk in battle. I explore the history and legal decisions in both cases, while also considering how indigenous rights can be introduced into the current legal framework. Current international law concerning underwater cultural resources is primarily comprised of common law, international customary law, and United Nation's treaties and conventions. The current legal structure does not address indigenous interests adequately. I look to the United States' legal and regulatory framework for cultural and natural resource management as a model for international underwater resource management. Using U.S. law as a model, I ultimately propose a combination of the Public Trust Doctrine, U.S. archaeology laws, and state guidelines for the Abandoned Shipwrecks Act as a remedy to ensure protection of post-excavation underwater cultural resources in the international context.

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INTRODUCTION

A rich history of diverse historic, prehistoric, and pre-Columbian archaeological sites exists throughout Latin America and the Caribbean. Marine archaeological resources and landscapes in this region span from coastal settlements, evidence of fishing and early navigation aids, shipbuilding technologies, and shipwrecks. Shipwrecks are often viewed

as capsules of a moment in time—a group of cultural artifacts that exemplify the lives of predecessors.[1] For this reason, the greater public is fascinated with shipwrecks. As archaeological sites, shipwrecks also pose their own set of problems and dangers, however, and through significant media attention, are extremely susceptible to looting.[2] The excavation and removal of shipwreck resources is controversial politically, legally, and archaeologically. The question of who has a right to claim ownership over cultural heritage is often contested, and a global international law framework does not provide a clear answer for what individuals, ethnic or cultural groups, or nations have a legal right to claim ownership over cultural artifacts.

The landscape of Latin America and the Caribbean has been modified by millennia of human occupation. Modern and historic cultures have impacted the cultural and natural resources of this region, but long before colonialism reached the New World, indigenous people and early civilizations inhabited the territories and imbued the region with their own cultural remnants.[3] Despite the substantial and diverse archaeological resources of indigenous people globally, the rights of indigenous people are largely non-existent from underwater international cultural property law. Underwater cultural property is generally governed by maritime law, which is comprised of domestic law concerning maritime activities, international treaties, and international customary law. In this Article, I explore the impediments to indigenous groups asserting rights to underwater cultural property. Current international law emphasizes state sovereignty over the rights of indigenous people. This state-centric approach is reflective of the world powers who have played the predominant role in the establishment of these international laws. Here, I compare the application of law in the case studies of the *San José* and *Mercedes* shipwrecks to pinpoint areas of improvement in preserving the archaeological record post-excavation through the use of law.

First, I discuss the field of cultural resource management and how the law operates in conjunction with archaeological research. Then, I provide the history of two Spanish colonial shipwrecks: the *San José* and the *Nuestra Señora de las Mercedes*, respectively. These two discoveries serve as case studies for evaluating indigenous rights in relation to submerged cultural property. Third, I describe the existing legal framework of ownership of underwater cultural heritage in international

1. *See, e.g.*, Michael Bawaya, *Salvaging Science*, 347 SCIENCE 117, 117–18 (2015); THOMAS F. KING, CULTURAL RESOURCE LAWS & PRACTICE 207–10 (4th ed. 2008); Heather Pringle, *Troubled Waters for Ancient Shipwrecks*, 340 SCIENCE 802, 802 (2013).

2. George F. Bass, *The Ethics of Shipwreck Archaeology, in* ETHICAL ISSUES IN ARCHAEOLOGY 57, 60–61 (Larry J. Zimmerman et al. eds., 2003).

3. *See* CRISTÓBAL GNECCO & PATRICIA AYALA, INDIGENOUS PEOPLES AND ARCHAEOLOGY IN LATIN AMERICA 53–54 (2011).

law. Using this legal framework, I explain the application of law in the cases of the *San José* and the *Mercedes*. After responding to issues in the application of these laws, focusing on conflicting claims and the lack of indigenous people brought into the conversation of their own cultural heritage, I provide an option for relief.

I. UNDERSTANDING CULTURAL RESOURCES

The first difficulty in discussing the legal treatment of cultural resources is understanding terminology. Government agencies, academics, international institutions, and other unaffiliated agencies interpret cultural resources to mean varying types of tangible and intangible property. To the layperson, these nuances in definition may be irrelevant or have the appearance of conjecture. To the lawyer, archaeologist, international institutions, and national legislators, the distinctions in these definitions are of material importance. How cultural resources are defined can impact the applicability of governing laws. Unfortunately, a single, universal definition of "cultural resources" has yet to be applied in legal analysis. Because "cultural resources" are not standardized, it follows that its meaning in non-legal analysis varies.[4] Its meaning in legal terms, however, needs to be unpacked to acknowledge disparities in the application of law.

The National Park Service (NPS), a bureau of the Department of Interior, is the lead United States government agency for cultural and historical properties since the Historic Sites Act of 1935 (HSA).[5] The HSA defines cultural resources as "physical evidence or place of past human activity: site, object, landscape, structure; or a site, structure, landscape, object or natural feature of significance to a group of people traditionally associated with it."[6] Under this definition, types of cultural resources may include: archaeological resources, historical structures, cultural landscapes, museum objects, and ethnographic resources.[7] The

4. *Compare* Don D. Fowler, *Cultural Resource Management*, 5 ADVANCES IN ARCHAEOLOGICAL METHOD AND THEORY 1, 1 (1982) (defining cultural resources as "physical features, both natural and manmade, associated with human activity . . ." which include ". . . sites, structures, and objects possessing significance, either individually or as groupings, in history, architecture, archaeology, or human [cultural] development."), *with* Rhys H. Williams, *Constructing the Public Good: Social Movements and Cultural Resources*, 42 SOCIAL PROBLEMS 124, 127 (1995) (defining cultural resources as "the symbolic tools that movements wield in their efforts at social change.").

5. Historic Sites Act of 1935, 16 U.S.C. §§ 461–67 (2010) (repealed 2014).

6. *Cultural Resources*, NAT'L PARK SERV., https://www.nps.gov/acad/learn/management/rm_culturalresources.htm (last updated Feb. 26, 2015).

7. *Id.*

NPS only has authority in U.S. jurisdictions.[8] Its definitions and administrative powers do not affect the protection and conservation of resources located outside of the U.S. and its territories.

The United Nations (UN), an international intergovernmental organization confronting global issues of humanity, is an important actor in international jurisprudence. The institution does not explicitly define cultural resources. Its specialized agency on science, education, and culture—the United Nations Educational, Scientific, and Cultural Organization (UNESCO)—does, however, define "cultural heritage" as intangible and/or tangible heritage, including movable, immovable, and underwater cultural heritage.[9] The UN and UNESCO only have jurisdiction insofar as signatory countries to its Charter, conventions, and treaties allow.[10] Neither institution can define cultural property or cultural heritage in a way that can be universally applied everywhere. Cultural resources have also been interpreted by some scholars as "those aspects of the environment—both physical and intangible, both natural and built—that have cultural value of some kind to a group of people," defining a group of people as "a community, a neighborhood, a tribe, or any of the scholarly and [other] disciplines that document and study cultural things—archaeologists, architectural historians, folklorists, [or] cultural anthropologists."[11]

Though these definitions vary in their depth and breadth, intangible and tangible property are encompassed as cultural resources. Contrary to what "cultural resources" may imply, this material—which can be both intangible and tangible material—is not necessarily intended to be exploited for the benefit of a person, organization, or other entity, as the use of "resources" may suggest. Because a universal definition has not been adopted, in this Article, I treat cultural resources and cultural property as relatively interchangeable. I use both terms to refer to intangible and tangible objects and material with significance to the ideas, customs, or social behavior of a group of people. In using the word "property," I am referring to these resources belonging to individuals or to collective possessions, without necessarily inferring a legal proprietary right to the resources in any given jurisdiction.

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8. *See* National Park Service Organic Act, Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified at 16 U.S.C. §§ 1–4 (2018)) (giving authority over federal areas to the NPS housed within the Department of Interior).

9. *What is meant by "cultural heritage?"*, Illicit Trafficking of Cultural Property, UNESCO, http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/frequently-asked-questions/definition-of-the-cultural-heritage/ (last visited May 6, 2018).

10. *See* U.N. Charter art. 2; Constitution of the United Nations Educational, Scientific and Cultural Organization arts. 1-2, Nov. 16, 1945, 4 U.N.T.S. 275. The UN consists of 193 Member States. *See* U.N. Charter art. 2.

11. KING, *supra* note 1, at 2–3.

A. *Cultural Resource Management in the U.S.*

Cultural resource management is "an art that applies a methodological discipline to the collection and analysis of archival and field data that are adequate to the objectives of an investigation."[12] As a field, it exists at the juncture between science, archaeology, historic preservation, conservation, and the law.[13] In the U.S., cultural resource management practices are governed by state and federal legislation and local laws and regulations. This legislation is then used by archaeologists, government agencies, lawyers, and other professionals to protect and preserve the country's natural and cultural resources. These federal statutes in the U.S. often include the National Historic Preservation Act of 1966 (NHPA), the National Environmental Policy Act of 1970 (NEPA), the Archaeological Resources Protection Act of 1979 (ARPA), and the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).[14] These statutes deal primarily with terrestrial cultural resources.[15] An additional statute pertaining exclusively to shipwrecks was enacted by Congress in 1988, the Abandoned Shipwrecks Act (ASA).[16] I provide a succinct overview of the legislation concerning terrestrial resources to offer a working frame of reference for further analysis. Given the explicit relevance to underwater cultural resources, I discuss the ASA in detail later in this Article.

In 1966, the U.S. Congress enacted the NHPA to preserve historical and archaeological sites in its jurisdiction.[17] This Act established institutions, including the Advisory Council on Historic Preservation, State Historic Preservation Offices, and the National Register of Historic Places.[18] The principal section of the NHPA is section 106.[19] This section requires federal agencies to "take into account the effects" of federal action on "any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."[20] It also requires

12. KATHRYN M. KURANDA, *Studying and Evaluating the Built Environment*, *in* A COMPANION TO CULTURAL RESOURCE MANAGEMENT 13, 14 (Thomas F. King ed., 2011).

13. *See* THOMAS F. KING, A COMPANION TO CULTURAL RESOURCE MANAGEMENT 1–3 (2011) (explaining how cultural resource management practitioners "don't bother to define the term very explicitly" and are comprised of professionals cross-discipline).

14. National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 54 U.S.C. §§ 300101–307108 (2018)); National Environmental Policy Act of 1970, 42 U.S.C. § 4321 (2018); Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470aa (2018); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–13 (2018).

15. Patty Gerstenblith, *The Legal Framework for the Prosecution of Crimes Involving Archaeological Objects*, 64 U.S. ATT'Y BULL. 5, 13–15 (2016).

16. Abandoned Shipwrecks Act, 43 U.S.C. §§ 2101–06 (2018).

17. *See* National Historic Preservation Act § 100.

18. *Id.* § 201.

19. *Id.* § 106.

20. *Id.*

federal agencies to afford the Advisory Council on Historic Preservation an opportunity to comment regarding such action.[21] The specific guidelines and procedures of section 106 analysis are found in federal regulations.[22] A detailed explanation of section 106 analysis is outside the scope of this Article; however, it is important to note that a project review process has developed from these requirements.[23] At its core, this law is procedural. The outcome of the section 106 process is not legislated by the NHPA. Instead, it requires federal agencies to follow proper procedures and consult with other parties before certain federal actions are taken that impact historic or archaeological sites.

In 1970, after "recognizing the profound impact of man's activity on the interrelations of all components of the natural environment," Congress enacted the NEPA.[24] This broad authority articulated national policy on environmental protection, including both natural and cultural resources. It requires the federal government to "use all practicable means . . . [to] preserve important historic, cultural, and natural aspects of [U.S.] national heritage."[25] The section of NEPA implicated in cultural resource management has its origins in section 102. Section 102 sets in place procedural requirements federal agencies must complete before undertaking "major [f]ederal actions significantly affecting the quality of the human environment," including the natural and human-made environment.[26] Section 102 is both nuanced and complicated, but practically, it requires federal agencies to undertake an analysis of actions significantly affecting the environment in preparation of environmental assessments and environmental impact statements.[27] The objective of these assessments and statements is for federal agencies to balance environmental and cultural resource protection with public values.[28]

The ARPA governs the acquisition and removal of archaeological resources from federal and Indian land.[29] The ARPA does not apply on private lands.[30] Archaeological resources, under the ARPA, are defined

21. *Id.*

22. Protection of Historic Properties, 36 C.F.R. § 800.3 (2018).

23. *Id.* §§ 800.3–800.7 (describing the four steps of the section 106 process: establishing an undertaking, identifying and evaluating historic properties, assessing effects to historic properties, and resolving adverse effects); *see Section 106 Applicant Toolkit Synopsis*, ADVISORY COUNCIL ON HIST. PRESERVATION, https://www.achp.gov/digital-library-section-106-landing/section-106-applicant-toolkit.

24. Bart Brush, *National Environmental Policy Act*, 22 ENVTL. L. 1163 (1992) (discussing the NEPA).

25. National Environmental Policy Act, 42 U.S.C. § 4331(b) (2018).

26. *Id.* § 4332(c).

27. Brush, *supra* note 24, at 1163.

28. *See* Environmental Impact Statement, 40 C.F.R. § 1502.1 (2018). *See generally* National Environmental Policy Act § 4321.

29. Archaeological Resources Protection Act, 16 U.S.C. § 470aa (2018).

30. *See id.*

as "material remains of past human life or activities which are of archaeological interest . . . [and] at least 100 years of age."[31] When drafting the ARPA, Congress recognized that archaeological resources "are increasingly endangered because of their commercial attractiveness" and existing laws did not provide "adequate protection to prevent the loss and destruction of these archaeological resources . . . ."[32] Unlike the NHPA and the NEPA, the ARPA is not merely procedural. Additionally, its provisions apply to "any person," not solely to federal agency action.[33] Within the ARPA, there are criminal penalties and fines associated with trafficking in archaeological resources and the unauthorized excavation, removal, damage, alteration, or defacement of archaeological resources.[34]

The first of these laws to explicitly address indigenous interests in cultural resources is the NAGPRA.[35] The purpose of the NAGPRA is to create a remedy for the repatriation of cultural resources, held by institutions receiving federal funds, to affiliated indigenous tribes and groups.[36] In addition to its remedial purposes, it also establishes procedures for inadvertent discovery or planned excavation of indigenous cultural resources on federal or Indian lands.[37] Prior to the repatriation of cultural resources, indigenous tribes or groups must first demonstrate that the resources have "cultural affiliation" to their tribe or group.[38] Cultural affiliation is "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."[39] Under a preponderance of the evidence standard, affiliation can be demonstrated through "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion" evidence.[40] When cultural affiliation is established, and a request for repatriation of cultural resources is made by the affiliated tribe or group, federal agencies and federally funded museums are to "expeditiously return" the cultural resources in question.[41]

Here, I am not exploring the treatment of underwater cultural property found in U.S. jurisdictions. Yet it is important to understand that the U.S.

31. *Id.* § 470bb.
32. *Id.* § 470aa.
33. *See, e.g.*, *id.* § 470ff.
34. *Id.* § 470ee(d).
35. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (2018).
36. Under NAGPRA, cultural resources include human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony. *Id.*
37. *Id.* § 3002(d).
38. *Id.* § 3005.
39. *Id.* § 3001.
40. *Id.* § 3005.
41. *Id.*

has a body of law that manages its national and cultural resources. Elements of these laws may serve as a models or templates for handling cultural resource management questions on a global scale. I introduce U.S. laws now to serve that purpose. Further, I provide this context because U.S. institutions and entities are often brought into litigation surrounding shipwreck discoveries. In the two case studies I discuss at length in this Article, the U.S. was an actor.

B. *UNESCO Conventions Concerning Cultural Resources*

UNESCO has adopted conventions to aid in the protection of cultural resources. The conventions mentioned here have not impacted the decisions in my case studies; however, I mention them to provide greater context in how international institutions purport to implement cultural resource management methods through international agreements. Unfortunately, participation in these Conventions by States is entirely voluntary.[42] With ratification or acceptance of a UNESCO Convention, State Parties retain many of their sovereign rights as nations and can treat cultural resources as they deem appropriate in their own geographic and cultural contexts.[43]

In the international context, UNESCO's Convention on the Protection of the World Cultural and Natural Heritage (CPWCNH) covers, primarily, terrestrial cultural property. The CPWCNH considers "cultural heritage" to include "works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view."[44] The CPWCNH calls upon the State Parties to identify and delineate the cultural and natural resources situated in their territories.[45] Currently, 193 State Parties have ratified, accepted, or acceded to the CPWCNH.[46]

The CPWCNH establishes a duty for the State Party to ensure the "identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage . . . situated on its territory."[47] It requires a State Party to establish a general policy to "give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive

42. *See* Constitution Constitution of the United Nations Educational, Scientific and Cultural Organization art. 4, Nov. 16, 1945, 4 U.N.T.S. 275.

43. *See id.* art. 1, ¶ 3.

44. Convention Concerning the Protection of the World Cultural and Natural Heritage Arts. 1-7, Nov. 23, 1972, 1037 U.N.T.S. 152 [hereinafter UNESCO Convention World Heritage].

45. *Id.* art. 3.

46. *States Parties Ratification Status*, UNESCO, https://whc.unesco.org/en/statesparties/ (last updated Jan. 31, 2017).

47. UNESCO Convention World Heritage, *supra* note 44, art. 4.

planning program[s]," to set up services to carry out these policies, to develop scientific and technical studies and research to operate these policies and to anticipate and counteract the dangers to cultural property within its state, and to initiate training centers to carry out its policies.[48] Further, the CPWCNH called upon States to develop their own "appropriate legal, scientific, technical, administrative and financial measures necessary" to protect their local history.[49] The CPWCNH purports to preserve State sovereignty, but it also calls upon the States to treat all cultural property as "cultural heritage [that] constitutes a world heritage for whose protection is the duty of the international community as a whole to co-operate."[50]

In 2001, UNESCO adopted the Convention on the Protection of the Underwater Cultural Heritage (CPUCH).[51] Only 60 States have ratified or accepted this convention, and the U.S. is an example of one who has not.[52] The CPUCH defines underwater cultural 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," including shipwrecks, human remains, objects, and structures.[53] The CPUCH does not provide much guidance to the State Parties aside from calling on them to cooperate to protect and preserve underwater cultural heritage for the benefit of humanity as a whole.[54] It suggests underwater cultural heritage be preserved *in situ* when possible.[55]

It is important to note that the CPUCH coexists with three admiralty law principles: the Law of Salvage, the Law of Finds, and the Law of the Sea. Although I describe these three principles in greater detail later in this Article, I provide a brief overview here for context. The Law of Salvage is a maritime law principle that creates an entitlement to a commensurate reward for the value of property salvaged or recovered from a ship or shipwreck deemed to be "in peril."[56] The Law of Finds is a common law principle, rooted in traditional property law, wherein abandonment of title is presumed, and title is conferred to the person who

48. *Id.* art. 5.

49. *Id.*

50. *Id.* art. 6.

51. Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 1037 U.N.T.S. 152 [hereinafter UNESCO Convention Underwater Heritage].

52. States Parties CPUCH Ratification Status, UNESCO, http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha (last updated Jan. 31, 2017).

53. UNESCO Convention Underwater Heritage, *supra* note 51, art. 1.

54. *Id.* art. 2.

55. *Id.*

56. *See, e.g.*, The Sabine, 101 U.S. 384, 384 (1879).

gains possession of the property.[57] Finally, the Law of the Sea is international customary law, ultimately codified in the U.N. Convention on the Law of the Sea (UNCLOS), prescribing the principles and rules of maritime activities, which includes marine natural resource protection and the rights and responsibilities of States in using international bodies of water.[58] The CPUCH supersedes the Law of Finds and the Law of Salvage, but does not supersede the Law of the Sea.[59]

This particular Convention has not been utilized often. It is mentioned briefly here for perspective on how the international community has begun to find new ways, over the last few decades, to confront underwater cultural property questions.

C. *Looting*

The repatriation of cultural property taken from its geographic location by imperial powers, colonial governments and private parties, and now housed in museums and the hands of private owners, remains a contentious problem in modern times.[60] Improvements to technology provide the means to access archaeological sites previously out of reach (e.g., reaching underwater sites by means of remotely operated submersible vehicles).[61] These technological advances further alter the methods looters can employ in removing properties from archaeological sites (e.g., underwater, prop-wash deflectors).[62] The combination of these advancements result in increased stress on the protection of archaeological sites. Local, domestic, and international institutions and governments are compelled to implement laws to relieve these pressures.

In 1970, UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (CPICP) to combat the plunder of

57. *See* Anne M. Cottrell, *The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17 FORDHAM INT'L L. J. 667, 685 (1994).

58. *See* Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

59. *Id.* arts. 3-4. The Law of Finds, Law of Salvage, and Law of the Sea are described *infra* Part IV.

60. *See, e.g.*, Annalisa Quinn, *After a Promise to Return African Artifacts, France Moves Toward a Plan*, N.Y. TIMES (Mar. 6, 2018), https://www.nytimes.com/2018/03/06/arts/design/france-restitution-african-artifacts.html; Robin Scher, *Back to Where They Once Belonged: Proponents of Repatriation of African Artworks Take Issue with The Pastand Present and Future*, ART NEWS (June 26, 2018), http://www.artnews.com/2018/06/26/back-belonged-proponents-repatriation-african-artworks-take-issue-past-present-future; Christopher F. Schuetze, *Berlin Museum Returns Artifacts to Indigenous People of Alaska*, N.Y. TIMES (May 16, 2018), https://www.nytimes.com/2018/05/16/arts/design/berlin-museum-artifacts-chugach-alaska.html.

61. Neil Brodie, *Illicit Antiquities: The Theft of Culture*, *in* HERITAGE, MUSEUMS AND GALLERIES: AN INTRODUCTORY READER 123, 123 (Gerard Corsane ed., 2005).

62. *Id.*

archaeological sites and cultural institutions.[63] The CPICP only applies to prescribed categories of cultural property as laid out in Article One of its provisions, which include "products of archaeological excavations (including regular and clandestine) or [products] of archaeological discoveries" and "antiquities more than one hundred years old, such as . . . coins."[64] Similar to most other UNESCO conventions, the CPICP imbues the onus of protection on its State Parties.[65] The transfer, import, and export of ownership of the categories of cultural property outlined in the CPICP is made illicit, and State Parties are asked to create appropriate national services within their jurisdictions to protect cultural property from such illicit actions.[66] Thus, State Parties work in concert with UNESCO to provide education, consultation, expert advice, and coordination of efforts to carry out its provisions.[67]

Looting of submerged archaeological sites poses a unique set of problems. In this context, looting may sometimes be characterized as treasure salvage of wreckage;[68] however, the Law of Salvage may allow for certain salvage activities to constitute legal recovery of submerged property.[69] The advent of self-contained underwater breathing apparatuses (SCUBA) and the relative affordability of this technology has allowed for laypersons and looters alike to penetrate submerged wrecks.[70] Access to shipwrecks using SCUBA technology is somewhat limited, and most submerged archaeological sites below depths of fifty meters are inaccessible using this technology.[71] Deep-water recovery, through the use of remotely operated submersible vehicles, has been possible since the 1980s, and the existence of such technology has created vulnerability for wrecks in deep waters, often outside of territorial jurisdiction.[72] Though deep-water recovery is often outside the scope of

63. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 11806 U.N.T.S. 231 [hereinafter UNESCO Convention Illicit Cultural Property].

64. *Id.* art. 1. Article One of the Convention lists eleven categories of cultural property for the purposes of the Convention. In addition to archaeological resources and antiquities greater than one hundred years old, it also includes: rare collections and specimens; property relating to history; dismembered elements of historic and artistic monuments and archaeological sites; ethnological objects; property of artistic interest; rare documents; postage; archives; and furniture and musical instruments older than one hundred years old. *Id.*

65. *Id.* art. 2.

66. *Id.* arts. 3, 5.

67. *Id.* art. 17.

68. *See* Brodie, *supra* note 61, at 125.

69. The Law of Salvage is discussed in depth *infra* Part IV.

70. Brodie, *supra* note 61, at 125; Sarah Dromgoole, *Law and the Underwater Cultural Heritage: A Question of Balancing Interests*, *in* ILLICIT ANTIQUITIES: THE THEFT OF CULTURE AND THE EXTINCTION OF ARCHAEOLOGY 109, 109 (Neil Brodie & Kathryn Walker Tubb eds., 2002).

71. Brodie, *supra* note 61, at 125.

72. Dromgoole, *supra* note 70, at 110.

recreational recovery, it creates an avenue for commercial gain from taking of resources found within deep-water wreckage.[73]

D. *Examples of Underwater Cultural Resources*

The CPUCH provides the most specific international definition of underwater cultural heritage. It defines "underwater cultural 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."[74] Elaborated examples include prehistoric objects, vessels or aircraft and their cargo, human remains, sites, and structures.[75] Cultural heritage, under the CPUCH, is to be included "together with [its] archaeological and natural context."[76]

The CPUCH classifies underwater cultural resources into typologies. It fails, however, to provide adequate examples of what objects may be found in submerged sites. Attempting to quantify the various objects found among wreckage is a difficult task. Cultural property can have significant historic, cultural, and archaeological value, but it can also have commercial value. Commercially valuable objects are those objects salvors and treasure hunters seek to recover from wreckage. These objects may include jewels, porcelain, antique objects, navigation instruments, weapons and artillery, precious minerals and metals, and coins.[77] This list, of course, is not exhaustive, and many other objects found submerged in wreckage may hold commercial value. Though these objects may be commercially valuable for salvors or treasure hunters, they may also hold cultural value to States, the public, and indigenous people and/or descendent communities. Human remains and organic material (e.g., wood from the ship, fabric, and furnishings) are other examples of archaeological and culturally significant resources found in wrecks, although these resources may hold less of a commercial value.[78]

II. THE HISTORY OF THE *SAN JOSÉ*

At the turn of the seventeenth century, the imperial power of Spain was at its peak. As the Spanish Empire continued to expand its reaches throughout the West Indies, the transportation of supplies, produce, and equipment to the New World sparked trade reciprocity with the mother

73. *Id.*

74. UNESCO Convention Underwater Heritage, *supra* note 51, art. 1(a).

75. *Id.* art. 1(a)(i)–(iii).

76. *Id.* art. 1(a)(i)–(ii).

77. Tatiana Villegas Zamora, *The Impact of Commercial Exploitation on the Preservation of Underwater Cultural Heritage*, 60 MUSEUM INT'L 18, 19 (2008).

78. *Id.* at 19–21.

country.[79] Spain began importing valuable raw materials, including tobacco, sugar, cacao, cotton, and hides from the colonies; however, interests quickly shifted toward the exploitation of the precious metals and gems of the New World.[80] Gold, silver, pearls, and emeralds were suddenly of primary import interest.[81] As Spain's economy shifted toward bullionism to fund costly war efforts, less emphasis was placed on the importation of the colonies' raw materials.[82] In fact, in attempts to retain control over colonial access to resources, Spain reduced efforts in colonial sustainability to monopolize resources and restore reliance on the mother country.[83] Emphasis in the colonies was shifted away from agriculture and toward mining for precious metals.[84] With little access to local resources, colonial dependency on Spanish exports shaped an underdeveloped and unsustainable economy for many of the colonies and served to further reiterate the Spanish Empire's gain and exploitation of its colonial riches.[85]

The interest in these riches was, in part, to fund Spain's European war efforts.[86] In the early eighteenth century, conflicts arose out of concern for the balance of power in Europe. Up until his death in 1700, Charles II, the King of Spain, was without an heir to inherit the Spanish Empire.[87] Prior to his death, he conveyed his Empire to Phillip V of the House of Bourbon, grandson of King Louis XIV of France.[88] The unification of Spain and France as a collective power terrified other European nations, so much so that the English, Dutch, and Austrians declared war in 1702, known as the War of the Spanish Succession.[89]

As the conflicts in Europe worsened, Spain continued to send its transatlantic fleets to the New World to continue acquiring goods and resources to finance the Empire. Most of the cargos being transported by the Spanish galleons were precious metals and gems and colonial land taxes that were acquired to aid in funding the war effort.[90] The *San José*, captained by General Casa Alegre, sailed as *Capitana* (flagship of the

79. GEOFFREY J. WALKER, SPANISH POLITICS AND IMPERIAL TRADE 1 (1979).

80. *Id.*

81. *Id.*

82. *Id.*

83. STANLEY J. STEIN & BARBARA H. STEIN, SILVER, TRADE, AND WAR: SPAIN AND AMERICA IN THE MAKING OF EARLY MODERN EUROPE 8 (2000).

84. WALKER, *supra* note 79, at 1.

85. *Id.* at 2.

86. STEIN & STEIN, *supra* note 83, at 41.

87. Gonzalo Alvarez et al., *The Role of Inbreeding in the Extinction of a European Royal Dynasty*, 4 PLOS ONE 1, 1 (2009).

88. CARLA RAHN PHILLIPS, THE TREASURE OF THE SAN JOSÉ: DEATH AT THE SEA IN THE WAR OF THE SPANISH SUCCESSION 38–39 (2007).

89. *Id.* at 52.

90. *Id.* at 129.

fleet) of the *Tierra Firme*, beginning her final transatlantic journey in 1706, with the *San Joaquín* and the *Santa Cruz* sailing alongside her.[91] The *San José*, a three-decked galleon and one of the largest Spanish warships at the time, would have been ornately decorated, likely featuring painted artwork of her namesake on the stern of the ship.[92] These identifiable features, in conjunction with the trove of property on-board, would aid archaeologists and salvagers centuries later in identifying her as the wreckage found off the coast of Cartagena.[93] The *Tierra Firme* was joined by the *New Spain Fleet* in a convoy that left the Spanish port of Cádiz, making its way across the Atlantic.[94] Once in the Caribbean, the *Tierra Firme* split away from the *New Spain*, which sailed to ports in the gulf of Mexico.[95] The *Tierra Firme* sailed to ports in Cartagena and Portobelo, ultimately reuniting with the *New Spain* in Havana before returning to the mother country.[96]

In 1708, after logging the ships' collections in Portobelo, the *Tierra Firme* was to head to Cartagena.[97] The Captain had split the bullion and goods, primarily between the *San José* and the *San Joaquín*.[98] En route to Cartagena, the *San José* and her fleet were intercepted by English warships, led by Admiral Charles Wager.[99] The battle that ensued on June 8, 1708, later known as Wager's Action, resulted in the explosion and loss of the *San José*.[100] Her sister ship, the *San Joaquín*, narrowly escaped, ultimately returning to Spain, but the *Santa Cruz* was captured by Wager.[101]

A. *The Discovery of the* San José

Colombian President Juan Manuel Santos claimed on social media in December 2015: "Great news: we found the galleon San Jose!"[102] The Colombian government claims to have found the remains of the *San José*, off the coast of Cartagena in its territorial waters; however, thirty-four

91. *Id.* at 35.

92. *Id.* at 28–29.

93. Willie Drye, *Battle Begins Over World's Richest Shipwreck*, NAT'L GEOGRAPHIC (Dec. 18, 2015), http://news.nationalgeographic.com/2015/12/151218-san-jose-shipwreck-treasure-colombia-archaeology.

94. PHILLIPS, *supra* note 88, at 83.

95. *Id.* at 125.

96. *Plate Fleets*, Plate Fleet Shipwrecks, FLA. DEP'T OF STATE, http://info.flheritage.com/galleon-trail/plateFleets.cfm (last visited Apr. 28, 2018).

97. PHILLIPS, *supra* note 88, at 129.

98. *Id.*

99. *Id.* at 178.

100. *Id.* at 152–53.

101. *Id.* at 158–59.

102. Juan Manuel Santos (@JuanManSantos), TWITTER (Dec. 5, 2015, 8:15 AM), https://twitter.com/JuanManSantos/status/673177850732609536?ref_src=twsrc%5Etfw.

years earlier, a U.S. Washington-based salvage firm, the Glocca Morra Company (GMC), later acquired by Sea Search Armada (SSA), claimed to have found the same shipwreck.[103] The Colombia Ministry of Culture utilized sonar scans, remote-controlled robots, and underwater cameras in search of the shipwreck.[104] The purported remains of the wreckage were found 1,000 feet below the surface, 16 miles from Cartagena.[105] The Colombian government later released video footage of the wreck, through underwater videography, capturing photographs of broken pottery and the ship's famed cannon.[106] Officials believed the shipwreck to be the *San José* based on its dimensions, location, and the cannon that matched historic descriptions of those on the ship.[107]

Decades earlier in 1981, SSA claimed to find the same shipwreck at a depth of 800 feet, at an undisclosed location off of Colombia's coast.[108] Further details about SSA's alleged discovery are largely kept secret, primarily to prevent looting or destruction of the wreckage.[109] The legal rights to the shipwreck and its property, which is purported to have a value upwards of $17 billion in U.S. currency, has been litigated over the past four decades.[110] SSA staked a claim on the value of the shipwreck, alleging that because the firm found the shipwreck first, finder's laws should apply.[111]

III. THE HISTORY OF NUESTRA SEÑORA DE LAS MERCEDES

Years after the Wager's Action and the sinking of the *San José*, Spain was involved in other military conflicts throughout Europe. At the turn of the nineteenth century, the Napoleonic wars were raging throughout Europe.[112] In October 1803, Spain and France signed an agreement for Spain to provide "a certain sum monthly in lieu of the Naval and Military succours which they had stipulated by the treaty [between France and

103. Michael Martinez & Alba Prifti, *Colombia Says it Found Spanish Galleon; U.S. Firm Claims Half of Treasure*, CNN (Dec. 5, 2015, 8:15 PM), http://www.cnn.com/2015/12/05/americas/colombia-spanish-galleon-san-jose-found/.

104. Danny Lewis, *Legendary Shipwreck May Have Been Found Off the Colombia Coast*, SMITHSONIAN.COM (Dec. 7, 2015), http://www.smithsonianmag.com/smart-news/colombia-discovers-legendary-shipwreck-lost-more-300-years-180957469/.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *See id.*

110. Drye, *supra* note 93.

111. *Id.*

112. Stephen Miller, *Seizing the Gold of Spain: The Action Off Cape Santa Maria*, THE NAPOLEON SERIES (Dec. 2007), https://www.napoleon-series.org/military/battles/1804/c_santamaria.html.

Spain] to provide."[113] Britain alerted Spain that any such action or payment to France would be considered a "direct subsidy of War."[114] If Spain continued to aid France in its war efforts, Britain alerted Spain that war "would be the infallible consequence."[115]

Spanish frigates, traveling back to Europe from the New World, carried treasures, including silver, gold, precious metals, and other material goods obtained in the Spanish colonies.[116] The frigates left on August 7, 1804, from a port in Montevideo to return back to Spain.[117] One of the four frigates was the *Nuestra Señora de las Mercedes* (the *Mercedes*).[118] The ship, commanded by Admiral Bustamante y Guerra, came under attack by British naval forces in response to anti-British hostilities in Spain.[119] The attack, known as the Battle of Cape St. Mary, occurred off the coast of Portugal on October 5, 1804.[120] The British warships were given instruction "not to detain any Spanish homeward-bound Ships of War, unless they should have treasure on board; nor Merchant Ships of that Nation, however laden, on any account whatsoever."[121]

The *Mercedes*, and the other four frigates—the *Fama*, the *Medea*, and the *Santa Clara*—were assigned to transport valuable cargo from the New World.[122] These commercial commodities, according to Spanish government documents, carried millions of pesos worth of bullion acquired in the colonies.[123] The British navy made plans to intercept the ships before they could unload their haul at a Spanish port.[124] The ensuing battle resulted in hundreds of casualties, the British taking of the ships' hauls, and the explosion of the *Mercedes*.[125] Though the *Mercedes* was lost, the remaining three frigates were transported back to Britain.[126] As a result of this conflict, Spain officially entered into the Napoleonic wars

113. Declaration of James P. Delgado, Ph.D. at 5, Odyssey Marine Expl., Inc. v. The Unidentified Shipwrecked Vessel (M.D. Fla. 2008) 2008 WL 9421180 (No. 8:07 Civ. 00614-SDM-MAP) [hereinafter Declaration of Delgado].

114. *Id.*

115. *Id.*

116. Miller, *supra* note 112.

117. Declaration of Delgado, *supra* note 113, at 11.

118. *Id.* at 6.

119. Miller, *supra* note 112.

120. Declaration of Delgado, *supra* note 113, at 19–21.

121. *Id.* at 15.

122. Miller, *supra* note 112.

123. *Id.*

124. *Id.*

125. *Id.*

126. Declaration of Delgado, *supra* note 113, at 7.

against Britain.[127] In 1804, King Carlos IV of Spain declared war against Britain, with the loss of the *Mercedes* as the catalyst.[128]

A. *The Discovery of the* Mercedes

In March 2007, the *Mercedes* was discovered by the U.S. based salvage firm, Odyssey Marine Corporation (Odyssey).[129] Before the discovery of the *San José*, the *Mercedes* touted the largest financial discovery in historical shipwrecks.[130] The haul collected from the remains of the wreck are estimated around $500 million.[131] Using advanced deep-sea sonar and magnetometer technology, Odyssey located the *Mercedes* 100 miles west of the Straits of Gibraltar, in the Atlantic Ocean off the coast of Portugal.[132] The shipwreck, unknown at the time, was given the code name "Black Swan."[133] The identity of the wreckage was believed to be the *Mercedes*, based on historical evidence, location, and distinguished ship features.[134]

After the discovery of the *Mercedes*, Odyssey recovered approximately 594,000 coins and numerous other artifacts.[135] The wreck is said to have "yielded seventeen tons of silver coins and several hundred gold ones."[136] Ownership of the cargo has been contested by Odyssey, Spain, Peru, and descendants of merchants who owned the cargo aboard the *Mercedes*.[137] Unlike in the case of the *San José*, the finding of the shipwreck is not in contention. No other entity has come forward to assert a contrary initial finding of the wreckage.

IV. LEGAL FRAMEWORK FOR OWNERSHIP OF UNDERWATER CULTURAL PROPERTY

Under international law, an international rule of law is one that is accepted by the international community, either as a customary law, an

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127. *Id.*

128. *Id.*

129. Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel, 675 F. Supp. 2d 1126, 1130 (M.D. Fla. 2009), *aff'd*, 657 F.3d 1159, 1166 (11th Cir. 2011).

130. Robin Whitlock, *The Black Swan Project: Controversy Strikes After Enormous Treasure Hoard Retrieved from Spanish Wreck*, ANCIENT ORIGINS (Aug. 22, 2015, 3:55 PM), http://www.ancient-origins.net/history/black-swan-project-controversy-strikes-after-enormous-treasure-hoard-retrieved-spanish-wreck-020495.

131. *Id.*

132. *Odyssey Marine Expl.*, 675 F. Supp. 2d at 1130.

133. *Id.*

134. *Id.* at 1133–36.

135. *Id.* at 1134.

136. John Colapinto, *Secrets of the Deep*, THE NEW YORKER (Apr. 7, 2008), https://www.newyorker.com/magazine/2008/04/07/secrets-of-the-deep.

137. Amber Crossman Cheng, *All in the Same Boat? Indigenous Property Rights in Underwater Cultural Heritage*, 32 HOUS. J. INT'L L. 695, 701 (2010).

international agreement, or by derivation from general principles of major legal systems globally.[138] Customary laws are the result of "general and consistent practice[s] of states followed by them from a sense of legal obligation."[139] "International agreements create law for the state parties thereto and may lead to the creation of customary international law."[140]And finally, general principles common to major legal systems, even if not incorporated by customary law or international agreements, "may be invoked as supplementary rules of international law where appropriate."[141]

Ownership of underwater cultural property is difficult to discern. This area of the law, in international waters, is governed largely by international treaties. The most significant of these treaties, the UNCLOS, is used in determining ownership over a shipwreck and its cargo.[142] In addition to international treaties, two principles of maritime law are typically invoked—the Law of Salvage and the Law of Finds. Though these more universally applied laws are utilized in international disputes over ownership, domestic statutory and constitutional law is also relevant. The U.S.,[143] Spain,[144] and Columbia[145]—three sovereign states implicated in both the *San José* and *Mercedes* case studies—have created their own domestic laws and/or regulations to govern shipwrecks found in their territorial waters or their cultural heritage found outside of these waters. Though not a strict underwater cultural heritage law, the UN has also adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The UNDRIP is largely relevant when considering indigenous people's rights to their cultural property. U.S. legislation for shipwreck management, which is not prescriptive for international heritage, is included here for comparison.

It is important to note that in 1954, the UN defined "cultural property" in The Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict. Article 1 states that cultural property is "movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; . . . works of art . . . and other objects of artistic, historical or archaeological

138. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (Am. Law Inst., 3rd ed. 1987).

139. *Id.*

140. *Id.*

141. *Id.*

142. *See, e.g.*, UNCLOS, *supra* note 58.

143. *See supra* Part I for discussion of relevant U.S. legislation and *infra* Part IV(e).

144. *See, e.g.*, Maritime Navigation Law arts. 369–83 (B.O.E. 2014, 180).

145. *See, e.g.*, L. 1675, julio 30, 2013, DIARIO OFICIAL [D.O.]; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 63. Specifically, archaeological patrimony is "inalienables, imprescriptibles, y inembargables" (translated to inalienable, imprescriptible, and unseizable). *Id.*

interest . . . ."[146] The signing countries acknowledge that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world . . . ."[147]

A. *United Nations Convention on the Law of the Sea*

In December 1982, the UN adopted UNCLOS. Since its adoption, this treaty boasts 157 signatories and 168 parties.[148] The purpose of this treaty is to establish the rights and responsibilities of the world's nations regarding environmental and natural resource management, maritime business, and cultural resources.[149] Within the UNCLOS, Article 89 states "[n]o state may validly purport to subject any part of the high seas to its sovereignty."[150] The high seas are to be "reserved for peaceful purposes," and are "open to all States, whether coastal or land-locked."[151]

The freedoms to the high seas, as articulated by the UNCLOS, include freedoms of navigation and scientific research, among others.[152] These provisions on the high seas do not include territorial sea or internal State waters.[153] The UNCLOS established state sovereignty "beyond [a coastal State's] land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea."[154] The limits of the territorial sea were further established to not exceed twelve nautical miles, though within these guidelines, a State is able to establish its own breadth of jurisdiction.[155] The treaty also establishes the sovereignty over the continental shelf,[156] where legal rights to its exploration are to be conducted by the coastal State, or an entity with express consent from the state.[157]

Under the UNCLOS, the nationality of ships is determined by the "State whose flag they are entitled to fly," and there "must exist a genuine link between the State and the ship."[158] Though this provision creates

146. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict art.1, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention].

147. *Id.*

148. UNCLOS, *supra* note 58.

149. *Id.* pmbl.

150. *Id.* art. 89.

151. *Id.* arts. 87–88.

152. *Id.* art. 87.

153. *Id.* art. 86.

154. UNCLOS, *supra* note 58, art. 2.

155. *Id.* art. 3.

156. *Id.* art. 76. "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea . . . or to a distance of 200 nautical miles." *Id.*

157. *Id.* arts. 77, 91.

158. *Id.*

some clarity on the ownership of ships themselves, it does not distinctly clarify what individuals, groups, or sovereign nations will retain ownership over its cargo if sunk. The UNCLOS provides minimal clarifications on the ambiguity of archaeological and historical objects:

> 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.[159]

The treaty does not provide any definition or explanation for "the benefit of mankind as a whole" or a resource of "archaeological and historic nature." Despite asserting preferential rights to the "State of cultural origin, or the State of historical and archaeological origin," no clarification exists within UNCLOS as to who these States might be. It can be presumed the interpretation is left to a State's discretion.

Article 303 of the UNCLOS is the only other occasion within its provisions that the treaty specifically addresses archaeological and historical objects found at sea. Under Article 303, States have "the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose."[160] States have the right to "control traffic in such objects" by presuming removal from their territorial waters without approval constitutes "an infringement within its territory."[161] However, the UNCLOS goes on to further state that "[n]othing in [Article 303] affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges."[162] Finally, Article 303 identifies that its reach does not supersede "other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature."[163] The Article is silent on its authority over domestic laws governing these resources.

In December 1982, Colombia, Peru, and the U.S. all joined the UNCLOS as signatories.[164] Spain signed the UNCLOS two years later in 1984, with a formal ratification occurring in 1997.[165] Although Colombia, Peru, and the U.S. are signatories, these three countries have not ratified UNCLOS.[166] As signatories of the UNCLOS, these countries

159. UNCLOS, *supra* note 58, art. 149.
160. *Id.* art. 303.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*

are "obliged to refrain from acts which would defeat the object and purpose of a treaty."[167] Despite ratification of the UNCLOS not acting with full force of the treaty on the non-ratifying parties, it has commonly been treated as customary law.[168] In *R.M.S. Titanic v. Haver*, the court stated "mutual access to the high seas is firmly etched into the *jus gentium*."[169]

B. *Law of Salvage*

The Law of Salvage is a historical principle of maritime law. The concept itself has existed since 800 B.C.E.[170] It has since been integrated into *jus gentium* and has become the favored law in determining ownership over vessels.[171] The function of salvage is to "accord the salvor a right to compensation, not title," which results in a "maritime lien on the shipwreck rather than a right of ownership or title."[172] To prove a valid salvage claim, three elements must be proven: (1) a marine peril; (2) service voluntarily rendered when not required as an existing duty or from a special contract; and (3) success in whole or in part, or that the service rendered contributed to such success.[173]

A multilateral treaty, the International Convention on Salvage (ICOS), exists to govern marine assistance and salvage at sea.[174] The ICOS's application extends to "any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or any other waters whatsoever."[175] Property is defined as "not permanently and intentionally attached to the shoreline and includes freight at risk."[176] The salvor has a duty to the owner of the vessel to use "due care," and the owner to "co-operate fully with him during the course of the salvage operations."[177] If the result of the salvage is "useful," the owner is to "give right to a reward."[178] The reward is determined by the value of the vessel and other

167. Cheng, *supra* note 137, at 707.

168. Thomas Street, *Marine Methane Hydrates as Possible Energy Source*, 23 NAT'L RES. & ENV'T 42, 43 (2008).

169. R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 965 (4th Cir. 1999). *Jus gentium* being Latin for "law of nations," a concept of customary law held commonly by all nations. Ralph C. Chandler et al., *Constitutional Law Deskbook* § 1:18 (2018).

170. Cheng, *supra* note 137, at 709 n.107.

171. R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel, 435 F.3d 521, 532 (4th Cir. 2006).

172. Cheng, *supra* note 137, at 709–10.

173. The Sabine, 101 U.S. 384, 384 (1879).

174. International Convention on Salvage, Apr. 29, 1989, 1953 U.N.T.S. 33479.

175. *Id.* art. 1(a).

176. *Id.* art. 1(c).

177. *Id.* art. 8(a).

178. *Id.* art. 12.

property, skill, measure of success, and the nature of the ship's danger, among other things.[179]

The ICOS maintains reservations that "[a]ny State may . . . reserve the right not to apply the provisions of [the ICOS]" when "the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed."[180] This final reservation is explicitly addressing the ability for party States to withdraw from salvage law under circumstances surrounding shipwrecks. Colombia, Spain, Peru, and the U.S. are contracting States to the ICOS.[181] Though the ICOS is not the only salvage law, it provides an additional legal framework under which shipwrecks can find protection.

C. *Law of Finds*

The Law of Finds is not specific to maritime or admiralty laws, unlike the Law of Salvage. The principle of this law of finds is rooted in western property law.[182] The primary purpose of the Law of Salvage is to call for compensation for successful efforts, but it does not provide title to the property, which is presumed to remain with the original owner.[183] In the Law of Finds, the presumption is that the owner abandoned title, and the title vests "in the person who reduces abandoned property to his possession."[184] Under this principle, it is assumed the property is unowned when found.[185] The Law of Finds "expresses the acquisitive principle of 'finders, keepers'—namely, that the first finder obtains title over unowned property that it has reduced to its possession."[186] Under judicial analysis of the Law of Finds in *R.M.S. Titanic*, abandoned property is treated as if it "returned to the state of nature and thus equivalent to property, such as fish or ocean plants, with no prior owner."[187] It has been traditionally presumed, however, that when property is lost at sea, the title remains with the true owner regardless of time passed.[188]

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179. *Id.* art. 13.

180. *Id.* art. 30.

181. *IMO Membership*, IMO, http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/IMO%20MEMBERSHIP.pdf (last visited Mar. 10, 2018).

182. *See, e.g.*, Pierson v. Post, 3 Cai. R. 175 (1805) (holding that mere pursuit of the fox did not entitle the pursuer title to it. Title was given to the individual who reduced the fox to his possession).

183. Mark A. Wilder, *Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries*, 67 DEFENSE COUNSEL J. 192, 193 (2000).

184. *Id.*

185. Cottrell, *supra* note 57, at 683–86.

186. R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel, 435 F.3d 521, 532 (4th Cir. 2006).

187. *Id.* (quoting Hener v. United States, 525 F. Supp. 350, 354 (S.D.N.Y. 1981)).

188. *Id.*

To prevail on a claim under the Law of Finds, the finder has to demonstrate that: (1) they intended to reduce the property to possession; (2) had actual or constructive possession of the property; and (3) the property is abandoned or unowned.[189] Courts have noted two types of maritime cases where the presumption of abandonment is overcome. The first is when there has been an express relinquishment of title.[190] The second are those cases where "items are recovered from ancient shipwrecks and no owner appears in court to claim them."[191] Typically, in cases involving shipwrecks or property lost at sea, there is a presumption the property was not intentionally abandoned, creating a policy favoring the Law of Salvage over the Law of Finds.[192] In describing the favor of the Law of Salvage over the Law of Finds, U.S. courts have found:

> [The law of finds] encourage[s] certain types of conduct and discourage[s] others. A would-be finder should be expected to act acquisitively, to express a will to own by acts designed to establish the high degree of control required for a finding of possession. The would-be finder's longing to acquire is exacerbated by the prospect of being found to have failed to establish title. If either intent or possession is found lacking, the would-be finder receives nothing; neither effort alone nor acquisition unaccompanied by the required intent is rewarded. Moreover, if the property is ultimately found not to have been abandoned the law of finds permits no reward, even for efforts to recover the property that have been partly or completely successful. [citation omitted] Furthermore, success as a finder is measured solely in terms of obtaining possession of specific property; possession of specific property can seldom be shared, and mere contribution by one party to another's successful efforts to obtain possession earns no compensation.[193]

This public policy consideration results in favoring the Law of Salvage. Though the Law of Finds is not often a favorable defense for salvors, it remains as the primary means to acquire legal ownership and title over underwater property.

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189. *Id.* at n.3.

190. *Id.*

191. *Id.* (quoting Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 461 (4th Cir. 1992)).

192. R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel, 435 F.3d 521, 532 (4th Cir. 2006).

193. Hener v. United States, 525 F. Supp. 350, 356 (S.D.N.Y. 1981).

D. *United Nations Declaration on the Rights of Indigenous Peoples*

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) does not pertain exclusively to underwater property rights. It is, however, relevant when analyzing the rights indigenous people may have to stake a claim in their property lost at sea or other cultural property obtained from shipwreck discoveries. This landmark agreement, though not binding, seeks to recognize and protect the human rights of indigenous people globally.[194] There were 143 states voting in favor of UNDRIP, so despite its non-binding nature, it can arguably be considered evidence of *opinio juris*, meaning "an opinion of law."[195] For states to feel obligated to follow a customary international law, "it must appear that the state follows the practice from a sense of legal obligation," and "*opinio juris* may be inferred from acts or omissions."[196]

The purpose of UNDRIP is to protect and recognize the rights of indigenous people to "the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms" recognized in the body of international law.[197] It purports that indigenous people "have the right to self-determination," the process by which a country or people determine their own statehood, allegiances, and forms of government.[198] And by "virtue of that right they freely determine their political status and freely pursue economic, social, and *cultural* development."[199] It further explains that indigenous people have a right to "maintain and strengthen their . . . social and cultural institutions, while retaining their right to participate fully, if they so choose, in the . . . social and cultural life of the State."[200] They have the right to not "be subjected to forced assimilation or destruction of their culture," and the agreeing States need to provide "effective mechanisms for prevention of, and redress for" actions that deprive them of "their cultural values or ethnic identities" and dispossess them of their resources.[201]

Within the cultural rights ascribed to indigenous people under the UNDRIP are the rights to maintain, protect, and develop "the past, present and future manifestations of their cultures, such as archaeological and historic sites" and artifacts.[202] Agreeing states are to provide redress

194. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

195. *Restatement (Third) of Foreign Relations Law of the United States* § 102 (1987).

196. *Id.*

197. UNDRIP, *supra* note 194, art. 1.

198. *Id.* art. 3.

199. *Id.* art. 3 (emphasis added).

200. *Id.* art. 5.

201. *Id.* art. 8.

202. *Id.* art. 11.

and remedies in respect of these rights.[203] Throughout the UNDRIP, the importance of protection of indigenous rights is articulated, but the relevance in this Article is on the second protection—the need for States to provide adequate redress for cultural property "taken without [indigenous peoples] free, prior and informed consent or in violation of their laws, traditions, and customs."[204]

The UNDRIP does not hold the same obligatory adherence as well-established customary laws and international agreements, but it does demonstrate the contemporary need to create a body of law to protect the rights of indigenous people. The provisions on State redress create a cause of action for indigenous people, perhaps not only in modern takings of their property, but also in colonial appropriation of their cultural property and resources. Redress, as defined under the UNDRIP, may include "restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied . . ."[205] and "with respect to their cultural . . . property taken without their free, prior and informed consent."[206]

E. *U.S. Legislation on Shipwrecks: The Abandoned Shipwrecks Act*

Maritime archaeology and underwater cultural resources in the U.S. are addressed in the ASA.[207] This act serves to clarify ownership over abandoned wrecks and to ensure proper management of historic shipwrecks.[208] Congress found that states have a responsibility to manage abandoned shipwrecks where the wreckage has been deserted and "the owner has relinquished ownership rights with no retention."[209] Practically, the ASA provides a basis for state claims of ownership while also lending impetus for salvors to claim rewards for salvage operations.

The U.S. asserts title under the ASA to three categories of shipwreck resources: (1) those "embedded in submerged lands of a State"; (2) those "embedded in coralline formations protected by a State on submerged lands of a State"; and (3) those "on submerged lands of a State and is included in or determined eligible for inclusion in the National Register."[210] The U.S. then transfers the titles of abandoned wrecks to the

203. *Id.*
204. *Id.*
205. *Id.* art. 28.
206. *Id.* art. 11.
207. Abandoned Shipwrecks Act, 43 U.S.C. § 2101(a) (2018).
208. *See* H.R. REP. No. 100-514, at 2 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 370, 370–71.
209. Abandoned Shipwrecks Act § 2101(b).
210. *Id.* § 2105(a).

State where the wreck is located.[211] Where the abandoned wreck is outside of state jurisdiction but is located on federal land, the U.S. retains title over the wreckage.[212] If the wreckage is located on Indian land, then the title of the abandoned wreck is the property of the Indian tribe owning the land where it is located.[213] Abandoned shipwrecks are defined as "any shipwreck to which title voluntarily has been given up by the owner with the intent of never claiming a right or interest in the future and without vesting ownership in any other person."[214] This definition does not apply to warships or other vessels entitled to sovereign immunity where title is presumed to remain with the nation whose flag the ship initially sailed under.[215] The Law of Finds and the Law of Salvage cannot be used by salvors to acquire ownership of the shipwreck resources for which the U.S. asserts title under the ASA.[216]

Under the ASA, the responsibility rests with states to develop appropriate and consistent policies to: (1) "protect natural resources and habitat areas"; (2) "guarantee recreational exploration of shipwreck sites"; and (3) "allow for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites."[217] States are encouraged to "create parks or areas to provide additional protection" for underwater resources.[218] To assist states and appropriate federal agencies in developing their own policies, the provisions of the ASA require the Secretary of the Interior, through the NPS, to develop guidelines.[219] These guidelines should "maximize the enhancement of cultural resources," promote a partnership among those with interests to manage shipwreck resources, enable recreational access, and "recognize the interests" of salvors.[220]

Other historic and archaeological preservation statutes, such as the ARPA and the NHPA, contain stricter requirements than ASA.[221] In

211. *Id.* § 2105(c).
212. *Id.* § 2105(d).
213. *Id.*
214. Abandoned Shipwrecks Act Guidelines, 55 Fed. Reg. 50116-01, 50120 (Dec. 4, 1990).
215. *Id.* at 50121.
216. Abandoned Shipwrecks Act § 2106(a).
217. *Id.* § 2103(a).
218. *Id.* § 2103(b).
219. *Id.* § 2104.
220. *Id.* § 2104(a).
221. The ASA is primarily regulatory and advisory and allows the States to implement their own individualized process. *See* Abandoned Shipwrecks Act § 2101(a); Abandoned Shipwrecks Act Guidelines, 55 Fed. Reg. 50116-1, 50125-50127 (Dec. 4, 1990). This contrasts with the stricter federal requirements implemented under the NHPA and the ARPA. The NHPA, for example, institutes a project review process under section 106, and the ARPA imposes criminal penalties on looting activities. *See* National Historic Preservation Act, Pub. L. No. 89-665 § 106, 80 Stat. 915 (codified as amended at 54 U.S.C. §§ 300301–307108 (2018); Archaeological

respecting the federal requirements under such statutes, the NPS guidelines for establishing federal shipwreck management programs defer to the requirements of the NHPA and the ARPA.[222] States are encouraged to follow the NPS guidelines for establishing state shipwreck management programs to develop legislation and promulgate regulations authorizing these programs to manage state-titled shipwrecks.[223]

The first of these state guidelines is to involve interest groups in shipwreck program development and management activities. It calls for states to "cooperate with, meet with, consult, seek comments from, request assistance from, and otherwise involve in an ongoing basis interested persons and groups in the establishment, review, revision, and implementation of legislation, regulations, policies, and procedures on the management of State-owned shipwrecks."[224] Under the guidelines, "interested persons" non-exclusively include recreational divers and dive operations, archaeologists, preservationists, maritime professionals, and commercial salvors.[225] The guidelines also call for states to establish a shipwreck advisory board, whose responsibilities would include the promotion and cooperation among interest groups to manage state shipwrecks.[226] Responsibility for state-owned shipwrecks should be assigned to agencies experienced in historic preservation and managing submerged lands and recreational resources.[227] These agencies would also be responsible for providing adequate staff, facilities, and equipment.[228]

The long-term management of state shipwrecks should include regulations, policies, or procedures providing for: (1) "the survey, identification, documentation, and evaluation"; (2) "the study, interpretation, protection, and preservation"; (3) "the creation of underwater parks or preserves"; (4) "recreational exploration . . . [and] reasonable public access"; and (5) "appropriate public and private sector recovery . . . consistent with the protection of historical values and environmental integrity" of state-owned shipwrecks.[229] The guidelines call for states to implement a consultation procedure, emulating the NHPA section 106 procedure, to take into account the effects of state and

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Resources Protection Act of 1979, 16 U.S.C. § 470ee (2018). Neither the NHPA nor the ARPA provide flexibility for the States. *See* National Historic Preservation Act §§ 101–08; Archaeological Resources Protection Act of 1979 §§ 470aa–470mm (2018).

222. Abandoned Shipwrecks Act Guidelines, 55 Fed. Reg. at 50125–26.

223. *Id.* at 50122.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 50123.

229. *Id.* at 50122–23.

federal agencies' actions on the state-owned shipwrecks.[230] Those state agencies with management responsibilities should also consult with other state and federal agencies and institutions, such as the state's historic preservation office, state museums, the Advisory Council on Historic Preservation, the NPS, and state law enforcement agencies.[231] State law enforcement agencies should prosecute individuals violating the state's guidelines on protection of state-owned shipwrecks.[232] The proposed guidelines suggest legal recourse, such as the denial of requests for recovery of state-owned shipwrecks, for those parties who believe the state's management program does not sufficiently satisfy the requirements of the ASA.[233]

Among the guidelines are provisions on providing for public and private sector recovery of shipwrecks, so long as the recovery is in the public interest.[234] The decisions to approve or deny requests for recovery should be fact-determinative by balancing the significance of the wreckage against the benefits and adverse effects of recovery.[235] The commercial salvage of shipwrecks is left available for those wrecks not designated as National Historic Landmarks or those in state-owned underwater parks or preserves, national parks/wildlife refuge/forest/marine sanctuary systems, or lands otherwise protected by state or federal law.[236]

These guidelines created by the NPS serve as a model for states to implement their own policies, regulations, and procedures consistent with their state law. Under the authority of the ASA, the responsibility of drafting state laws consistent with the ASA's principles still rests with the states.[237] Therefore, these guidelines are merely advisory in nature.

V. APPLICATION OF LAW IN THE CASES OF THE *SAN JOSÉ* AND THE *MERCEDES*

Both the *San José* and the *Mercedes* have been litigated in court.[238] The battle over ownership of the *San José* is still ongoing, but the decision surrounding the *Mercedes* has reached a more final conclusion. These

230. *Id.* at 50124.

231. *Id.* at 50123–24.

232. *Id.* at 50124–25.

233. *Id.* at 50125.

234. *Id.* at 50133.

235. *Id.* at 50133–34.

236. *Id.* at 50133.

237. *See* Abandoned Shipwrecks Act, 43 U.S.C. § 2104(c) (2018); Abandoned Shipwrecks Act Guidelines, 55 Fed. Reg. at 50125–26.

238. *See* Sea Search Armada v. Republic of Colombia, 821 F. Supp. 2d 268 (D.D.C. 2011), *aff'd*, 522 F. App'x 1 (D.C. Cir. 2013); Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel, 675 F. Supp. 2d 1126, 1130–31 (M.D. Fla. 2009), *aff'd*, 657 F.3d 1159 (11th Cir. 2011).

two shipwrecks demonstrate largely different legal arguments and applications of law.

A. *The* San José

The battle to obtain rights to the *San José* has not been limited to litigation between the Government of Colombia and the salvage firm, SSA. Spain, as well as Peru, have also staked claims to the property in the wreckage.[239] The long legal battle between Colombia and SSA has left multiple decisions open to future litigation. U.S. and Colombian courts have both set precedent determining the rightful ownership over the *San José*, and the cultural property aboard, as belonging to the Colombian government.[240] Since the shipwreck's alleged initial discovery in the 1980s, the struggle to identify and exert ownership, and awarding any potential finder's fees, has been ongoing.[241]

The availability of court documents in the decades of litigation is scarce. The SSA provided a chronological outline of the history of litigation between the firm and the Government of Colombia.[242] In SSA's December 2010, complaint against the Colombian government, the investment group claims that the *San José* was located "on the edge of the Continental Shelf at a depth of approximately 1,000 feet."[243] The group claims to have identified six locations off the coast of Colombia that contained potential wreckages between 1980 and 1985, reporting and filing the location with the Colombia government.[244] According to this complaint, the SSA obtained permission from the Colombian maritime director to search the Colombian continental shelf for shipwrecks.[245]

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239. *Spain Says it has Rights to Colombian Treasure Ship*, BBC (Dec. 8, 2015), http://www.bbc.com/news/world-latin-america-35036121; Chris Kraul, *U.S., Colombian Treasure Dispute May Soon Play Out at Sea*, L.A. TIMES (Jan. 10, 2016, 3:00 AM), http://www.latimes.com/world/mexico-americas/la-fg-colombia-treasure-20160110-story.html.

240. *Sea Search Armada*, 821 F. Supp 2d at 274 (explaining how this case was also litigated before the Colombian Supreme Court, although there is no judicial opinion or other available court documents containing the court's holding); *see also* Jim Wyss, *Colombia Deep: The Fight Over Billions in Sunken Treasure*, MIAMI HERALD (Dec. 25, 2015).

241. *See* Willie Drye, *Fight for 'World's Richest Shipwreck' Heats Up*, NAT'L GEOGRAPHIC (July 20, 2018) (explaining the ongoing conflict in salvage efforts and contested ownership).

242. Jack Harbeston, *1980-2013 Chronology of Government of Colombia Expropriation of Property belonging to the American Investment Group, SSA*, IOTA PARTNERS & SEA SEARCH ARMADA (Dec. 14, 2015), http://www.iotapartners.org/chronology-of-litigation-in-colombia/. It is important to note the potential bias in authorship of information from SSA's chronology, as it is written from the perspective of a party in litigation with the Colombian government over the acquisition of the *San José* and its cultural property. Jack Harbeston is the Managing Director of the Sea Search Armada. *Id.*

243. Complaint ¶¶ 5–6, Sea Search Armada v. Republic of Colombia, 821 F. Supp. 2d 268 (D.D.C. 2011) (No. 10-Cv- 02083), *aff'd*, 522 F. App'x 1 (D.C. Cir. 2013).

244. *Id.* ¶¶ 9–10.

245. *Id.* ¶¶ 7–8.

Initial agreements with the Colombian government for the salvage of the *San José* were with GMC, the company that was later acquired by SSA,[246] which allegedly entitled GMC, and later SSA, the rights to thirty-five percent of the findings.[247] The initial offer was not signed by the Colombian government,[248] and SSA was never permitted to continue full salvage operations of the *San José*.[249]

In 1989, SSA sued Colombia for passing a law that would entitle SSA to only a five percent finder's fee, taxable at forty-five percent, alleging that the legislation was unconstitutional.[250] The initial legislation was passed in 1984 when Colombia issued Decree Number 2324 that created a commission to treasure finders of five percent, while Colombia was entitled to the other ninety-five.[251] In March 1994, the Colombian Constitutional Court declared the decree unconstitutional and unenforceable.[252] This decision, seemingly favoring SSA's position, resulted in further litigation.

SSA filed a civil suit in the Civil Court of Barranquilla to seek its commission for the discovery of the *San José*.[253] Colombia was in opposition to the suit claiming "lack of legal standing, non-existence of the claimed right, lack of action, lack of jurisdiction, lack of competence" and improper representation of the Plaintiff.[254] Colombia's opposition was ineffective, and the Barranquilla court determined that SSA was entitled to fifty percent of the recovered treasure.[255] According to this Colombian court, the *San José* was in joint tenancy between the Colombian government and SSA.[256] Colombia appealed this decision, but it was ultimately reaffirmed.[257] An injunction was filed by the Colombian government, resulting in the Colombian Supreme Court assuming control of the case.[258] The decision of the Supreme Court posited that indeed fifty percent of the treasure value—not amassed by cultural heritage—belonged to SSA.[259] This decision seemingly

246. *Id.* ¶¶ 10–11.

247. *Id.* ¶¶ 23–24.

248. *Id.* ¶¶ 10–11.

249. *Id.*

250. *Id.* ¶¶ 12, 24.

251. Juan Carlos Uribe & Jaime Escobar, *A Very Elusive Treasure: San Jose's Shipwreck Judicial Development*, MARTINDALE, https://www.martindale.com/corporate-law/article_Triana-Uribe-Michelsen_1513882.htm (last visited Apr. 28, 2018).

252. *See Sea Search Armada*, 821 F. Supp. at 270.

253. Harbeston, *supra* note 241.

254. Uribe & Escobar, *supra* note 251, at 2–3.

255. *Id.* at 3. Note, however, that this decision did not provide a monetary value or an explicit judgment under the terms cultural heritage, property, or otherwise.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 4.

reinforced the Civil Court's decision, though notably the separation of treasure from cultural heritage failed to confront the issue of what monetary value SSA might have been entitled to. As of 2018, the shipwreck has not been fully salvaged, leaving the actual monetary value and contents unknown.[260]

Following the Colombian decisions, and no action on the part of the Colombian government to produce a payment to SSA, litigation was moved to the U.S.[261] The Honorable James E. Boasberg, District Judge for the District of Columbia, described the 2010 complaint "reads like the marriage between a Patrick O'Brian glorious-age-of-sail novel and a John Buchan potboiler of international intrigue."[262] Within the complaint, SSA filed for breach of contract, conversion, and recognition and enforcement of a foreign judgment against the Colombian government.[263] Colombia opposed this litigation citing lack of subject-matter jurisdiction, insufficient process,[264] and claimed that the complaint failed "to state a claim upon which relief can be granted."[265] The district court dismissed the breach of contract claim because it was barred by the three-year statute of limitations and determined that, given SSA's previous litigation in Colombia, the case could have been raised in U.S. courts at an earlier date.[266] The court came to a similar conclusion about the conversion claim.[267]

The third count in SSA's complaint required more analysis. SSA's request for recognition and enforcement of a foreign judgment falls on the Uniform Foreign-Money Judgment Act.[268] Under this Act, "foreign-money judgment [are] enforceable in the same manner as the judgment of a sister jurisdiction which [are] entitled to full faith and credit."[269] The court correctly points out that this act is not enforceable on non-monetary judgments.[270] SSA's allegation were that fifty percent of the shipwreck's value was a money judgment, one that is estimated to be half of anywhere from $4 to $17 billion in U.S. currency.[271] SSA did not provide the district

260. Drye, *supra* note 241.

261. *Sea Search Armada*, 821 F. Supp. 2d 268 at 270.

262. *Id.*

263. *See id.*

264. *Id.*

265. *Id.* at 272; *see* FED. R. CIV. P. 12(b)(6).

266. *Sea Search Armada*, 821 F. Supp. 2d at 273.

267. *Id.* at 273–74 ("While it is true that Count II of the Complaint refers to the 2007 Colombia Supreme Court ruling and mentions actions taken thereafter, [citation omitted] Plaintiff cannot skirt around the fact that the allegations throughout the rest of the Complaint show that the conversion, if it occurred, began in 1984.").

268. *Id.* at 274.

269. *Id.* (quoting D.C. Code § 15-382).

270. *Id.* ("[T]he Act applies specifically to foreign-money judgments—that is, judgments 'of a foreign state granting or denying recovery of a sum of money . . . .").

271. Complaint ¶ 102, *id.* (No. 10-Cv- 02083).

court with a copy of the Colombian Supreme Court decision that allegedly granted this percentage.[272] Even assuming the validity of the Colombian opinion, the district court found a percentage to be inadequate because "[f]or a foreign judgment to be recognized[,] . . . courts have held that the sum of money awarded or denied must be *specific*."[273] The case was ultimately dismissed for failure to state a claim that could grant relief.[274] On appeal, the district court's decision was affirmed.[275]

In April 2013, SSA pursued further litigation against Colombia for tortious interference with contract and tortious interference with business relationships, asking for $17 billion in compensatory damages.[276] The U.S. District Court for the District of Colombia dismissed SSA's claims on the basis of *res judicata*, which precludes re-litigation of claims previously addressed or that could have been brought in an earlier lawsuit.[277] Though the potential for sanctions against SSA and its attorney were explored, the court ultimately decided against it.[278]

SSA continues to pursue opportunities for litigation and judgments against the Colombian government. According to the group's website, it filed a petition with the Inter-American Commission on Human Rights (IACHR) claiming Colombia "has violated, and is continuing to violate, SSA's human rights under IACHR Convention Articles 21 and 35, the right to own and enjoy property and the right to judicial protection."[279] No information about the filed petition was available via IACHR.[280] SSA's website states that "[f]urther litigation in the U.S. and Colombia is being considered, including a complaint to the U.S. Trade Representative, Office of Enforcement, that [Colombia] has violated the U.S.—Colombia

272. *Id.* at 274 (describing how the Plaintiff cited to a Colombian Supreme Court decision, but "does not provide a copy of the opinion, let alone an English translation, for this Court's review" and that "[i]t would be quite a step for the Court to simply decree Plaintiff is entitled to billions of dollars without ever seeing the basis of such request.").

273. *Id.*

274. *Id.* at 275.

275. Sea Search Armada v. Republic of Colombia, 522 F. App'x 1, 2 (D.C. Cir. 2013).

276. Complaint ¶ 102, *Sea Search Armada* (No. 10-Cv- 02083).

277. *Sea Search Armada*, 522 Fed. App'x. 1, 2.

278. *Id.*

279. Harbeston, *supra* note 242.

280. *See Reports on Cases*, INTER-AM. COMM'N H.R., http://www.oas.org/en/iachr/decisions/cases_reports.asp (last visited Apr. 29, 2018). IACHR has a procedure for determining admissibility of petitions, given the large volume received. After a preliminary evaluation is conducted, the IACHR decides whether or not to process the petition. Dinah Shelton, *The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System*, 5 NOTRE DAME J. INT'L & COMP. L. 1, 10–11 (2015). If the petition is processed, it progresses to the stage of determining admissibility. *Id.* SSA's petition was not available on IACHR's database, in the admissible, inadmissible, archival records, hearings, settlements, cases in court, or merits categories. It can therefore be assumed that IACHR did not find the petition to have merit to pass the preliminary evaluation.

Trade Promotion Agreement."[281] In U.S. courts, legal rights to ownership of the *San José* remains in Colombia.[282]

The crux of SSA's argument rests on whether the Colombian shipwreck discovery is the same discovery that SSA claimed to make in the 1980s. According to President Santos, "the shipwreck was discovered at a site 'never mentioned in previous studies.'"[283] The Colombian government claimed there was no evidence of a shipwreck at the coordinates provided by SSA, where the group alleged to have initially found the ship.[284] In December 2016, the Colombian government invited SSA to search its original coordinates to determine if the contested shipwreck is in fact the same.[285]

Largely absent from the application of law in the case of the *San José* is the UNCLOS treaty. SSA's arguments have primarily been made under the Law of Salvage, the Law of Finds, and international human rights laws.[286] Though outside the scope of this Article, the Colombian government has also made a number of legal arguments under its domestic law. The use of international laws governing underwater cultural property have not been fully explored yet in this case. It is likely, in the future, the use of other applicable laws will be introduced to settle the dispute of ownership. Also missing from the current legal analysis of the *San José* are the rights indigenous and cultural groups may have to the property onboard. The Ministry of Justice of Peru has asserted a cultural right to the property onboard, stating the gold and silver found on the *San José* was illegally extracted from the Incas.[287] This question has yet to be explored by the courts in the U.S., Colombia, or Peru.

B. *The* Mercedes

When the U.S.-based salvage firm, Odyssey, uncovered the "Black Swan," or the *Mercedes*, a legal battle ensued over the ownership of the

281. Harbeston, *supra* note 242.

282. *See Sea Search Armada*, 522 Fed. App'x. 1, 2.

283. Jim Wyss, *Colombia Finds Disputed 'Holy Grail' of Shipwrecks*, MIAMI HERALD (Dec. 5, 2015, 2:06 PM), http://www.miamiherald.com/news/nation-world/world/americas/colombia/article48182885.html (quoting President Santos from a press conference held after the Colombian discovery of the shipwreck).

284. *Id.*

285. Ana Marcos, *Sea Search Armada Acepta la Invitación de Colombia para Verificar las Coordenadas*, EL PAÍS (Dec. 7, 2016), http://cultura.elpais.com/cultura/2016/12/07/actualidad/1481118788_966341.html.

286. Harbeston, *supra* note 242.

287. *¿Cuál es la relación del Perú con el galeón San José valorizado en US$ 5,000 millones?*, GESTIÓN (Dec. 14, 2015), https://gestion.pe/tendencias/relacion-peru-galeon-san-jose-valorizado-us-5-000-millones-107225.

shipwreck and its contents.[288] In this case, the identity of the shipwreck itself was in question and in fact constitutes the majority of the legal questions at issue in determining the ownership of the wreckage. The position of the Spanish government was that "the [shipwreck] is unquestionably the remnants of the *Mercedes*; Spain has not abandoned its sovereignty of the vessel . . . Spain's warship should be accorded the same respect as those of the [U.S.]," and that the court here lacked subject matter jurisdiction.[289] Odyssey countered these claims by asserting that the wreckage was not that of a single ship, specifically that it was not the *Mercedes*.[290] The first task of the court in this case was to determine, based on the evidence, if the shipwreck in question was actually the *Mercedes*.

The court considered the historical context of the shipwreck, including its location, the wreckage, and property found at the site.[291] The court claims Odyssey "minimize[ed] the overwhelming circumstantial evidence pointing to the *Mercedes*—the location, coins, cannons, and artifacts."[292] Spain had plotted the likely location of the *Mercedes* based on the historical record and preliminary findings, which pointed to the identity of the questioned shipwreck being the *Mercedes*.[293] It was also known that the *Mercedes*, on her last voyage in 1804, was carrying roughly 900,000 coins, comprised of mostly silver.[294] Odyssey retrieved "approximately 594,000 coins; with an overwhelming disparity of silver to gold; dating from the latter half of the 18th century to no later than 1804; all of Spanish nationality."[295] Odyssey rebutted that the recovered coins came from the *Mercedes*, arguing against the identity of the wreckage as the *Mercedes*, asserting that Spanish currency was commonplace; the court, however, did not find this argument compelling enough to prove that the shipwreck was not the *Mercedes*.[296] The court also analyzed the cannons and other artifacts recovered from the shipwreck, including copper and tin.[297]

Spain filed a motion for summary judgment.[298] Within this motion, the State argued that the shipwreck was the *Mercedes*, as a shipwreck it was immune from Odyssey's lawsuit, and that any claims under the Law

288. Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel, 675 F. Supp. 2d 1126, 1130–31 (M.D. Fla. 2009), *aff'd*, 657 F.3d 1159 (11th Cir. 2011).

289. *Id.*

290. *Id.*

291. *Id.* at 1134.

292. *Id.*

293. *Id.*

294. *Id.* (noting that the *Mercedes* was carrying only "a few hundred gold coins").

295. *Id.*

296. *Id.*

297. *Id.* at 1135.

298. Cheng, *supra* note 137, at 700.

of Salvage and the Law of Finds were without merit.[299] It was Spain's position that underwater heritage should be for the benefit of mankind.[300] This language similarly mirrors the assertion of cultural property "for the benefit of mankind" found in the UNCLOS.[301]

The Republic of Peru also filed claims to the contents of the *Mercedes*.[302] Peru asserts that "the plurality of the coins recovered and thus far identified were struck at the mint in Lima, Peru."[303] As a sovereign nation, Peru asserts that the property onboard the *Mercedes* originated in its territory or was produced by people within its jurisdiction.[304] Under Peruvian law, "known or discovered archaeological objects, not privately owned . . . keep their condition of state-owned property . . . [and] cannot be conveyed nor acquired by prescription."[305] Descendants of the merchants who claim to have owned the property aboard the *Mercedes* have made similar claims.[306]

Ultimately, the court found the shipwreck was the *Mercedes*.[307] Although the U.S. court ultimately abandoned any jurisdiction it may have initially had over the property of the *Mercedes*,[308] the court acknowledged a relevant concern about the shipwreck's recovery. The *Mercedes* was a warship; when it went down at sea over 200 years ago, the lives of those on board went with it.[309] The court stated that "[i]nternational law recognizes the solemnity of their memorial, and Spain's sovereign interests in preserving it. This Court's adherence to those principles promotes reciprocal respect for our nation's dead at sea."[310]

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299. *Id.* at 700.

300. *Id.*

301. *See* UNCLOS, *supra* note 58, art 149.

302. Cheng, *supra* note 137, at 701.

303. *Id.* (quoting Claimant Kingdom of Spain's Motion to Dismiss or for Summary Judgment at 14, Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel, 675 F. Supp. 2d 1126, 1130–31 (M.D. Fla. 2009) (No. 8:07-cv-614–T–23MAP), 2008 LEXIS 96657, at *21.

304. *Id.* at 701.

305. L. 28296, julio 21, 2004, DIARIO OFICIAL [D.O.] art. 5; *see* JACK BATIEVSKY & JORGE VELANDE, *The Protection of Cultural Patrimony in Peru*, *in* ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 100, 101 (Barbara Hoffman ed., 2006).

306. Cheng, *supra* note 137, at 701.

307. *Odyssey Marine Expl.*, 675 F. Supp. 2d at 1134; *see also id.* at 1136 n.10 ("I find the evidence as to the [shipwreck's] identity so one-sided that Spain would prevail as a matter of law.").

308. *Id.* at 1130 (holding that the court lacked subject matter jurisdiction under the Foreign Sovereign Immunities Act).

309. *Id.* at 1148.

310. *Id.* (quoting Sea Hunt v. Unidentified Shipwrecked Vessel, 221 F.3d 634, 647 (4th Cir. 2000)).

In February 2012, a U.S. Magistrate Judge ordered Odyssey to return the *Mercedes* property to the Spanish government.[311] Odyssey filed an emergency application for the U.S. Supreme Court to stay the decision.[312] U.S. Supreme Court Justice Thomas denied the application without comment.[313] The Spanish Culture Minister, Jose Ignacio Wert, has since stated the contents of the *Mercedes* will go to "artistic exhibitions" in Spanish museums.[314] Wert stated that Peru did not formally file a claim for ownership over the contents of the *Mercedes*, but that the Spanish government would be open to "distributing some part of the treasure also among [to] Latin American museums."[315]

VI. PROBLEMS IN THE LAW

The courts paid little attention to international treaties in deciding the cases of the *San José* and the *Mercedes*. As of this writing (2018), the *San José* case has not reached a resolution,[316] but no assertions of international treaties have been made. Further, customary international law has not been utilized. Though it has been suggested that indigenous people in both Peru and Colombia, as well as descendants of merchant property owners,[317] may come forward with assertions of ownership, the courts have not explored the validity of these potential claims.

A. *The Case Studies*

The litigation surrounding the *San José* and the *Mercedes* has been largely done outside of the framework of international law. Despite international agreements, customary law, and general policies involving property ownership, these cases were both heard in U.S. courts. This is due, in part, to the U.S. retaining jurisdiction because of the location of the salvage firms in both cases.[318] The ships, in both cases, were presumed to be owned by Spain by default.[319] Though this may be the case with the ships themselves, what about the cultural property?

In the case of the *Mercedes*, the cultural property was treated as a mere extension of the shipwreck itself, insofar as the ship's national origin was

311. Al Goodman, *High Court Rejects Stay in Spanish Sunken Treasure Case*, CNN (Feb. 9, 2012, 7:43 PM), https://www.cnn.com/2012/02/09/us/sunken-treasure/index.html.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *See* Drye, *supra* note 241.

317. *See* Jim Wyss, *Colombia Plans to Salvage Storied Shipwreck Amid Legal Challenge*, MIAMI HERALD (July 6, 2017), https://www.miamiherald.com/news/nation-world/world/americas/colombia/article159904439.html.

318. *See supra* Parts I–III.

319. UNCLOS, *supra* note 58, art. 91.

ascribed to the cultural resources on-board.[320] The treatment of the wreckage as a single entity limits a fair application of the law, especially when considering the rights of potential indigenous claims. Despite international law suggesting otherwise, the archaeological resources onboard were not given deference in the decision making, particularly in the *Mercedes*, which reached a final decision in 2012.[321] In the case of the *San José*, only time will tell whether its resources will face a similar fate.

B. *The Laws Generally*

One of the biggest problems in the application of the UNCLOS is in its ambiguity. Article 149 provides for cultural property to be "preserved or disposed of for the benefit of mankind as a whole."[322] However, "benefit of mankind" is left undefined in this international agreement. The UN does not provide any further guidance to treaty-parties about what this phrase purports to mean. Instead, States are left with a framework of their own interpretation. The ambiguity of Article 149 continues to provide preferential rights to three distinct groups: (1) the State or country of origin; (2) the State of cultural origin; and (3) the State of historical and archaeological origin.[323] But what is a State to do when these three preferential parties are in disagreement? Without guidance from the UN, or applicable interpretations of these provisions, States are left with empty words in an international agreement meant to protect cultural property found at sea. The ambiguity leaves the entirety of Article 149, one of only two articles discussing cultural property in the UNCLOS, open for interpretation or misuse by the State. This interpretation falls in line with the overtly State-centric approach of cultural property laws.

Another term that lacks adequate definition is "cultural property," especially in international law. Domestically, cultural property may retain its own definition that is in opposition to the customarily understood meaning of the word. The trouble with defining such a broad concept is that a strict definition can act as an inherent limitation. Any property that retains cultural value to an individual or group, under the UNDRIP, may constitute cultural property. If an international body, like the UN, chooses to define this, then they must do so with care. Should cultural property include bullion and other "treasures" found aboard

320. *See* Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel, 675 F. Supp. 2d 1126, 1141–44 (M.D. Fla. 2009), *aff'd*, 657 F.3d 1159 (11th Cir. 2011).

321. *See id.* (finding "[a] vessel and its cargo are inextricably intertwined."); Odyssey Marine Expl., Inc. v. Unidentified Shipwrecked Vessel, 566 U.S. 1005, 132 S. Ct. 2379 (2012) (denying certiorari).

322. UNCLOS, *supra* note 58, art. 149.

323. *Id.*

shipwrecks? The current legal framework does not provide a clear answer to this. Arguably, if any property, including bullion, is acquired at the expense of a group's resources, labor, or ownership, then it should constitute cultural property.[324] In the case of the bullion found onboard the *San José* and the *Mercedes*, indigenous and cultural groups' labor and resources were appropriated in the manufacture of this property, and therefore should be considered cultural property.[325]

Further, the Laws of Salvage and Finds have the potential for misuse. These principles of maritime law are meant to reward third-parties that utilize their own resources to aid in wreck salvage or reduce found property to their own ownership.[326] Both of these principles exist under the assumption that such a third-party is not a bad actor.[327] If the salvor is a bad actor, this system is easily manipulated.[328]

The international community is concerned with "the subjective experience of groups from whom cultural materials and ideas originate."[329] Customary international law has been interpreting and changing views on moral rights to cultural property law. The 1948 Universal Declaration of Human Rights (UDHR) acknowledges cultural rights as "indispensable for . . . dignity and the free development of . . . personality."[330] Under the UDHR, "[e]veryone has the right to freely participate in the cultural life of the community, to enjoy the arts . . ." has been viewed as the foundation for the argument of a human right to access cultural property and cultural sites.[331] Engagement with cultural property and sites is needed for participation in cultural life. This is acknowledged by UNDRIP explicitly.[332]

The UNDRIP recognized that indigenous peoples and groups should control their cultural resources.[333] It calls for signing parties to agree to "seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession . . ."[334] This declaration "emphasizes that cultural independence is imperative to the human right to self-determination and creates a new class of rights based on the relationship

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324. *See* UNDRIP, *supra* note 194, arts. 26, 28 (stating indigenous peoples have rights, including for redress, any resources "they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired).

325. Cheng, *supra* note 137.

326. Cottrell, *supra* note 57, at 686.

327. *See id.* at 688.

328. *See supra* Part III.

329. Kimberly L. Alderman, *The Human Right to Cultural Property*, 20 MICH. ST. INT'L L. REV. 69, 72 (2011).

330. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 22 (Dec. 10, 1948).

331. Alderman, *supra* note 329, at 73.

332. *See supra* Part IV.

333. UNDRIP, *supra* note 194, art. 31.

334. *Id.* art. 12.

that indigenous peoples have with cultural objects and sites, recognizing this relationship exists independently of ownership concerns."[335] Moral issues and questions of compromise when dealing with indigenous post-colonial repatriation is a concern in the realm of cultural property law.[336] Yet, this topic rarely makes it into the case law.

This could be, in part, due to the difficulty of defining indigeneity. The word "indigenous" remains difficult to define, and the definition will largely be contingent on the definer's spatial, geographic, temporal, and cultural understanding.[337] Indigeneity is entirely contextual.[338] The task of defining "indigenous" becomes increasingly difficult when contentions over temporal or spatial existence in a geographic region prevail.[339] Definers must also question who is defining indigeneity and to what end.[340] Without a clear meaning of the word under an international law framework, it is easily manipulated to exclude people from conversations and valid claims.

The absence of indigeneity in underwater cultural property claims could also stem from indigenous groups' lack of standing, under the current framework, to assert such a claim. The UNDRIP and the UDHR seek to provide indigenous people with the necessary legal standing to assert claims for their cultural property and heritage.[341] However, the onus is then on indigenous groups and/or descendent communities to clearly demonstrate that any property in contention is, in fact, their archaeological, historical, or cultural property.[342] An example of the difficulty in administration of a rule with this stringency is evident in U.S. statutory law. For example, under the Native American Graves Protection and Repatriation Act,[343] indigenous people within the U.S. must demonstrate "cultural affiliation" with cultural patrimony before any claim for repatriation is valid.[344] This process is lengthy, expensive, and often impossible to successfully complete.[345]

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335. Alderman, *supra* note 329, at 75.

336. Kimberly L. Alderman, *Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples*, 45 IDAHO L. REV. 515, 521 (2009).

337. U.N., Permanent F. on Indigenous Issues, Factsheet: Who are indigenous peoples?, un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (last visited Oct. 29, 2018).

338. *See* AMY LONETREE, DECOLONIZING MUSEUMS: REPRESENTING NATIVE AMERICA IN NATIONAL AND TRIBAL MUSEUMS 23 (2012).

339. Manjusha S. Nair, *Defining Indigeneity: Situating Transnational Knowledge*, WORLD SOC'Y FOCUS PAPER SERIES 1, 3 (2006).

340. *See id.* at 6.

341. *See* Donald M. Goldberg & Tracy Badua, *Do People Have Standing? Indigenous Peoples, Global Warming, and Human Rights*, 11 BARRY L. REV. 59, 69–70 (2008).

342. *See supra* Part IV.

343. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (2018).

344. *Id.* § 3005.

345. *See* Chip Colwell-Chanthaphonh et al., *The Repatriation of Culturally Unidentifiable Human Remains*, 26 MUSEUM MGMT. & CURATORSHIP 27, 28 (2011).

If a similar framework were implemented in the international context, this process would be met with exceeding difficulty. There are around 370 million indigenous people globally, which can be equated to approximately five percent of the world's population.[346] With these numbers, indigenous people also constitute approximately one third of the world's most rural and poor people.[347] Most of these communities lack the resources to bring a claim for their cultural property into the world's courts.[348] This is in part due to economic restrictions, but also due to a need to prioritize resource allocation for survival.[349]

VII. A PROPOSED SOLUTION

The preferred management method for underwater cultural heritage, including shipwrecks, is to leave the property *in situ*.[350] *In situ* preservation is not always an option.[351] If *in situ* preservation is not a viable option, there needs to be an effective alternative to mitigate damage or destruction in an equitable balance with State, public, and private interests. When there are so many moving parts in the assessment of ownership over underwater cultural property, there needs to be an easier way to navigate the law. Here, I propose a new framework for determining ownership of underwater cultural property, derived from current international and U.S. law. An effective proposal will consider the deep, loaded histories of the two shipwrecks detailed above and the countless others that are currently unknown or undiscovered. The *San José* and the *Mercedes* were casualties of war and, as such, contain a deep history for both Spain and its colonies. Practically, there needs to be consideration for both procedural steps and equitable outcomes. An equitable outcome will call for indigenous rights to cultural property, but will also retain rights for interested States, public and private sector recovery, and commercial salvors. These actors may retain concurrent stakes in the outcome of shipwreck resource dispersal, whether such a stake is financial, cultural, or both. If any interested party lacks considerable deference, the efficacy of a remedy will be lost.

An ideal outcome would accomplish the following: (1) create adequate and workable procedural steps for States, salvors, and indigenous people to follow in the process of discerning ownership of shipwreck resources; (2) equitably balance the interests of States and

346. Press Release, U.N. Dep't of Pub. Info., State of the World's Indigenous People, U.N. Press Release DPI/255 1/L (Jan. 14, 2010).

347. *Id.*

348. *Id.*

349. *Id.*

350. John Broadwater & David Nutley, *The Management of Marine Archaeological Sites In Situ and Site Sustainability*, 11 CONSERVING MARINE CULTURAL HERITAGE 70, 70–71 (2013).

351. *Id.*

salvors with the interests of indigenous people or groups; (3) safeguard State and indigenous sovereignty; (4) provide standing for interested parties to seek relief over property disputes; (5) prescribe for a consultation process between the interested parties before any removal, destruction, or transportation of shipwreck resources occurs; (6) prevent illicit trafficking and looting of shipwreck sites; (7) penalize illegal conduct intending to withhold an interested party's valid property interest, including conduct caused by looting, destruction, or bad faith; and (8) allow for a division between the ship and its cargo. No singular extant law is sufficient to satisfy this ideal outcome. By borrowing from the different laws discussed in this Article, and introducing additional legal principles, I propose an alternative legal framework as a step in the right direction toward decolonizing shipwrecks. First, I set out the elements of other laws that may be reasonably used as a replacement model to the current framework. Then, I convey how these elements may amalgamate into the new framework.

A. *Borrowing from U.S. Cultural Resource Management Laws*

U.S. legislation for managing cultural resources is not applicable internationally; however, there are useful elements of current U.S. legislation that may guide an effective solution for shipwreck management. Extracting elements from three U.S. statutes for management of terrestrial cultural resources is advantageous. Adopting some of the procedural requirements of the NHPA can aid parties bearing the responsibility of managing discovered shipwrecks in international waters. Further, the ARPA permit requirements and penalties to parties violating the statute mirror two of the objectives described in the ideal solution above.[352] The NAGPRA lays a burden of both time and finances on tribes in fulfillment of the cultural affiliation requirement, but it also creates a prospect for repatriation of indigenous human remains and cultural objects.[353]

Procedurally, section 106 of the NHPA requires federal agencies to "take into account the effects" of federal actions on historic and archaeological sites and objects.[354] In considering the effects of federal action, these agencies must also provide the Advisory Council on Historic Preservation an opportunity to comment on the action.[355] Adverse effects on historic and archaeological resources broadly include destruction of or damage to the property, removal, change or alteration to the character of the property, neglect of the property, and transfer, lease, or sale of the

352. *See* Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470ee (2018).

353. *See generally* Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–13 (2018).

354. National Historic Preservation Act, 54 U.S.C. § 306108 (2018).

355. *Id.* § 304107.

property.[356] In the process of consultation, federal agencies must consult with state and tribal historic preservation offices and other interested parties, including Indian tribes and Native Hawaiian groups, "to develop and evaluate alternatives or modifications to the [federal action] . . . that could avoid, minimize, or mitigate adverse effects on historic properties."[357] Members of the general public are also given the opportunity to "express their views on resolving adverse effects" of the federal action.[358]

I will not unpack section 106 in its entirety. Useful for this analysis are the assessments of effects on historic and archaeological sites and the proposed consultation process between interested parties. The NHPA and its accompanying federal regulations elucidate the specifics of the section 106 process in the U.S., but in the international sphere, these regulations are too specific to enjoy useful application. There is no singular party responsible for global management of historic and archaeological sites at sea. Adopting the section 106 process in part, specifically its call for consultation and assessment of effects,[359] for shipwreck management would aid interested and implicated parties in the process of wreck management and protection. Internationally, this may involve States and international institutions adopting similar advisory councils with the purpose of overseeing an international iteration of this section 106 process in underwater cultural resource management. Where an appropriate administrative body already exists, it can incorporate the shipwreck management program into its other duties.

The ARPA prevents the unauthorized removal of archaeological resources,[360] and its provisions criminalize such unauthorized removal through fines and/or imprisonment.[361] Authorized removal of archaeological resources under the ARPA is permitted through the acquisition of a permit to excavate or remove resources from public or Indian land.[362] Consistent with any applicable management plans for these lands, an ARPA permit is issued only to those qualified to carry out the activity when the activity is in the public interest.[363] When the activity poses a possible harm or destruction to culturally or religiously important Indian sites, the permitting agency must first notify any potentially impacted Indian tribes.[364] Unauthorized removal or damage to

356. Protection of Historic Properties, 36 C.F.R. § 800.5(a)(2) (2018).
357. *Id.* § 800.6(a).
358. *Id.* § 800.6(a)(4).
359. *Id.* § 800.5.
360. Archaeological Resources Protection Act, 16 U.S.C. § 470ee(a) (2018).
361. *Id.* § 470ee(d).
362. *Id.* § 470cc(a).
363. *Id.* § 470cc(b).
364. *Id.* § 470cc(c).

archaeological resources is subject to criminal penalties.[365] These criminal penalties range from a $10,000 fine and/or one year of imprisonment to a $100,000 fine and/or five years of imprisonment.[366] The gravity of the penalty is concomitant with both the costs of restoration and repair and the number of violations an individual has incurred.[367]

In the U.S., the ARPA has been successfully applied to underwater cultural heritage cases.[368] Though the language of the statute primarily addressed terrestrial archaeological resources within U.S. jurisdiction,[369] its permit and penalty structure productively limits unauthorized access to archaeological resources. Following the creation of a management council corresponding to the NHPA provisions, an international management body could follow the permit and prohibition structure of the ARPA. This may involve a maximum and minimum fine and imprisonment penalty concomitant with the value, damage, or destruction of underwater archaeological resources. Such provisions can be imposed domestically or, where appropriate, by the UN's International Court of Justice.[370] States, under their own shipwreck management programs, can issue removal permits subject to their own domestic laws. The issuance of permits is already conducted in some international jurisdictions.[371]

Under the NAGPRA, Indian tribes and Native Hawaiian organizations are able to request the repatriation of certain cultural items after demonstrating cultural affiliation to such items.[372] Repatriation under the NAGPRA applies to cultural items removed from federal or Indian lands[373] and held by federal agencies and museums receiving federal funding.[374] The tribe or organization requesting the return of cultural objects must first demonstrate that they have a historic or prehistoric relationship of shared group identity with the cultural item by demonstrating "cultural affiliation."[375] Demonstrating the cultural affiliation requirement may be cumbersome,[376] but it provides an avenue

365. *Id.* § 470ee(d).

366. *Id.*

367. *Id.*

368. *See, e.g.*, Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511 (11th Cir. 1985).

369. Archaeological Resources Protection Act § 470aa(a) (noting the mention of federal and Indian "lands").

370. U.N. Charter art. 36, ¶ 3.

371. *See, e.g.*, L. 397, augosto 7, 1997, DIARIO OFICIAL [D.O.] art. 9 (Colom.) (stating that, for underwater cultural heritage, the Ministry of Culture of Colombia provides permit authorization for the removal of such underwater cultural resources in certain circumstances).

372. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3005(a) (2018).

373. *Id.* § 3002(a).

374. *Id.* § 3005.

375. *Id.* § 3001(2).

376. *Id.* § 3005(a)(4).

for extant groups to prove commonality with historic or prehistoric cultural items to request repatriation. Practically, a procedure for establishing cultural affiliation with archaeological objects is a process indigenous groups could utilize internationally to prove a cultural link with underwater cultural property after its discovery. Given the vast number of indigenous groups existing globally, such a procedure may be functionally necessary for creating a cause of action to ownership, or a share of ownership, in these resources. Proof of cultural affiliation in the U.S. is an expensive and difficult process.[377] If it were similarly applied in international jurisprudence, the evidentiary standard may need to be softened or allowable evidence may need to be expanded to take into account the breadth of indigenous identity globally.

B. *U.S. State Solutions Under the Abandoned Shipwrecks Act*

In the U.S., the ASA creates a duty for U.S. states to develop their own shipwreck management programs to handle issues arising from the discovery, removal, and ownership of abandoned shipwrecks in state jurisdictions.[378] Under the authority of the ASA, the NPS developed guidelines to aid states in developing their own laws in compliance with the statute.[379] States have independently developed their own bodies of law under the ASA. A discussion of all state ASA-compliant laws is beyond the scope of this Article,[380] but I have selected two state laws and

377. *See* Colwell-Chanthaphonh et al., *supra* note 345, at 39.

378. Abandoned Shipwrecks Act, 43 U.S.C. § 2101 (2018). For a detailed description of ASA, see *supra* Parts I–III.

379. *See* Abandoned Shipwrecks Act Guidelines, 55 Fed. Reg. 50116-01 (Dec. 4, 1990).

380. All fifty states in the U.S., and the District of Columbia, have legislation protecting underwater archaeological resources. *See* ALA. CODE § 41-9-290 (2018); *see also* ALASKA STAT. ANN. § 41.35.010 (West 2018); ARIZ. REV. STAT. ANN. § 41-841 (2018); ARK. CODE § 13-7-101-21 (2018); CAL. PUB. RES. CODE § 6301 (2018); COLO. REV. STAT. § 24-80-401 (2018); CONN. GEN. STAT. §§ 10-381 (2018); DEL. CODE ANN. tit. 7., § 5301 (West 2018); D.C. CODE ANN. §§ 102, 1101 (West 2018); FLA. STAT. ANN. § 26.011 (West 2018); GA. CODE ANN. § 12-3-80 (West 2018); HAW. REV. STAT. ANN. § 6E-1 (West 2018); IDAHO CODE ANN. § 67-4601 (West 2018); 20 ILL. COMP. STAT. ANN. 3436 §§ 1–11 (West 2018); IND. CODE ANN. § 14-29-1-8 (West 2018); IOWA CODE ANN. § 263B (West 2018); KAN. STAT. ANN. §§ 75-2715, 74-5401 (West 2018); KY. REV. STAT. ANN. § 164.705 (West 2018); LA. STAT. ANN. § 41:1601 (2018); ME. REV. STAT. ANN. tit. 27, § 371 (2018); MD. CODE. ANN., STATE FIN. & PROC. § 5A-333 (West 2018); MASS. GEN. LAWS ANN. ch. 91, § 63 (West 2018); MICH. COMP. LAWS ANN. § 324.76101 (West 2018); MINN. STAT. ANN. §138.31 (West 2018); MISS. CODE ANN. § 39-7-3 (West 2018); MO. ANN. STAT. § 253.420 (West 2018); MONT. CODE ANN. § 22-3-101 (West 2018); NEB. REV. STAT. ANN. § 82-503 (West 2018); NEV. REV. STAT. ANN. § 383.011 (West 2018); N.H. REV. STAT. ANN. § 227-C (2018); N.J. STAT. ANN. § 13:1 (West 2018); N.M. STAT. ANN. § 18-6-1 (West 2018); N.Y. PARKS REC. & HIST. PRESERV. LAW § 14.09 (McKinney 2018); N.C. GEN. STAT. ANN. §§ 121–22 (West 2018); N.D. CENT. CODE ANN. § 55-10 (West 2018); OHIO REV. CODE. ANN. § 1506.1 (West 2018); OKLA. STAT. ANN. tit. 53, § 361 (West 2018); OR. REV. STAT. ANN. § 358.905 (West 2018); 37 PA. STAT. AND CONS. STAT. ANN. §§ 501–12 (West 2018); 42 R.I. GEN. LAWS. § 42-45-1 (2018); S.C. CODE ANN. § 54-7-610 (2018); S.D. CODIFIED LAWS. § 1-20-17 (2018); TENN. CODE. ANN. § 11-6-

programs that may serve as templates in developing similar international legal systems. For my purposes, the laws of Massachusetts and South Carolina provide helpful guidance.

1. Massachusetts

Under the ASA, states have the authority and responsibility to develop appropriate policies and administrative bodies to manage their underwater resources.[381] Pursuant to this authority, the Board of Underwater Archaeological Resources (BUAR) was established under a Massachusetts state statute to act as a trustee to manage, protect, and preserve underwater cultural resources.[382] Specifically, it is the BUAR's duty and responsibility to "encourage the discovery and reporting of and to protect and preserve historical, scientific and archaeological information about underwater archaeological resources located within the inland and coastal waters of [Massachusetts]."[383] Massachusetts holds title to underwater archaeological resources located in the inland and coastal waters of the state.[384] Under its authority by the state, the BUAR created state regulations to specify its authority over underwater cultural resources.[385]

Massachusetts law prevents the unauthorized recovery and salvage of underwater cultural resources.[386] Under state law, "[n]o person, organization or corporation may remove, displace, damage or destroy underwater archaeological resources" without procuring an exemption permit.[387] To acquire a permit for operations involving underwater archaeological resources, an individual or organization must first demonstrate to the BUAR that the proposed activity is in the public interest.[388] The BUAR issues permits "to persons who have located a shipwreck or other resource for purposes of investigation, exploration,

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121 (West 2018); TEX. NAT. RES. CODE ANN. § 191.001 (West 2018); UTAH CODE ANN. § 9-8-301 (West 2018); VT. STAT. ANN. tit. 22, § 701 (West 2018); VA. CODE ANN. § 10.1-2200 (West 2018); WASH. REV. CODE ANN. § 79.105.600 (West 2018); W. VA. CODE ANN. § 29-1-1 (West 2018); WIS. STAT. ANN. § 44.47 (West 2018); WYO. STAT. ANN. § 36-1-114 (West 2018).

381. Abandoned Shipwrecks Act § 2103.

382. MASS. GEN. LAWS ANN. ch. 6, § 179 (West 2018).

383. *Id.* § 180. Underwater archaeological resources under this statute include "any of the following which have historical value: abandoned properties, artifacts, treasure trove or sunken ships, which have remained unclaimed for one hundred years or more or which are valued at five thousand dollars or more, within the inland or coastal waters of the commonwealth as defined in section one of chapter one hundred and thirty and section one of chapter one hundred and thirty-one, respectively, or upon lands thereunder, or any other objects one hundred years old or judged by the board to be of historical value which are located inside, upon or around said resources." *Id.*

384. *Id.*

385. *See* 312 MASS. CODE REGS. 2 (2018).

386. MASS. GEN. LAWS ANN. ch. 9, § 63 (West 2018).

387. *Id.*

388. *Id.*

recovery, reporting, and/or conservation of underwater archaeological resources if the Board deems that such operations are in the public interest."[389] The BUAR issues three types of permits: reconnaissance,[390] excavation,[391] and special use.[392]

Permittees are required to maintain accurate and updated records of the activities carried out under the authority of the acquired permit.[393] Permittees may retain seventy-five percent of the value of the archaeological resources authorized for removal under the permit.[394] The remaining twenty-five percent of the value is paid to the state, "provided however, that [Massachusetts] and private museums within the [state] shall have the first option to purchase within six months said resources at fair market value."[395] Final disposition of the resources authorized by permit must be made within one year of the date of salvage, unless other arrangements are made with the state.[396] Salvage operations may not occur within designated underwater archaeological preserves.[397]

Massachusetts law makes an exemption for "isolated finds,"[398] defined as "single unassociated artifacts."[399] If isolated finds are not of major historical value, title and the entire value of the find may vest with the finder.[400] Given the nature of shipwrecks, the exemption for isolated finds would likely not be implicated. The BUAR also retains the discretion to exempt a site from the permitting process when it is best left in the public domain because of its location, condition, history, or resource value.[401]

The underwater cultural resource protection provided for under Massachusetts law heavily supports the rights of salvors. Whereas traditional admiralty common law calls for a fifty-fifty split, Massachusetts provided for a seventy-five percent compensation for authorized salvage operations.[402] No percent allocation is provided for

389. 312 MASS. CODE REGS. 2.06 (2018).

390. *Id.* 2.06(1)(a) ("[G]ranted for the non-disruptive inspection and identification of an underwater archaeological resource and is characterized by minimal site disturbance.").

391. *Id.* 2.06(1)(b) ("[G]ranted to uncover and/or recover archaeological resources through the use of disruptive investigation techniques.").

392. *Id.* 2.06(1)(c) ("[G]ranted to address underwater archaeological investigations associated with a project's environmental review and public planning purposes, or other scientific purposes.").

393. *Id.* 2.09(3)(a).

394. MASS. GEN. LAWS ANN. ch. 9, § 63 (West 2018).

395. *Id.*

396. *Id.*

397. *Id.*

398. 312 MASS. CODE REGS. 2.15(1) (2018).

399. *Id.* 2.04.

400. *Id.* § 2.15(1).

401. *Id.* § 2.15(2).

402. *Id.* § 2.13(2).

Indian tribes under this system.[403] In fact, the BUAR asserts title remains in the state for "submerged Native American sites," in addition to shipwrecks.[404] By requiring permits for salvage operations, the state is able to retain valuable cultural and historic resources for public use under the ownership of the state. Permit acquisition allows for salvors to retain rights to salvage wrecks and their resource value while also preventing certain sites from being eligible for recovery.

2. South Carolina

The South Carolina Institute of Archaeology and Anthropology (Institute) manages the state's underwater cultural resources pursuant to the South Carolina Underwater Antiquities Act of 1991 (Act).[405] The Institute is the custodian of submerged archaeological historic property and artifacts owned by the state or located on lands owned by the state.[406] In South Carolina, the title to all submerged archaeological resources rests with the state; however, the state maintains the discretion to convey this title to a licensee in accordance with its Act.[407]

Similar to Massachusetts's permit requirements, South Carolina calls for a license to conduct activities affecting submerged archaeological resources, namely salvage operations.[408] The licensed activities, such as removal or destruction, must fall within the interests of the public and the state.[409] In addition to applying for a license to excavate or destroy a submerged site that is commercial in nature, an applicant must also provide a research plan with assurance to the Institute that the plan will be adhered to in the process of recovery.[410] The proposed resources for removal must be determined by the Institute to not be of primary scientific archaeological, anthropological, historical, recreational, or other public value.[411] In deciding whether to issue a commercial license to an applicant, the Institute may require a public hearing before a decision is made to grant the applicant's license.[412] This hearing allows the public an opportunity to question, comment, and respond to the license application and the applicant himself.[413] Further, the Act requires that " [a]t all times the work must be under the immediate supervision of

403. *See id. passim* (noting the absence of any mention of an allocation for Indian tribes).

404. *Board of Underwater Archaeological Resources*, MASS.GOV, https://www.mass.gov/orgs/board-of-underwater-archaeological-resources.

405. *See* S.C. CODE ANN. § 54-7-620 (2018).

406. *Id.* § 54-7-640.

407. *Id.* § 54-7-630.

408. *Id.* § 54-7-650.

409. *Id.* § 54-7-650(A).

410. *Id.* § 54-7-700(B).

411. *Id.* § 54-7-770(B).

412. *Id.* § 54-7-710(D).

413. *Id.* § 54-7-710(D).

a professional field archaeologist" for each license issued.[414] This provision purports to prevent salvors from engaging in destructive recovery techniques even under a commercial state-issued license.

Unlike Massachusetts, South Carolina does not require a license or permit for non-invasive, non-destructive activities, such as inspection, study, reconnaissance, or the use of detection devices.[415] This is the case so long as the activity does not involve any excavation, destruction, or disturbance of the site or violate other state, local, or federal laws.[416] The state does allow for "hobby licenses," which are issued to those individuals wishing to conduct noncommercial search and recovery of submerged cultural resources.[417] Hobby licenses only allow an individual to recover "a limited number of objects which can be recovered by hand," and it disallows any mechanical equipment or lifting devices.[418] If objects obtained under this license are not considered by the Institute to be artifactual items under the Act, the hobby licensee may retain the objects.[419]

Successful applicants for a license to recover submerged cultural resources may be entitled to division of the recovered property between the recoveree and the state.[420] Such a division "may be in value or in kind, with the [Institute] acting as arbiter of the division in the best interests of the State and giving due consideration to the fair treatment of the licensee."[421] Salvors acting under a commercial salvage license, called a data recovery license in the Act, "must receive at least fifty percent of the artifacts and/or fossils recovered in value or in-kind."[422] The Act provides for special circumstances where the Institute initiates an agreement with a salvor to recover submerged resources, in which case, the salvor is entitled to "receive reasonable compensation for any recovered submerged archaeological historic property . . . claimed and turned over to the State."[423] In some instances where the salvor and finder are different individuals or entities, the Act requires a finder's fee of twenty-five percent of the salvor's share to be paid to the finder.[424]

South Carolina's approach provides an example of submerged resources being divided between different interested parties. In the case

414. *Id.* § 54-7-740.
415. *Id.* § 54-7-660.
416. *Id.* § 54-7-660.
417. *Id.* § 54-7-670(A). The number of items recovered this way from shipwrecks is limited to ten per day. *Id.* § 54-7-670(G).
418. *Id.* § 54-7-670(F).
419. *Id.* § 54-7-670(G).
420. *Id.* § 54-7-650(C).
421. *Id.* § 54-7-650(D).
422. *Id.* §.§ 54-7-770(2).
423. *Id.* § 54-7-770(2).
424. *Id.* § 54-7-785.

of the Act, this includes the state, salvors, and finders. It also creates variations in what is disposed to the salvor, whether it is the property itself or monetary compensation in-kind. The disposition of recovered resources has more flexibility under South Carolina's shipwreck management program than under Massachusetts's plan. South Carolina's shipwreck laws are instructive for an international shipwreck management plan.

C. *The Public Trust Doctrine*

The Public Trust Doctrine (PTD) is a legal principle derived from property common law proposing that sovereigns hold some natural and cultural resources in trust for the public.[425] These resources are held in trust for present and future generations under government safeguards for public benefit.[426] In the U.S., the PTD has provided standing in environmental litigation against the federal government.[427] The PTD in U.S. jurisprudence arose from an early case, *Illinois Cent. R.R. Co. v. Illinois*.[428] In this case, the Supreme Court found an implication of a "trust" on submersible lands that held an important value to the greater public.[429] The trust resulted in a retained property right, held by the entire public, in lands later acquired by a private party.[430] To address the paternalistic nature of such a relationship, the PTD "involves a sovereign trust model, but with no guardian-ward aspect."[431] The fundamental effect of the PTD was to create a restriction on government action. It created a fiduciary duty for the government to protect the resources for current and future generations.[432]

If applied to a State trust relationship in cultural property, then the PTD would act to prevent the government from disavowing their responsibility to protect and preserve the cultural property belonging to indigenous people.[433] Applied internationally, under the PTD, a State

425. Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part i): Ecological Realism and the Need for A Paradigm Shift*, 39 ENVTL. L. 43, 45 (2009).

426. *Id.* "A trust is a basic type of ownership whereby one manages property for the benefit of another. An ancient yet enduring legal principle, it underlies modern environmental statutory law." *Id.*

427. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1242 (D. Or. 2016).

428. 146 U.S. 387 (1892).

429. *Id.* at 452.

430. *Id.* at 455.

431. Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 359 (2003).

432. MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 165 (2014).

433. *See id.* at 136–38.

would hold cultural property *in situ* or in repositories for the benefit of the public, unless doing so was not in the public interest. The State would not act as property owners, but instead as the trustee holding the property "for the benefit of mankind as a whole."[434] Perhaps most importantly, a PTD relationship would provide the public and indigenous people with standing in a cause of action for resource mismanagement by the State.[435] If such a trust relationship were created outside U.S. jurisdictions, it should be enacted through an international agreement in conjunction with State domestic law. The establishment of the State as the trustee of cultural property could be most effective at the State-level, using domestic law. State-level legislation would ease cause of action complaints by providing the public with a venue for their complaints to be heard.

D. *Incorporating U.N. Treaties and Conventions*

Few conventions and treaties under the current UN legal framework provide much guidance to decolonizing underwater cultural heritage. Current UN documents already exist to govern, at least to a degree, these resources.[436] I discussed these conventions and treaties earlier in this Article. Because these documents are international conventions and treaties enacted, adopted, and managed by the UN and its agencies, there is not much room here to provide realistic suggestions for changes with much authority. These laws are not without their flaws, as I explained in the previous section of this Article. The UN legal framework for this area of law is comprised of the following: the UNCLOS, the CPWCNH, the CPUCH, and the CPICP.[437] Here, I look to the UNDRIP to examine how it might be applied and incorporated, even idealistically, in the context of submerged cultural resources.

Under the UNDRIP, States are to provide redress to indigenous people for the appropriation, taking, or destruction of cultural resources or property.[438] This declaration is meant to create a system for indigenous people to turn to States for redress. The UNDRIP calls for "effective mechanisms" for redress, which may include restitution or other appropriate remedies, like repatriation.[439] The UNDRIP's favoring of redress goes in "a particular order: first as the thing taken, second as a like-kind substitute, and third as monetary compensation."[440] The

434. *See* UNCLOS, *supra* note 58, pmbl.

435. *See, e.g.*, *Juliana* v. United States, 217 F. Supp. 3d 1224, 1242–45 (D. Or. 2016).

436. *See* UNCLOS, *supra* note 58; *see also supra* Part IV for a discussion of relevant UN conventions.

437. *See supra* Parts I & IV for a detailed description.

438. *See* UNDRIP, *supra* note 194, art. 11.

439. *See id.*

440. Cheng, *supra* note 137, at 729.

functional benefit to indigenous people of these three categories of redress may depend on the type of cultural resources involved. For example, an object of cultural patrimony—an inalienable object with continual importance to the heritage, cultural, tradition, or history of a shared group—or human remains may warrant a different approach than minted coins, which may hold a greater monetary value than cultural value. This is, of course, an example. There are no one-size fits-all molds for cultural resources. An object type of supreme importance to one cultural group may not hold similar value to a disparate group. If international communities look to the UNDRIP for guidance, then the type of property involved should be considered first, in consultation with the affected group, to maximize an equitable result for all interested parties.

The return of "the thing taken," theoretically, will provide indigenous people with a cause of action to regain control and assert ownership over unique, meaningful, and irreplaceable cultural property. This may include human remains, objects of cultural patrimony, sacred or funerary objects, or other objects with a cultural value that outweighs the stake of other parties when balancing equities. Realistically, this may not consistently be practicable in real-world situations.

The second category of return provided for in the UNDRIP is the offering of a "like-kind" substitute. If a like-kind substitute is offered, then it should be done at the request of indigenous people where a like-kind substitute is a better solution than monetary compensation. By returning the property, or a like-kind substitute, to the indigenous peoples and/or descendent communities, the State will meet its obligation to use an "effective mechanism" for return under the UNDRIP.

In the cases of the *San José* and the *Mercedes*, following the UNDRIP's first category of return, this would include return of cultural property.[441] to those indigenous people who initially owned it or whose labor and resources were used in its acquisition. The UNDRIP is unclear how broadly to interpret cultural property when States consider repatriation. In the *Mercedes* case, for example, Incan Peruvians' labor and natural resources were appropriated in the minting and acquisition of silver, gold, and other precious metals found onboard the wreck.[442] Incan cultural and natural resources and labor to create these coins appears to demonstrate evidence of the property as cultural heritage; however, whether this is enough evidence for a State to consider repatriation of the

441. *See* UNDRIP, *supra* note 194, art. 12 ("States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned."). However, UNDRIP provides little guidance on what constitutes cultural property outside of human remains or ceremonial objects.

442. Cheng, *supra* note 137, at 729.

coins under the UNDRIP is unclear. This predicament is further complicated by questioning what other interested parties may have contributed labor, resources, or time in the acquisition of these properties (and then, of course, whether the interested parties similarly have a claim to the coins as cultural property). Practically, if salvors were involved in the acquisition of these cultural resources, States need to consider their financial obligations to salvors to provide them with their share of the property—or the property's value—under the applicable law in such circumstances.

The third category of return, monetary compensation, may provide relief for indigenous people in some cases when repatriation of the object or a like-kind substitute is not available or not requested by the impacted indigenous group. Under some circumstances, the value of the cultural property may be more beneficial to a community by a payment of restitution as opposed to object repatriation. The Incan coins on the *Mercedes* are an example where circumstances may favor restitution as a more practical and beneficial solution for indigenous people than the return of the coins of themselves. Practical considerations for indigenous people favoring monetary compensation under some circumstances may include the financial needs of their people, suitable repositories to house returned property, and the cultural value of the object in question.

Regardless of the category of return employed, it is paramount States act responsibly and in the best interest of indigenous people through consultation. Different communities, people, or groups may want outcomes that are not expected by the State. Communication with the affected parties will let States adapt to a variety of individualized needs in the process of cultural property return. This process will be most effective if assessments are made case-by-case, through consultation.[443]

E. *A New Solution*

In accordance with the principles of the ideal outcome I postulated at the start of this section, and supported by my evaluation of U.S. laws and UNDRIP above, I propose:

> (1) States create a shipwreck management program, similar to the programs authorized in the U.S. under the ASA;
>
> (2) States create an underwater cultural property advisory council or government agency or vest the responsibilities of the shipwreck management program in an extant State institution or agency;

443. *See, e.g.*, Chip Colwell, *Collaborative Archaeologies and Descendant Communities*, 46 ANN. REV. ANTHROPOLOGY 113, 115 (2016) (explaining how collaboration "necessitates a form of cross-cultural communication and negotiation").

(3) States and international institutions, such as the UN, enact an assessment and consultation process to be completed prior to the excavation, removal, or destruction of shipwrecks similar to the NHPA section 106 process;

(4) States require the issuance of permits or licenses prior to the excavation, removal, salvage, or reconnaissance of shipwrecks, with requirements for professional competency and archaeological consultation, mirrored after elements of Massachusetts's and South Carolina's state statutes enacted pursuant to the ASA;

(5) States allow for indigenous people and/or descendant communities to demonstrate cultural affiliation with discovered shipwrecks and their cargo as a means to establish that the nature of the found property is cultural property;

(6) States criminalize the unauthorized removal, excavation, salvage, or destruction of shipwrecks, similar to the ARPA, wherein penalties are concomitant with the cost of repair or the value of the objects;

(7) The disposition of cultural property is divisible by category (human remains, other culturally significant objects, and objects of primarily commercial value);

(8) When indigenous interests are involved, the division of cultural property is executed in compliance with the UNDRIP's preferred repatriation and restitution order under consultation with the appropriate indigenous groups and/or descendant communities;

(9) The State, salvors, and/or indigenous people and/or descendant communities are entitled to a share of the cultural property; and,

(10) States enact a legal principle similar to the PTD where they hold natural and cultural resources in trust for the benefit of the present and future public to provide a cause of action for resource mismanagement.

Under section nine of this proposal, I suggest States do not follow the traditional fifty-fifty split or a higher split favoring the salvors, such as that authorized by the Massachusetts example. Instead, I propose salvors are entitled to fifty-percent of the fair market value of the property or the property itself when such property is not culturally significant and/or associated with an indigenous group and/or descendant community, with the remaining fifty-percent of the property belonging to the State. If more than one State has a valid interest in the property, such as with the *San*

Jose and the *Mercedes*, I recommend an equitable split of the value of the property to each party with a valid stake in the property.

If there is an indigenous interest in the property—or if the shipwreck contains cultural resources such as indigenous human remains, objects of cultural patrimony, or sacred or funerary objects—I suggest the agency or institution responsible for managing a State's shipwrecks consult with the associated people to determine whether repatriation or monetary restitution—or some combination—is appropriate. Where monetary restitution is appropriate, I propose the value of the property is split in thirds between the indigenous people, the State, and the salvors. If the property is culturally significant, but monetary restitution is still the more appropriate remedy under the circumstances, I propose States hold the cultural property in trust for the benefit of the public, providing the necessary means for appropriate parties to bring a cause of action in their country's courts. Under this framework, title to cultural property should not vest in salvors when there is an indigenous interest in the property. Title to culturally significant properties should only vest in the appropriate indigenous groups or in the State. Where requested, and when it is viable, culturally significant properties should be returned to the interested indigenous group under the UNDRIP.

CONCLUSION

The case studies of the *San José* and the *Mercedes* provide insight into the real-world applicability of underwater cultural heritage law. It is a complex, and often chaotic, body of law. Neither the international legal framework nor the case law suggest that there has been a "right" or "wrong" answer for law application in most of the decisions. One thing that is clear, however, is that the rights of indigenous people are not acknowledged or protected in the laws governing underwater cultural heritage. Treating cultural property rights as human rights is one step toward appropriate redress for indigenous people.

According to Dr. Robert Ballard, famous for his 1985 discovery of the *R.M.S. Titanic*: "The deep ocean is the largest museum on earth."[444] The job of underwater cultural resource laws is to protect it. In doing so, it is important these laws are enacted with consideration of the impact shipwreck discoveries have on all parties—not just the State or the salvor, but also the greater public and indigenous communities. The body of international law governing shipwrecks and the heritage found onboard needs more clarification and incorporation of indigenous ownership rights to be effective at equitably balancing the interests of those affected

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

by shipwreck discoveries. Its effectiveness also calls for changes to its overtly State-centric approach at the exclusion of indigenous rights. Here, I sought to propose an alternative framework to begin addressing the proprietary interests of a State's indigenous people in an equitable and sustainable manner. Though it is not a perfect solution, it may be a start to begin acknowledging and redressing the effect colonialism has had on indigenous populations and descendent communities globally.

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