

ALL IN THE SAME BOAT? INDIGENOUS PROPERTY RIGHTS IN UNDERWATER CULTURAL HERITAGE

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I. INTRODUCTION

In March 2007, Odyssey Marine Corporation (Odyssey)¹ discovered the controversial *Black Swan*² treasure on the Atlantic sea floor.³ The treasure is worth approximately \$500 million and consists of silver and gold coins.⁴ This extraordinary discovery has resulted in a Federal Court case, in which Spain, Peru, and descendants of Spanish Merchants have all asserted a claim to the treasure. Notably absent from the claimants are the

1. Odyssey engages in the exploration and recovery of deep-water shipwrecks from around the world. Odyssey Marine Exploration, Company Overview, <http://shipwreck.net/companyoverview.html> (last visited Apr. 10, 2010).

2. “Black Swan” is the code name Odyssey Marine Corporation assigned to the disputed treasure. *Spain Sues Over Shipwreck Bonanza*, BBC NEWS, May 30, 2007, <http://news.bbc.co.uk/2/hi/europe/6705613.stm>.

3. Am. Verified Compl. in Admiralty, No. 8:07-CV-00614-SCB-MAP, Aug. 7, 2007 [hereinafter Odyssey Complaint].

4. Greg Allen, *Odyssey Marine, Spain Dispute Treasures*, NAT’L PUB. RADIO, Oct. 24, 2007, <http://www.npr.org/templates/story/story.php?storyId=15584445> (noting an “estimated half-billion dollars in gold and silver”). The treasure consists of over 500,000 gold and silver coins. Terry Aguayo, *A Bountiful Undersea Find, Sure to Invite Debate*, N.Y. TIMES, May 19, 2007, at A7.

indigenous people from whose land and labor the ore was transformed into its current form. This paper analyzes the rights indigenous people have in international law over items that they can fairly claim to be their cultural heritage. In particular, this paper addresses the claims indigenous people may have regarding the salvaged coins. Because there are an estimated three million undiscovered shipwrecks in the oceans of the world,⁵ many containing untold wealth and history, questions over indigenous peoples' rights to their underwater cultural heritage are likely to continue in the future.

Part II of this paper will discuss the history of the *Black Swan*, the current claims to the *Black Swan* coins, and the indigenous peoples' relationship to the mining of those coins. The coins discovered by Odyssey were mined and minted in Peru when Peru was still a viceroyalty of the Spanish Empire.⁶ These precious metals were mined through the exploitation of indigenous people⁷ under terrible working conditions,⁸ and then transported to Spain with little benefit to themselves or their community.⁹ The fused relationship of the coins to the history of indigenous Peruvians is evidence that the coins represent their cultural heritage.¹⁰ Therefore, indigenous Peruvians should

5. Press Release, UNESCO, UNESCO Urges Americas to Join the Underwater Heritage Conventions, No. 2002-38 (June 12, 2002), http://portal.unesco.org/en/ev.php-URL_ID=3304&URL_DO=DO_TOPIC&URL_SECTION=201.html.

6. *A Tale of Colonial Ships and Peruvian Gold*, EN PERU, Jan. 15, 2010, <http://enperublog.com/2010/01/15/a-tale-of-colonial-ships-and-peruvian-gold/>.

7. The indigenous people of Peru consist of diverse ethnic, cultural, and linguistic groups. See MINISTERIO DE EDUCACIÓN, DIRECCIÓN NACIONAL DE EDUCACIÓN BILINGÜE INTERCULTURAL, POLÍTICA NACIONAL DE LENGUAS Y CULTURAS EN LA EDUCACIÓN 2 (Mar. 2002), <http://www.pucp.edu.pe/eventos/intercultural/pdfs/inter17.PDF>.

8. EUSEBIO QUIROZ PAZ SOLDÁN, *Capítulo III Aspectos Económicos y Sociales*, in V HISTORIA GENERAL DEL PERÚ, EL VIRREINATO 245, 267-68 (1994); see also John Fisher, *Mining and the Peruvian Economy in the Late Colonial Period*, in THE ECONOMIES OF MEXICO AND PERU DURING THE LATE COLONIAL PERIOD, 1760-1810, 46, 52 (Nils Jacobsen and Hans-Jürgen Puhle eds., 1986) (“[T]hey usually worked long hours in harsh conditions for very small wages”).

9. PAZ SOLDÁN, *supra* note 8, at 269.

10. See Tolina Loulanski, *Revising the Concept for Cultural Heritage: the Argument for a Functional Approach*, 13 INT'L J. CULTURAL PROP. 207, 218 tbl.2 (2006) (depicting the shifting role of cultural heritage from “national unity” to “respect for cultural diversity”). Loulanski recognizes that today “heritage has a more human face; it can also be dark, painful, dramatic or unpleasant.” *Id.* at 213 (internal quotation marks omitted).

have standing to assert a claim to them. Unfortunately, as discussed in Parts III and IV of this paper, any rights indigenous people would have to the coins are for the most part ignored in State-centric international conventions and declarations.

II. ORIGINS OF THE *BLACK SWAN* TREASURE

A. *History of the Black Swan*

The recent development of advanced deep-sea sonar and magnetometer technology has made feasible the discovery of forgotten wrecks hidden in deep international waters.¹¹ One shipwreck discovered using this technology is the *Black Swan*.¹² The *Black Swan* lies approximately 100 miles west of the Straits of Gibraltar in the Atlantic Ocean.¹³ Odyssey has kept its precise location secret to protect the find from other treasure hunters.¹⁴ Although Odyssey has yet to confirm the identity of the shipwreck carrying the treasure, Spain claims that it is the “*Nuestra Señora de las Mercedes*” (the *Mercedes*), a Spanish warship sunk by the British in 1804.¹⁵

According to Spanish authorities, the *Mercedes* was an official warship of the Royal Spanish Navy.¹⁶ The Spanish built the *Mercedes* in Havana in 1788; subsequently, the ship participated in combat operations and the transport of troops, cargo, and government officials.¹⁷ On February 27, 1803, the *Mercedes* embarked on her final mission, carrying Royal Treasury coins from the Peruvian port of El Callao to Cádiz, Spain.¹⁸ By the time the *Mercedes* reached El Callao, France (an

11. A magnetometer identifies high concentrations of ferrous metals. Rich Green, *Metal Detection Reconnaissance*, HISTORIC ARCHAEOLOGICAL RESEARCH, <http://www.har-indy.com/Methods.html>.

12. Odyssey Complaint, *supra* note 3, at 5.

13. *Id.* at 2.

14. Pl’s Mot. for Protective Order Regarding Preliminary Site Assessment, 9, Aug. 6, 2007.

15. Spain’s Mot. to Dismiss, 12–17, Sept. 22, 2008.

16. *Id.* at 4.

17. *Id.*

18. *Id.* at 5–6.

ally of Spain) and Great Britain were at war.¹⁹ While in El Callao, the *Mercedes* took onboard the property of Spanish citizens seeking protection from war.²⁰ She carried a total of 900,000 coins minted in Lima, Peru, as well as copper and tin ingots.²¹ On the *Mercedes's* return journey to the Spanish port of Cádiz, three Spanish frigates accompanied her in case of attack by the British.²² Before Spain and Britain were at war, the British Navy operated under orders to intercept Spanish warships with “treasure on board.”²³ On October 5, 1804, the British Navy intercepted the *Mercedes* and her escorts and demanded their surrender.²⁴ She declined, and the British opened fire, sinking the *Mercedes*.²⁵ Two hundred and fifty Spaniards perished, and the British seized the other frigates.²⁶ Two months later, King Carlos IV of Spain declared war against Great Britain, “[c]iting the ‘sad loss of the frigate *Mercedes*”²⁷ The significant role of the *Mercedes* in the history of Spain and Peru explains why both nations consider the *Mercedes* and its cargo part of their cultural heritage.

B. Claims to the Black Swan Treasure

So far, Odyssey, Spain, Peru, and descendants of merchants owning *Mercedes* cargo have filed claims against the coins. Odyssey discovered the *Black Swan* treasure site in March 2007, using sophisticated sonar and magnetometer equipment.²⁸ The company also prepared a Preliminary Site Assessment of the site and artifacts for archeological purposes, which it intends to keep confidential.²⁹ Odyssey has removed artifacts, including

19. *Id.* at 4.

20. *Id.*

21. *Id.* at 14–15.

22. *Id.* at 6.

23. *Id.*

24. *Id.* at 6–7.

25. *Id.*

26. *Id.* at 7.

27. *Id.*

28. Odyssey Complaint, *supra* note 3, at 5.

29. *Id.* at 6.

approximately 595,000 coins,³⁰ from the site and transported them to the Middle District of Florida, establishing the basis for jurisdiction over the wreck and its treasure.³¹

In response, Spain filed a motion for summary judgment, arguing (1) the shipwreck is the *Mercedes*, (2) the *Mercedes* is a Spanish warship which is immune from suit, and (3) claims under the law of finds and salvage are unmerited.³² Spain opposes the commercial sale of underwater heritage, believing all underwater heritage is for the benefit of mankind.³³ Accordingly, Spain denied Odyssey permission to excavate the *Mercedes*.³⁴ The Magistrate Judge, in his Report and Recommendation for District Judge Merryday, agreed with Spain's position that the coins should be turned over to Spain and the Federal District Court has no jurisdiction over the issue because the coins are subject to sovereign immunity.³⁵ In response to this report, Odyssey, Peru and descendants of the merchants who owned the cargo filed objections.³⁶ As of the writing of this paper, Judge Merryday adopted the Report and Recommendation and stayed the order vacating the arrest warrant and the return of the recovered coins to Spain until the

30. Spain's Mot. to Dismiss, *supra* note 15, at 14.

31. *Id.*; 28 U.S.C. § 1333 (2006) (“[D]istrict courts shall have original jurisdiction [of] [a]ny prize brought into the United States and all proceedings for the condemnation of property taken as prize.”); Rob Regan, Comment, *When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters with Some Proposals for Change*, 29 TUL. MAR. L. J. 313, 334 (2005) (noting that salvors prefer U.S. courts because “salvors are likely to take a higher salvage award through the U.S. courts than in other jurisdictions.”).

32. Spain's Mot. to Dismiss, *supra* note 15, at 1.

33. *Id.* at 9. Spain is a party to the UNESCO Convention on the Protection of the Underwater Cultural Heritage. See *infra* notes 134–35 and accompanying text.

34. Spain's Mot. to Dismiss, *supra* note 15, at 9.

35. See Pl. Odyssey Objections to the Magistrate Judge's June 3, 2009 Report and Recommendation, 1, July 21, 2009, available at http://www.shipwreck.net/pdf/dkt230OdysseyObjectionstoRandR_000.pdf [hereinafter Pl. Odyssey Objections]; *Spain Awarded Shipwreck Treasure*, BBC NEWS, June 4, 2009, <http://news.bbc.co.uk/2/hi/americas/8083298.stm>.

36. Pl. Odyssey Objections, *supra* note 35; *Peru Asks US Judge for Hearing Over Spanish Boot*, EL PAIS (English), Oct. 8, 2009, 2009 WLNR 19799659; *Odyssey Files Objections to Report and Recommendation in “Black Swan” Admiralty Case*, 50 SEA TECH, 9, Sept. 1, 2009, available at 2009 WLNR 19253555.

U.S. Court of Appeals for the Eleventh Circuit decides the case.³⁷

In addition to the claims asserted by Spain and Odyssey, the Republic of Peru filed a verified conditional claim to the contents, artifacts, and cargo of the *Black Swan*.³⁸ Although Peru is awaiting confirmation on the origin of the coins,³⁹ “the plurality of the coins recovered and thus far identified were struck at the mint in Lima, Peru”⁴⁰ The argument that the coins were mined and minted in Peru would be further substantiated if the shipwreck can be positively identified as the *Mercedes*.⁴¹ Although Peru was a Spanish colony in 1804,⁴² Peru claims that the treasure may be part of the patrimony of the Republic of Peru.⁴³ Odyssey and Spain both dispute the merits of Peru’s claim.⁴⁴

Along with the claims of Odyssey, Spain, and Peru, descendants of the merchants who owned cargo aboard the *Mercedes* have also filed claims.⁴⁵ Indeed, if the *Mercedes* was not on a military mission and was instead on a primarily

37. Press Release, Odyssey Marine Exploration, “*Black Swan*” Case Moves to Federal Court, (Dec. 23, 2009), available at <http://shipwreck.net/pr194.php>.

38. Peru’s Verified Conditional Claim, No. 8:07-CV-00614-SCB-MAP, Aug. 19, 2008.

39. Christine Armario, *Did Silver Coins Come from Peru?*, ASSOCIATED PRESS, Aug. 21, 2008, 2008 WLNR 15759238.

40. Spain’s Mot. to Dismiss, *supra* note 15, at 14. (quoting Odyssey’s Artifact Summary). In addition, the dates of the coins range from 1773 to 1804, which is during the time Peru remained a Spanish colony. *Id.*

41. The *Mercedes* was carrying coins mined and minted in Peru. *Id.*

42. Peru achieved independence in 1824. See PETER FLINDELL KLARÉN, PERU SOCIETY AND NATIONHOOD IN THE ANDES 133 (2000).

43. Peru’s Verified Conditional Claim, *supra* note 38, at 2 (“[T]he Republic of Peru affirms and restates its sovereign and other rights in property that originated in its territory or was produced by its people”). Also, under Peruvian law “known or discovered archaeological objects, not privately owned . . . keep their condition of state-owned property . . . [and] cannot be conveyed nor acquired” Jack Batievsky & Jorge Velande, *The Protection of Cultural Patrimony in Peru*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 100, 101 (Barbara T. Hoffman, ed., 2006).

44. Sam Jones, *£254m Battle of the Black Swan: Dispute Over Sunken Ship Involves US Firm, Spain and Peru, and Raises British Fears*, GUARDIAN, Mar. 24, 2008 <http://www.guardian.co.uk/world/2008/mar/24/usa.spain>.

45. *E.g.*, Verified Claim by Jose Antonio Rodriguez–Menendez, Feb. 3, 2009.

commercial one, as Odyssey contends,⁴⁶ then descendants of the merchants who owned the cargo would have a claim to ownership.⁴⁷ Moreover, because as much as three quarters of the coins may have been owned by merchants, with the remainder owned by the Spanish Crown,⁴⁸ this would be a valuable claim. Predictably, Odyssey questions the merits of such claims.⁴⁹

C. *Indigenous Peoples' Relationship to Mining in Peru*

The precious metals of the Peruvian Andes are an important part of Peru's indigenous history. Indeed, the Incas developed metallurgical technology specially adapted to high-altitude mining.⁵⁰ The Incas used these precious metals in creating spectacular royal palaces and temples,⁵¹ and when the Spanish discovered and then looted them, these sites "set off a virtual 'gold rush' to Peru . . ."⁵² Moreover, in 1545, an indigenous Peruvian named Diego Gualpa discovered silver at Potosí.⁵³

46. PI's Answers to Interrogs. No. 3, Apr. 11, 2008; Odyssey Marine Exploration, Q & A following Spain's Motion to Dismiss on Sept. 22, 2008, http://www.merchantroyalshipwreck.com/2008/09/post_5.html.

47. One account of the history of the *Mercedes* says that "[i]n a letter to Cornwallis, Admiral Moore stated that the four Spanish ships carried 4,436,519 gold and silver pesos, 1,307,634 of which belonged to the king of Spain." Jeffrey Kramer, *Treasure Shipwrecks Around the World*, http://www.treasurelore.com/florida/treasure_ships.htm (last visited Apr. 10, 2010). If true, this could bolster Odyssey's argument that the *Mercedes* was primarily on a commercial mission. Russell Ray, *Treasure May Spark: Mad Grab By Heirs*, TAMPA TRIB., Aug. 26, 2008, 2008 WLNR 16233417.

48. *Odyssey Intenta a Frenar en los Tribunales la Entrega a España del Tesoro de 'La Mercedes'*, EL PAÍS, July 22, 2009, http://www.elpais.com/articulo/sociedad/Odyssey/intenta/frenar/tribunales/entrega/Espana/tesoro/Mercedes/elpepusoc/20090722elpepusoc_2/Tes.

49. Ray, *supra* note 47 ("The people who lost the property aren't going to get a high score," he said. "I don't think they're going to be able to demonstrate that they've made a lot of effort and gone to great expense and risk to look for it." quoting Mark Gordon, president of Odyssey Marine Exploration).

50. KLARÉN, *supra* note 42, at 43. The Incas used furnaces called *guayra* for melting the crushed ore. *Id.* These furnaces ran on llama dung or charcoal, were built on the slopes of the mountain, and wind fueled the fire via holes on the side of the *guayra*. *Id.*

51. *Id.* at 39.

52. *Id.* "A huge cache of gold and silver objects was melted down . . . making instant millionaires." *Id.*

53. *Id.* at 43. Although Potosí was part of the viceroyalty of Peru during colonial

Potosí became the most productive silver mine in colonial Peru.⁵⁴ This mine produced so much wealth that scholars claim it was responsible for “fuel[ing] the Hapsburg war machine and Spanish hegemonic pretensions in Europe.”⁵⁵ During the first stage of development, Potosí mines yielded a “royal fifth” of 1.5 million pesos a year to the crown.⁵⁶ During the eighteenth century, the Cerro de Pasco silver mines in the country’s central highlands replaced Potosí as the major producer of silver in the region.⁵⁷ The Spanish transported the silver from the mines to the colonial port of Callao, where they loaded the treasure onto the Royal South Seas Fleet for Panama City.⁵⁸ After being packed onto mules, the silver crossed over to the Atlantic port of Portobelo, where it was loaded onto the Atlantic treasure fleet for shipment to Spain.⁵⁹

Silver production required a large labor supply.⁶⁰ To solve labor shortages, the Spanish instituted a forced labor system, where they drafted indigenous Peruvians from their villages to work in the mines.⁶¹ Officially, the Spanish drafted one-seventh of able-bodied males from the Peruvian villages to work four months in the mines for a low fixed wage; although, “[i]n practice, the percentage recruited . . . was often even higher and the term of the mines longer.”⁶² This system of forced labor was called *mita*, a system familiar to indigenous Peruvians since the time of the Incas.⁶³ However, the Incan system of *mita* “was an

times, it is now within Bolivian territory. *Id.* at 103, 135.

54. *Id.* at 75.

55. *Id.* at 43.

56. *Id.* The “royal fifth,” or Quito Real, was a tax Spain applied on mine production. PAZ SOLDÁN, *supra* note 8, at 280.

57. KLARÉN, *supra* note 42, at 141–42 (“Cerro de Pasco produced about 65 percent of Peruvian silver (up from 40 percent) during the first two decades of the postindependence period.”).

58. *Id.* at 75.

59. *Id.* at 75–76.

60. *See id.* at 67 (“Toledo also realized that without a steady, reliable, cheap source of labor, mining . . . would not advance sufficiently.”).

61. *Id.* at 62. Indigenous Peruvians could avoid this only by paying an exorbitant fee. PAZ SOLDÁN, *supra* note 8, at 268.

62. KLARÉN, *supra* note 42, at 62.

63. *Id.* at 63. The *mita* was the main form of taxes levied on the Incan population.

element of the larger social contract involving reciprocal benefits . . . [whereas the Spanish *mita*] was a purely exploitative colonial mechanism, with no real benefits flowing back to the community . . .”⁶⁴ The indigenous people did not benefit from the production of the mines because the wealth they created was used by the Spanish to purchase European goods.⁶⁵ In addition, powerful *Criolla*⁶⁶ families, who would align to prevent any other entries to the market, closely held the businesses profiting from European trade.⁶⁷ There was no trickle-down effect to local communities.

Although *mitayos*⁶⁸ were the minority of the workers (the rest being free indigenous Peruvians) at the Potosí mines, they were forced to do the most difficult and least desirable work.⁶⁹ The *mita* system was disastrous for indigenous communities because it resulted in mass depopulation in three ways: (1) The *mita* directly drafted men from their villages;⁷⁰ (2) people fled the village to avoid the *mita*;⁷¹ and (3) the reduction in workers

Id. at 23. The work “was always carried out in a festive, ritualized manner.” *Id.* at 23–24.

64. *Id.* at 62–63. The Incas did not have a monetary system; instead the principle of reciprocal exchange “underpinned the politicoeconomic system of the Incas.” *Id.* at 27. At the empire level, this involved the collection of tribute from the people into huge warehouses, where the tribute was first distributed to the army, civil administration, and the royal household before being redistributed to the people. *Id.* At the household level, this meant each family could ask their neighbors for help cultivating their land and would offer them food and drink in return. U.S. Library of Congress, The Incas, <http://countrystudies.us/peru/3.htm> (last visited Apr. 10, 2010).

65. Alberto Flores Galindo, *Aristocracia en Vilo: Los Mercaderes de Lima en el Siglo XVIII*, in THE ECONOMIES OF MEXICO AND PERU DURING THE LATE COLONIAL PERIOD, 1760–1810, 252, 252–53 (Nils Jacobsen and Hans-Jürgen Puhle eds., 1986).

66. *Criollas* were born in Peru, but of Spanish descent. REAL ACADEMIA ESPAÑOLA, DICCIONARIO DE LA LENGUA ESPAÑOLA (22 ed. 2001), available at http://buscon.rae.es/draeI/SrvltConsulta?TIPO_BUS=3&LEMA=CRIOLLO.

67. Galindo, *supra* note 65, at 252–53.

68. *Mitayos* are workers drafted by the Spanish *mita* system. See KLARÉN, *supra* note 42, at 67.

69. See *id.* at 68. (“At Potosí ‘the most killing labor in the mines was that of carrying on one’s back a large and heavy basket of ore, climbing up hundreds of feet through narrow, precipitous tunnels, clutching at ropes and finding toeholes in notched logs, struggling, antlike, to reach the mouth of the mine, where one’s exhausted, sweating body would be blasted by freezing winds . . .”).

70. *Id.* at 67.

71. *Id.*

meant subsistence production fell and famine spread.⁷² The fixed wage was so low that it was almost insignificant, and, regardless, it was often unpaid.⁷³ The *mitayos* spent whatever salary they received at the mines on food, textiles, coca, or alcohol.⁷⁴ The prices of these goods were artificially high, requiring the workers to buy on credit; consequently, the four months of *mita* turned into obligatory debt servitude lasting much longer.⁷⁵

Compounding the exploitation of indigenous Peruvians through the *mita*, the Spanish ruling class forced the sale of European goods onto the indigenous population in a practice called *repartimiento de mercancías* (hereinafter *reparto*).⁷⁶ Members of the Spanish ruling class used the *reparto* to supplement their income.⁷⁷ They conducted these forced sales of European goods at inflated prices by using judicial and police powers, even though the indigenous people were unable to pay the exorbitant amounts demanded.⁷⁸ The combination of the *mita* and the *reparto* supported the “extensive internal economic expansion in the Spanish sector of the economy”⁷⁹ Although exploited for Spanish gain, the indigenous people developed ways to survive the “inexorable and often brutal pressures imposed by their new masters” by adapting to the new commercial economy.⁸⁰ They rented out their land for profit and began using the legal system to defend their interests.⁸¹ Some scholars, however, consider the judicial system as an instrument in the oppression of natives because, although it sometimes ruled in their favor, “in the end it served to strengthen the

72. *Id.*

73. PAZ SOLDÁN, *supra* note 8, at 268.

74. *Id.*

75. *Id.* This practice is analogous to debt bondage, where a person’s labor is demanded in repayment of a loan. Anti-Slavery International, What is Bonded Labour?, http://www.antislavery.org/english/slavery_today/bonded_labour.aspx (last visited Apr. 10, 2010).

76. KLARÉN, *supra* note 42, at 63–64. The *reparto* was technically illegal. *Id.* at 64.

77. *Id.*

78. *Id.* at 63–64.

79. *Id.* at 64.

80. *Id.* at 65.

81. *Id.* at 65–66.

colonial system against any overt, radical, revolutionary challenge from the oppressed population.”⁸² That is, it served to legitimize a system that was fundamentally exploitative.⁸³ In sum, the economic structure Spain effectuated in Peru, based on the appropriation of land, natural resources, and indigenous labor, was a disaster for the indigenous people, and the effects⁸⁴ are still felt to this day.⁸⁵

82. *Id.* at 66.

83. *Id.*

84. These effects were not limited to economic loss and environmental damage but also psychological harm. See Mountain Voices, Cerro de Pasco, Culture and Customs, http://www.mountainvoices.org/p_th_culture_and_customs.asp.html (last visited Apr. 10, 2010) (“[T]he huaynos, mulisas, chimaychas and the pasacalles of Cerro de Pasco are not for dancing or for getting drunk to, they’re songs to listen to . . . Someone once said to me – but these songs are so sad they make you cry. It’s because they have pillaged this place, not only minerals but also our thoughts.” Interview with Victor, Cultural Researcher, Cerro de Pasco 1995).

85. PAZ SOLDÁN, *supra* note 8, at 304. The indigenous people of Peru are still subjected to forced labor, perpetuating the cycle of poverty in indigenous communities. International Labor Organization, Forced Labour, Discrimination and Poverty Reduction Among Indigenous Peoples in Bolivia, Peru and Paraguay, http://www.ilo.org/sapfl/Projects/lang-en/WCMS_082040/index.htm (last visited Apr. 10, 2010) [hereinafter Forced Labour, Discrimination and Poverty Reduction Among Indigenous Peoples]. In addition, 79% of indigenous Peruvians live below the poverty line. United Nations, Poblaciones Indígenas: Un Desafío Para La Comunidad Internacional, <http://www.un.org/spanish/hr/pobla.htm> (last visited Apr. 10, 2010); see also Amalia Barron, *Potosí’s Silver Tears*, UNESCO COURIER, Mar. 2000, http://www.unesco.org/courier/2000_03/uk/dici/txt1.htm (describing the terrible living conditions of Quechua and Aymara in Potosí).

III. EXISTING TREATMENT OF UNDERWATER CULTURAL HERITAGE IN INTERNATIONAL LAW⁸⁶

A. *Maintaining the Status Quo: The U.N. Convention on the Law of the Sea*

The most significant international treaty for determining ownership over shipwrecks and treasure in international waters is the U.N. Convention on the Law of the Sea (UNCLOS).⁸⁷ More than 157 nation-states have ratified UNCLOS, although the United States and Peru are not among them.⁸⁸ The United States, however, is a signatory⁸⁹ and is therefore “obliged to refrain from acts which would defeat the object and purpose of a treaty”⁹⁰ Nevertheless, because there has been such wide acceptance of UNCLOS,⁹¹ the principles represented therein may be considered an expression of customary law.⁹²

86. The following sources of international law are not exhaustive but limited to the most relevant and authoritative sources of international law for this Comment. Other sources for research in the area of indigenous rights and cultural heritage include, *inter alia*, the UNESCO Convention for Safeguarding Intangible Cultural Heritage (2003), the EU Framework Convention for the Protection of National Minorities (Feb. 1995) (stating in Article 5, “Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.”), General Assembly Resolution 3201 Declaration on the Establishment of a New International Economic Order U.N. Doc. A/Res/S-6/3201 (providing a right to people under foreign occupation to restitution), General Assembly Resolution 3281 Charter of Economic Rights and Duties of States U.N. Doc. A/Res/29/3281 (imposing responsibility on States that practice colonialism, occupation and domination to provide restitution), and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

87. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1245, U.N. Doc. A/CONF.62/122 [hereinafter UNCLOS].

88. STATUS OF THE UN CONVENTION ON THE LAW OF THE SEA 1–9 (2010), http://www.un.org/Depts/los/reference_files/status2010.pdf.

89. *Id.*

90. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 18.

91. “To become ‘custom,’ a practice must have the widespread (but not necessarily universal) support . . . and must usually have continued for a period of time long enough to signify understanding and acquiescence.” Jon M. Van Dyke, *The Role of Customary International Law in Federal and State Court Litigation*, 26 U. HAW. L. REV. 361, 368–69(2004).

92. *See* R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 965 (4th Cir. 1999); Thomas

UNCLOS is fundamentally ambiguous in its treatment of underwater cultural heritage found in the “Area” of international waters.⁹³ Article 149 provides:

All objects of an archaeological and historic nature found in the Area shall be preserved or disposed of for the benefit of mankind as 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.⁹⁴

This raises the issue of what constitutes the “benefit of mankind”⁹⁵ and what objects are of “an archaeological and historical nature.” Unfortunately, neither of these terms is defined in the treaty.⁹⁶ Consequently, it is up to the nation-states to interpret these terms; an interpretation necessarily colored by each nation-state’s cultural and philosophical background.⁹⁷

A further source of ambiguity in article 149 is the preferential rights allocated to certain “States”⁹⁸ to the archaeological and historic objects found in the Area. The scope of these preferential rights is not elaborated on, and there is no guidance when more than one State has preferential rights.⁹⁹

Street, *Marine Methane Hydrates As Possible Energy Source*, 23 NAT’L RES. & ENV’T 42, 43 (2008) (“[UNCLOS considers its] provisions to be best evidence of customary international law.”).

93. UNCLOS refers to international waters as the “Area,” which is defined as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction” UNCLOS, *supra* note 87, art. 1. Consequently, “[t]here are no sovereign rights in the Area” Anne M. Cottrell, Comment, *The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17, FORDHAM INT’L L. J. 667, 678 (1993–94).

94. UNCLOS, *supra* note 87, art. 149.

95. EKE BOESTEN, ARCHAEOLOGICAL AND/OR HISTORIC VALUABLE SHIPWRECKS IN INTERNATIONAL WATERS 38 (2002) (pointing out the phrase is used differently in articles 140 and 149).

96. *Id.* at 39, 45 (arguing there are multiple views on whether an object is of an archaeological and historic nature).

97. *See id.* at 43, 45, 52–53.

98. These States are defined as “the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.” UNCLOS, *supra* note 87, art. 149.

99. BOESTEN, *supra* note 95, at 53.

Scholar Eke Boesten suggests that in such cases “it may be assumed that a claim from another State should be taken into account when deciding on preservation or disposal but without a duty to return the object to the claiming State.”¹⁰⁰ In sum, despite the purpose of article 149 to protect archaeological and historic objects found in the Area, the language itself is so ambiguous that it provides no more than general guidance to States.¹⁰¹

Although the UNCLOS confers a duty upon States to protect objects of an archaeological and historical nature found at sea, this is only a general principle that does not create any specific duties or responsibilities for individual States.¹⁰² However, it preserves the laws of salvage and finds,¹⁰³ which keeps the door open for the traditional resolution of ownership disputes over shipwrecks.¹⁰⁴ Finally, article 303 provides for future international agreements and a legal framework for the protection of archaeological and historic objects.¹⁰⁵

B. Maritime Law: The Laws of Salvage and Finds

1. Law of Salvage

The purpose of salvage¹⁰⁶ is to “accord the salvor a right to compensation, not title.”¹⁰⁷ As a result, the award for salvage is a maritime lien on the shipwreck rather than a right of

100. *Id.*

101. See James A.R. Nafziger, *Finding the Titanic: Beginning an International Salvage of Derelict Law at Sea*, 12 COLUM.-VLA J. L. & ARTS 339, 346–48 (“The applicable law of the sea is itself at sea.”).

102. Article 303 confers a duty on States “to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.” UNCLOS, *supra* note 87, art. 303; BOESTEN, *supra* note 95, at 59.

103. UNCLOS, *supra* note 87, art. 303, ¶ 3 (“Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty.”).

104. See THOMAS J. SHOENBAUM, ADMIRALTY AND MARITIME LAW § 14–7 (3d ed. 2001).

105. UNCLOS, *supra* note 87, art. 303, ¶ 4 (“This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.”).

106. The legal concept of salvage has been in existence since 800 B.C. See Regan, *supra* note 31, at 321.

107. SHOENBAUM, *supra* note 104, § 14–7.

ownership or title.¹⁰⁸ Three elements are necessary to a valid salvage claim (1) marine peril,¹⁰⁹ (2) service voluntarily rendered when not required as an existing duty or from a special contract, and (3) success in whole or in part.¹¹⁰ Salvage is a well-established practice internationally, as reflected by the International Convention on Salvage.¹¹¹

The International Convention on Salvage applies to “any act or activity undertaken to assist a vessel or any other property in danger in navigable waters”¹¹² This broad scope includes the salvaging of historic shipwrecks and underwater cultural heritage.¹¹³ The United States, Spain, and Peru are contracting States to the Convention.¹¹⁴ The Convention is broadly consistent with the maritime law of salvage and is self-executing, meaning that it creates rights for individuals under international law.¹¹⁵

2. *Law of Finds*

To establish a claim under the law of finds, a finder must show (1) intent to reduce the property to possession, (2) actual or constructive possession of the property, and (3) that the property is either unowned or abandoned.¹¹⁶ The law of finds is a disfavored common law doctrine for purposes of determining

108. BOESTEN, *supra* note 95, at 98.

109. “Marine Peril” could also include threat of a shipwreck being lost to the elements. *Treasure Salvors Inc. v. The Unidentified Wreck*, 569 F.2d 330, 337 (5th Cir. 1978).

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

111. International Convention on Salvage, Apr. 29, 1989, 37 Stat. 1658, 1996 U.N.T.S. 194. This Convention encompasses underwater cultural heritage, unless a signatory makes a reservation otherwise. *Id.* art. 30 (“Any State may . . . reserve the right not to apply the provisions of this Convention . . . when the property involved is maritime cultural property . . .”).

112. *Id.* art. 1.

113. See Martin Davies, *Whatever Happened to the Salvage Convention of 1989?* 39 *J. MAR. L. & COM.* 463, 482–83 (2008) (arguing the convention applies to all shipwrecks).

114. International Maritime Organization (IMO), Status of Conventions by Country, http://www.imo.org/includes/blastData.asp/doc_id=693/status-x.xls (last visited Apr. 10, 2010). A total of fifty-seven States have signed the Convention. *Id.*

115. Davies, *supra* note 113, at 463.

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

title for property lost at sea because traditionally title remains with the true owner, no matter how much time has passed¹¹⁷ or how difficult it is to locate the owner.¹¹⁸ In shipwreck cases, a court must find property has either been abandoned or has no owner.¹¹⁹ Policy reasons exist against applying the law of finds where title may still reside in another party to discourage behavior that is at odds with the preservation of the shipwreck site for others to enjoy.¹²⁰ “[T]he law of finds is applied sparingly—only when no private or public interest would be adversely affected by its application.”¹²¹

C. Providing Resistance to Commercial Development of Underwater Cultural Heritage: the UNESCO Convention on the Protection of the Underwater Cultural Heritage

The UNESCO Convention on the Protection of the Underwater Cultural Heritage (hereinafter Convention on Underwater Cultural Heritage)¹²² is intended, in part, to prevent the exploitation of historic shipwrecks for profit.¹²³ The primary purpose of the Convention on Underwater Cultural Heritage is to “ensure and strengthen the protection of underwater cultural heritage.”¹²⁴ Underwater cultural heritage is defined by the Convention as “all traces of human existence having a cultural, historical or archeological character which have been partially or totally under water, periodically or continuously, for at least 100 years”¹²⁵ This broad definition encompasses not just shipwrecks, but also cargo, human

117. *Id.*

118. *Columbus-Am. Discovery Group, Inc. v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 461 (4th Cir. 1992); Cottrell, *supra* note 93 at 685.

119. *R.M.S Titanic Inc.*, 435 F.3d at 532.

120. *See id.* at 532–33.

121. *Id.* at 533.

122. U.N. Educational, Scientific, and Cultural Organization (UNESCO), Convention on the Protection of the Underwater Cultural Heritage, UNESCO Doc. 31 C/Resolution 24, <http://unesdoc.unesco.org/images/0012/001246/124687e.pdf> (last visited Apr. 10, 2010) [hereinafter Convention on Underwater Cultural Heritage].

123. *Id.* pmbl. (“Deeply concerned by the increasing commercial exploitation of underwater cultural heritage . . .”).

124. *Id.* art. 2, ¶ 1.

125. *Id.* art. 1, ¶ 1.

remains, and “archaeological and natural context.”¹²⁶ In this way, the Convention seeks to clarify and enhance articles 149 and 303 of the UNCLOS.¹²⁷

Believing commercial salvage operations and the preservation of underwater cultural heritage to be irreconcilable with each other,¹²⁸ the Convention prohibits the application of the law of salvage or the law of finds to underwater cultural heritage unless it is in “full conformity with this Convention” and “ensures that any recovery of the underwater cultural heritage achieves its maximum protection.”¹²⁹ Most archaeologists believe that *in situ* preservation of underwater cultural heritage is preferable;¹³⁰ therefore, salvage should only

126. *Id.*

127. See UNESCO, General Conference 31st session, *Draft Convention on the Protection of the Underwater Cultural Heritage*, UNESCO Doc. 31 C/24, ¶¶ 1–2 (Aug. 3, 2001) [hereinafter General Conference].

128. Convention on Underwater Cultural Heritage, *supra* note 122, Annex I, Rule 2. “The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage.” Buenos Aires Draft Convention on The Protection of the Underwater Cultural Heritage, Aug. 1994, <http://fletcher.tufts.edu/multi/texts/buenos.txt> (“The major problem is that salvage is motivated by economic considerations; the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value.”). The Buenos Aires Draft Convention was the predecessor to the Convention on Underwater Cultural Heritage. JENNIFER RODRIGUES, DEP’T OF MARITIME ARCHAEOLOGY, THE UNESCO CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: A ONE-DAY WORKSHOP HELD ON 23 MAY 2004, 7 (2005), <http://www.museum.wa.gov.au/collections/maritime/march/documents/No.%20189%20UNESCO%20Report.pdf>.

129. Convention on Underwater Cultural Heritage, *supra* note 122, art. 4; Regan, *supra* note 31, at 325 (“Most salvage undertakings are provided by commercial salvage companies . . .”).

130. See John Alan Cohan, *An Examination Of Archaeological Ethics And The Repatriation Movement Respecting Cultural Property (Part One)*, 27 ENVIRONS ENVTL. L. & POLY J. 349, 360 (2004) (“The whole (the artifacts *in situ*) is greater than the sum of its parts (the artifacts separated from one another.)”); Brooke Wright, Comment, *Keepers, Weepers, or No Finders at All: The Effect of International Trends on the Exercise of U.S. Jurisdiction and Substantive Law in the Salvage of Historic Wrecks*, 33 TUL. MAR. L.J. 285, 311 (2008). *But see* Forrest Booth, *The Collision of Property Rights and Cultural Heritage; the Salvors’ and Insurers’ Viewpoints*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 293, 296 (Barbara T. Hoffman ed., 2006) (“Much of what lies on the ocean floor is both fragile and rapidly decaying.”).

occur in rare situations.¹³¹ In addition, the Convention on Underwater Cultural Heritage requires State parties to control the activities of their nationals.¹³² Sanctions for violating the Convention are applied to “offenders,” suggesting individuals may have liability independent from the State.¹³³ Thus, the responsibility of preserving undersea heritage in international waters is extended to individuals.

Neither the United States nor Peru has agreed to the Convention on Underwater Cultural Heritage.¹³⁴ Spain is one of only thirty-one States that have ratified or accepted the Convention.¹³⁵ The failure of the Convention on Underwater Cultural Heritage to garner any more signatories suggests that there is not a sufficient international consensus yet over the preservation of underwater cultural heritage.¹³⁶ One reason for the lack of consensus is the regulation of State vessels in the territorial sea. In particular, the reporting requirements to the flag State of the discovery of identifiable state vessels in another State’s archipelagic and territorial seas.¹³⁷ Therefore, States’ failure to sign the Convention may not be related to principles of the Convention itself but to notice requirements believed to interfere with States’ sovereignty.¹³⁸

131. Wright, *supra* note 130, at 311.

132. See Convention on Underwater Cultural Heritage, *supra* note 122, art. 11 (“State Party shall require its national, or the master of the [flagged] vessel, to report such discovery [of underwater cultural heritage] or activity to it”).

133. *Id.* art. 17, ¶ 2.

134. UNESCO, States Parties, <http://portal.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha> (last visited Apr. 10, 2010).

135. *Id.* This Convention requires twenty States to deposit their instruments before it enters force. Convention on Underwater Cultural Heritage, *supra* note 122, art. 27.

136. Although Tullio Scovazzi argues “the lack of consensus at the moment of its adoption should not be considered as an irreparable flaw. . . . [T]he great majority of developing countries vote[d] in favour” Tullio Scovazzi, *The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE 285, 285 (Barbara T. Hoffman ed., 2006).

137. General Conference, *supra* note 127, ¶ 9.

138. However, “[t]he United Kingdom was also consistently opposed to any provision that would restrict the ability of private salvors to continue to recover and trade in underwater cultural heritage.” John Gribble and Craig Forrest, *Underwater Cultural Heritage at Risk: The Case of the Dodington Coins*, in ART AND CULTURAL

Although the Convention on Underwater Cultural Heritage does not resolve ownership disputes over underwater cultural heritage, a State may “declare . . . its interest.”¹³⁹ Only States of “cultural, historical, or archaeological origin” may declare an interest.¹⁴⁰ The Director-General then selects one of the States with a declared interest to become the “Coordinating State,”¹⁴¹ which is then responsible for implementing and authorizing agreed measures for the protection of the cultural heritage.¹⁴² As a result, States with an “interest” have some control over the preservation of the wreck.¹⁴³

D. Defining Cultural Heritage and Creating Duties for Nation States: the U.N. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

The U.N. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property¹⁴⁴ (1970 Convention) may provide an alternative basis for regulating underwater cultural heritage. Cultural property includes products of archaeological excavations, property relating to history and to events of national importance, and antiquities more than 100 years old, such as coins and engraved seals.¹⁴⁵ As a result, some underwater cultural heritage may also be defined as cultural property and therefore subject to the provisions of the 1970 Convention.¹⁴⁶

HERITAGE: LAW, POLICY AND PRACTICE 313, 323 (Barbara T. Hoffman ed., 2006).

139. Convention on Underwater Cultural Heritage, *supra* note 122, art. 11, ¶ 4.

140. *Id.*

141. *Id.* art. 12, ¶ 2.

142. *Id.* art. 12, ¶ 4.

143. *See id.* art. 12.

144. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *opened for signature* Nov. 14, 1970, 10 I.L.M. 289, 823 U.N.T.S. 232 [hereinafter 1970 Convention].

145. *Id.* art. 1.

146. *See supra* notes 38–43 and accompanying text.

The 1970 Convention also recognizes certain property as belonging to “cultural heritage.”¹⁴⁷ Cultural property is cultural heritage when it is created by nationals of the State, or created by “stateless persons” resident in the State, or the property is found in the State’s territory.¹⁴⁸ Cultural property is a product of cultural heritage.¹⁴⁹ The measures protecting cultural property are more concrete than those protecting cultural heritage. For example, cultural property is subject to return and recovery,¹⁵⁰ is inventoried by the State party,¹⁵¹ and must be certified for export.¹⁵² Cultural heritage, on the other hand, is to be developed, protected, and respected.¹⁵³ In addition, when cultural heritage¹⁵⁴ is in jeopardy, “each State concerned shall take provisional measures to the extent feasible to prevent irreparable injury to the cultural heritage of the requesting State.”¹⁵⁵

Cultural property transferred under colonialism is provided special protection in the 1970 Convention. Article 11 states “[t]he export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.”¹⁵⁶ When a transfer is considered illicit, State parties are directed to oppose it “with the means at their disposal” and

147. 1970 Convention, *supra* note 144, art. 4.

148. *Id.* Other types of cultural heritage include: cultural property acquired by the State with permission from the State of origin; cultural property that is the result of a freely agreed exchange; or property received as a gift. *Id.*

149. *See id.* art. 5.

150. *Id.* art. 7(b)(i).

151. *Id.* art. 5(b).

152. *Id.* art. 6.

153. *Id.* arts. 5(a), (f), 12.

154. Only in article 9 does the 1970 Convention refer to “cultural patrimony.” *Id.* art. 9; PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS 553 (2004). This term is not defined in the 1970 Convention. GERSTENBLITH, *supra*, at 552–53. Some suggest that this was a “drafting blunder” and that the drafters meant “cultural heritage.” *Id.* In all the authoritative texts, cultural heritage is used consistently. *See id.* (explaining that the same term is used consistently in the Spanish, French, and Russian texts).

155. 1970 Convention, *supra* note 144, art. 9.

156. *Id.* art. 11.

“make the necessary reparations.”¹⁵⁷ This provides a means of redress for indigenous peoples against States only.

E. Cultural Heritage as a Human Right: the U.N. Declaration on the Rights of Indigenous Peoples

The U.N. Declaration on the Rights of Indigenous Peoples (DRIP) is a landmark international agreement recognizing and protecting the human rights of indigenous peoples.¹⁵⁸ Although it is non-binding,¹⁵⁹ its provisions “reflect growing state practice,”¹⁶⁰ and 143 States voted in favor, approving the Declaration for U.N. adoption.¹⁶¹ This strong support for DRIP is evidence of *opinio juris*,¹⁶² a component of customary international law.¹⁶³ In other words, DRIP is an expression of growing customary international law in the area of indigenous rights.¹⁶⁴

157. *Id.* art. 2, ¶ 2.

158. *See, e.g.*, Press Release, Office of the Spokesperson for the Sec’y-Gen., Statement Attributable to the Spokesperson for the Secretary-General on the Adoption of the Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007), <http://www.un.org/apps/sg/sgstats.asp?nid=2733> (recognizing DRIP as a “triumph for indigenous people”).

159. U.N. Declarations are generally non-binding, but may be considered as evidence of *opinio juris*. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 rep. n. 2 (1987).

160. Ana F. Vrdoljak, *Reparations for Cultural Loss*, in REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 197, 213 (Fredrico Lenzerini ed., 2008) [hereinafter *Reparations for Cultural Loss*].

161. Four States voted against the Declaration—New Zealand, Australia, United States, and Canada. U.N. News Centre, United Nations Adopts Declaration on Rights of Indigenous Peoples, Sept. 13 2007, <http://www.un.org/apps/news/story.asp?NewsID=23794>.

162. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 102 rep. n. 2 (1987) (“The United Nations General Assembly in particular has adopted resolutions, declarations, and other statements of principles that in some circumstances contribute to the process of making customary law” and declarations “may have greater significance than ordinary resolutions” because “it may be considered to impart . . . a strong expectation that Members . . . will abide by it.”).

163. Customary international law is universally obligatory and is created through both *opinio juris* and State practice. *See id.* § 102(2).

164. There is a growing State practice that condones the return of cultural property in respect to historic injustices. *Reparations for Cultural Loss*, *supra* note 160, at 214–15.

DRIP aims to protect the diversity of indigenous cultures and their right to self-determination.¹⁶⁵ To further these aims, DRIP protects indigenous cultural heritage including “the right to maintain, protect and develop the past, present and future manifestations of their cultures”¹⁶⁶ Not only is indigenous culture to be protected, but redress is required for cultural property taken without “free, prior and informed consent or in violation of their laws, traditions and customs.”¹⁶⁷ It is well noted that often such informed consent was not acquired, especially because the system of property rights was very different from those of the occupiers.¹⁶⁸ This redress provision provides an important cause of action for indigenous populations that were subject to colonization.¹⁶⁹

Similarly, DRIP also provides redress for “lands, territories and resources which they have traditionally owned or otherwise occupied and used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”¹⁷⁰ The article permits redress as either restitution or compensation for those lands and resources.¹⁷¹ Compensation may take the form of equal lands, territories and resources, or money.¹⁷² Redressibility is important because it provides an opportunity for indigenous peoples to repair past wounds and develop their communities, breaking the cycle of poverty that is so common among indigenous peoples.¹⁷³

165. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, arts. 1–3, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter DRIP].

166. *Id.* art. 11, ¶ 1.

167. *Id.* art. 11, ¶ 2.

168. See DAVID LEA, PROPERTY RIGHTS, INDIGENOUS PEOPLE AND THE DEVELOPING WORLD 96–97 (2008).

169. See Christopher J. Fromherz, Comment, *Indigenous Peoples’ Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples*, 156 U. PA. L. REV. 1341, 1356–64 (2008) (discussing self-determination of indigenous and colonized peoples).

170. DRIP, *supra* note 165, art. 28, ¶ 1.

171. *Id.* art. 28.

172. *Id.* art. 28, ¶ 2.

173. See, e.g., Forced Labour, Discrimination and Poverty Reduction Among Indigenous Peoples, *supra* note 85 (explaining how an ILO project is connecting the eradication of forced labor with the implementation of indigenous rights); *Peru Culture and Customs*, http://www.mountainvoices.org/p_th_culture_and_customs.asp.html (last

*F. Prospective Protection of Indigenous Cultural Property Rights: International Labor Organization Convention concerning Indigenous and Tribal Peoples in Independent Countries*¹⁷⁴

This Convention is “the most binding of such [indigenous peoples’ rights] international instruments.”¹⁷⁵ It encourages members to protect the rights of indigenous people, including the right to participate in government,¹⁷⁶ the right to social, cultural and religious practices,¹⁷⁷ the right to self-determination over their development,¹⁷⁸ safe working conditions,¹⁷⁹ health care,¹⁸⁰ education,¹⁸¹ security,¹⁸² equality,¹⁸³ and land use, management, and conservation.¹⁸⁴ The Convention provides redress for indigenous peoples, but only prospectively¹⁸⁵ and only in relation to land and resource use, stating “[t]he peoples concerned . . . shall receive fair compensation for any damages”¹⁸⁶ Unlike in DRIP, there is no provision for the repatriation of cultural heritage.¹⁸⁷ Even if indigenous people were to proceed against a State for the exploitation of their land and resources, the International Labor

visited Apr. 10, 2010) (emphasizing the importance placed on preserving the local culture).

174. International Labor Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> [hereinafter ILO Convention 169].

175. Claire Charters, *Reparations for Indigenous Peoples: Global International Instruments and Institutions*, in REPARATIONS FOR INDIGENOUS PEOPLES 163, 166 (Fedrico Lenzerini ed., 2008).

176. ILO Convention 169, *supra* note 174, art. 2.

177. *Id.* art. 5.

178. *See id.* art. 7.

179. *Id.* art. 20.

180. *Id.* art. 25.

181. *Id.* art. 26.

182. *Id.* art. 4.

183. *Id.* art. 2.

184. *Id.* arts. 14–15.

185. *See* Charters, *supra* note 175, at 166 (noting that ILO Convention 169 is focused on indigenous people’s rights but states have been slow to ratify it).

186. ILO Convention 169, *supra* note 174, art. 15, ¶ 2; Charters, *supra* note 175, at 167.

187. *See supra* notes 166–67 and accompanying text.

Organization only would only be instructive for wrongs committed after its adoption, not for those wrongs occurring two hundred years earlier.

IV. LIMITED OPTIONS: FINDING RELIEF FOR INDIGENOUS PEOPLE

Against this background—and assuming indigenous Peruvians want the return of or an ownership interest in the *Black Swan* coins—how would international law help them pursue this goal? Currently, indigenous rights to cultural property found in international waters are not protected as strongly as the rights of States. The primary reason for this lack of equality is the preference for States’ rights in the relevant treaties.¹⁸⁸ In international law, indigenous peoples may only (1) rely on States to further their interests, (2) claim title to the underwater cultural heritage in maritime law, or (3) demand redress through DRIP.

A. *Reliance on States to Protect Indigenous Underwater Cultural Heritage*

1. *State and Indigenous Interests May Not Be Congruent; Therefore, Indigenous Interests Will Not Be Protected Under UNCLOS.*

The UNCLOS has two provisions addressing cultural property in the Area,¹⁸⁹ but neither provision provides clear guidance on how cultural property is to be protected “for the benefit of mankind;”¹⁹⁰ the scope of States’ “duty to protect

188. Although international law recognizes indigenous peoples’ right to self-determination, they are not considered to be a sovereign State. *See* DRIP, *supra* note 165, art. 46 (“Nothing in this Declaration may be interpreted as . . . authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of . . . States.”); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791 n.21 (D.C. Cir. 1984) (per curiam) (“To qualify as a State under international law, there must be a people, a territory, a government and a capacity to enter into relations with other states. . . . Jurisdiction over the territory must be exclusive.”).

189. UNCLOS, *supra* note 87, arts. 149, 303.

190. *Id.* art. 149.

objects of an archaeological and historic nature;”¹⁹¹ or the “preferential rights of the State or country of origin.”¹⁹² In addition, these articles only discuss rights and duties as they pertain to States. Odyssey is not a State actor; under international law, it is an individual.¹⁹³ Therefore, it would appear that Odyssey is not under the same obligation as States are to protect cultural property found in the Area. Similarly, indigenous Peruvians are not considered a State; therefore, they may have no preferential rights.¹⁹⁴ They would need a State such as Peru to represent their interests.

The Republic of Peru has made progress with respect to indigenous rights, although there is still much room for improvement.¹⁹⁵ It is questionable whether Peru would be effective in representing indigenous interests because, among other things,¹⁹⁶ indigenous interests may be incompatible with those of the rest of Peru.¹⁹⁷ Peru considers the coins part of its “cultural patrimony,”¹⁹⁸ and the coins may be more representative of Peru as a whole than of a distinct indigenous culture.¹⁹⁹ As a result, indigenous control of the coins would not

191. *Id.* art. 303.

192. *Id.* art. 149.

193. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 101 rep. n. 1 (1987) (“[T]his section indicates that international law has ceased to apply exclusively to states and international organizations and now deals also with their relations with individuals and juridical persons.”).

194. See *supra* text accompanying note 1887.

195. See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN PERU, CHAPTER X: THE RIGHTS OF INDIGENOUS COMMUNITIES, OEA/Ser.L/V/II.106 (2000), <http://www.cidh.oas.org/countryrep/Peru2000en/chapter10.htm>.

196. Additionally, some may argue that because Peru was not a state at the time the coins were minted, it has no standing to claim them. However, “[i]n cases where the government under whose authority the violation occurred is no longer in existence, the successor state has the (moral) duty to provide reparation to the victim(s).” Ana F. Vrdoljak, *Reparations for Indigenous Peoples in International and Comparative Law, in REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 3, 6–7 (Fredrico Lenzerini ed., 2008).

197. See *infra* note 199 and accompanying text.

198. See *supra* notes 38–43 and accompanying text.

199. See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 222 (2003) (identifying the “narrowing gap between native and non-native practices” that “underscore[s] the folly of cordoning off heritage as a discrete domain that can be defined and defended by

be for the “benefit of mankind” because possession of the coins could lead to exclusivity and the restriction of access to these cultural objects.²⁰⁰ On the other hand, storing the coins in a national museum away from indigenous communities “may not foster a feeling that the artifact has ‘come home.’”²⁰¹

Regardless of the inherent conflict between State and indigenous possession, Peru alone would be unrepresentative of indigenous peoples rights because the people who were subject to the *mita* system live throughout the region and are not limited to State boundaries. For example, the Aymara and Quechua people live on the border of Bolivia and Peru,²⁰² and Potosí is now in Bolivian territory.²⁰³ A broader definition of State is necessary to truly provide a remedy for indigenous peoples in international law and for the equal representation of cross-border communities.²⁰⁴

law”).

200. See Francesco Francioni, *Culture, Heritage and Human Rights: An Introduction*, in CULTURAL HUMAN RIGHTS 1, 6 (Francesco Francioni & Martin Sheinin eds., 2008) [hereinafter *Culture, Heritage and Human Rights: An Introduction*]. Such a balancing test will pit “[indigenous cultural heritage’s] symbolism, its inspirational value, its tribal memory or its close association with group identity” against “its collective importance to the world at large.” John Alan Cohen, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 8 ENVIRONS ENVTL. L. & POL’Y J. 1, 113 (2004).

201. Kimberly L. Alderman, *Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples*, 45 IDAHO L. REV. 515, 527–28 (2009) (noting that “nations sometimes use the interests of indigenous cultures as political tools without necessarily giving back to the indigenous cultures once their initiatives have succeeded”).

202. See Jorge P. Arpasi, *Historia del Pueblo Aymara*, <http://www.aymara.org/historia-aymara.html> (last visited Apr. 10, 2010) (noting that speakers of Aymara and Quecha have historically lived in the Andean regions of Peru, Bolivia, and Chile).

203. See KLARÉN, *supra* note 42, at 184 (illustrating the Map of Chilean Expansion).

204. *But see* BROWN, *supra* note 199, at 226 (arguing that extending control over cultural resources to indigenous leaders “would violate principles of equal sacredness: freedom of speech, freedom of religion, and freedom from unwarranted intrusion into the work of artists, musicians, and intellectuals.”).

2. *Ratification of the Convention on Underwater Cultural Heritage Would Not Advance Indigenous Peoples' Rights Over Their Cultural Heritage.*

Under the Convention on Underwater Cultural Heritage, only States can declare an interest in underwater cultural heritage or become the Coordinating State.²⁰⁵ Foreclosing indigenous people's participation is a major blow to the protection of indigenous cultural heritage and deprives them of the right to participate. Arguably, this could violate DRIP, which provides for "the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, art[i]facts . . ." ²⁰⁶ Even if the Convention on Underwater Cultural Heritage were ratified by all relevant States, it would still lack in the same way as the UNCLOS because it limits participation to States.

3. *Protection of Indigenous Cultural Property From Illicit Import, Export, and Transfer Requires State Action.*

Before the 1970 Convention is applicable to this case, the coins must meet the definition of cultural property as detailed in the Convention.²⁰⁷ The definition has two parts. First, the property must be "designated by each State as being of importance for archaeology, prehistory, history, literature, art or science . . ." ²⁰⁸ Again, this can only be designated by a State.²⁰⁹ Peru already has declared that the *Black Swan* coins are objects of cultural patrimony.²¹⁰ Second, the property must fall within

205. Convention on Underwater Cultural Heritage, *supra* note 122, art. 12.

206. DRIP, *supra* note 165, art. 11, ¶ 1.

207. 1970 Convention, *supra* note 144, art. 1.

208. *Id.*

209. *Id.*; see Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2010–11 (2007).

210. Verified Conditional Claim of the Republic of Peru, 1, Odyssey Marine Exploration, Inc. v. The Unidentified, Shipwrecked Vessel, No. 8:07-CV-00614-SDM-MAP, Aug. 1, 2008 (M.D. Fla.). *Contra* Peter Tompa & Ann M. Brose, *A Modern Challenge to an Age-Old Pursuit: Can Cultural Patrimony Claims and Coin Collecting Coexist?*, in WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 205, 211 (Kate Fitz Gibbon ed., 2005) (Numismatists "state that it is impossible to tie artifacts like coins to one particular modern nation-state's cultural patrimony, because coins have circulated widely across borders as hard currency for centuries.").

one of the twelve identified categories.²¹¹ Of these categories, the coins would most fit within “(e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals.”²¹² However, the coins are much more than objects of numismatic interest because they represent the history and experience of Andean indigenous peoples.²¹³

The 1970 Convention recognizes that cultural heritage may be created “by the individual or collective genius of nationals of the State [and] stateless persons resident within [State] territory”²¹⁴ However, even if this definition encompasses indigenous people, the fact that indigenous people are recognized as creating cultural heritage does not provide them any rights regarding cultural property under the 1970 Convention.²¹⁵ This is because the only specific protection the 1970 Convention furnished for cultural heritage is that “each State concerned shall take provisional measures to the extent feasible to prevent the irremediable injury to the cultural heritage of the requesting State.”²¹⁶ Notice, however, that the request must be made from a State.²¹⁷ If indigenous people believed their cultural heritage were in danger of being pillaged,

211. 1970 Convention, *supra* note 144, art. 1.; see Geoffery R. Scott, *A Comparative View of Copyright as Cultural Property in Japan and the United States*, 20 TEMP. INT'L & COMP. L.J. 283, 295–98 (2006) (identifying an additional, but easily met, “connections” test in the 1970 Convention).

212. 1970 Convention, *supra* note 144, art. 1.

213. *Culture, Heritage and Human Rights: An Introduction*, *supra* note 200, at 7 (noting that in international law, “the concept of ‘heritage’ has been expanded . . . to encompass the practices, traditions and skills that represent the common legacy of a community and is fundamental component of its living culture”); Daniel Shapiro, *Repatriation: A Modest Proposal*, 31 N.Y.U. J. INT'L L. & POL. 95, 97–98 (1998) (noting that the emotional connection a community has to an object is important in determining who it belongs to).

214. 1970 Convention, *supra* note 144, art. 4.

215. See *id.* art. 9; see David Curfman, *Thar be Treasure Here: Rights to Ancient Shipwrecks in International Waters-A New Policy Regime*, 86 WASH. U. L. R. 181, 197 (2008) (“The interests of mankind are not adequately represented by the current framework because only owners, finders, or governments have standing to assert a claim [to cultural property.]”).

216. 1970 Convention, *supra* note 144, art. 9.

217. *Id.*

they could not directly request another State to protect their cultural heritage.²¹⁸

Alternatively, article 11 provides relief for colonized countries, but only applies prospectively. It states “[t]he export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit.”²¹⁹ Although “country” is not defined,²²⁰ assuming it is broad enough to include territory under the control of indigenous peoples, then any future transfer of cultural property under compulsion would be illicit. This provision is no remedy to the indigenous people in Peru because, under the Vienna Convention, it cannot be applied retroactively.²²¹ In sum, indigenous people must rely on States to further the protection and preservation of indigenous cultural heritage.

B. Claim title to Coins in Maritime Law

Regardless of whether individuals have rights and duties under articles 149 and 303, UNCLOS preserves the law of finds and the law of salvage to the detriment of indigenous peoples’ potential claims. Generally, the law of finds is not considered a preferable tool in determining the disposition of cultural property.²²² As a condition precedent to awarding title to the finder, a court must find that the property has either been abandoned or has no owner.²²³ Abandonment is more likely to be

218. *Id.*

219. *Id.* art. 11.

220. *Id.*

221. Vienna Convention on the Law of Treaties, art. 28, May 23, 1969, 8 I.L.M. 679 (stating that treaties are non-retroactive unless it is the intention of the treaty maker for retroactive application). *But see* Francesco Francioni, *Is International Law Ready to Ensure Redress for Historical Injustices?*, in REPARATIONS FOR INDIGENOUS PEOPLES, 27, 43 (2008) [hereinafter *Is International Law Ready to Ensure Redress for Historical Injustices?*] (“[E]ven in the absence of specific protecting instruments in force at the time the injury occurred, the principle of non-retroactivity would not cover the most serious breaches of human rights and humanitarian law. It would be difficult to defend a position whereby acts of genocide, mass deportation, and deprivation of the means of livelihood of indigenous peoples were sheltered from legal scrutiny.”).

222. *Supra* notes 117–21 and accompanying text.

223. *Supra* note 119 and accompanying text.

found in the case of indigenous people, who may not have the expertise or the resources to appear in court to assert their rights. Also, because the law of finds awards title to the finder, the cultural property may be sold or disbursed around the world, so tracing it becomes prohibitively expensive and time-consuming. This is especially true for coins, whose historical value “may only be discernable to the expert or connoisseur”²²⁴ but their value as precious metals is “recognize[ed] . . . by a much greater range of person who may be tempted to . . . realize their value privately.”²²⁵ Protection and preservation of the coins would therefore be much harder to control, and indigenous people would have no say in how their cultural heritage is treated.

Although the law of salvage provides rights to individuals as opposed to states, it is not clear whether the law of salvage should apply to underwater cultural heritage. The elements of salvage are (1) marine peril,²²⁶ (2) service voluntarily rendered when not required as an existing duty or from a special contract, and (3) success in whole or in part.²²⁷ The first element, marine peril, is problematic because most archaeologists would agree that the preservation of shipwrecks and antiquities underwater is best achieved *in situ*; therefore, such items can hardly be said to be in marine peril.²²⁸ Moreover, salvaging shipwrecks and antiquities causes irreparable loss of context, which is an essential element in archaeological study.²²⁹ Although the coins from the *Mercedes* probably would not suffer deterioration from salvage, neither were they in marine peril or at risk from being lost to the elements. They had been lying on the bottom of the

224. P.J. O'KEEFE & LYNDEL V. PROTT, *LAW AND THE CULTURAL HERITAGE: VOLUME I DISCOVERY AND EXCAVATION* 159 (1984).

225. *Id.*

226. “Marine Peril” could also include threat of a shipwreck being lost to the elements. *Treasure Salvors Inc. v. The Unidentified Wreck*, 569 F.2d 330, 337 (5th Cir. 1978).

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

228. *See supra* note 130 and accompanying text.

229. *See id.*; Peter T. Wendel, *Protecting Newly Discovered Antiquities: Thinking Outside the “Fee Simple” Box*, 76 *FORDHAM L. REV.* 1015, 1015 (2007) (“When the typical finder excavates an antiquity, its historical and archaeological information is severely damaged.”).

seafloor undisturbed for more than two hundred years,²³⁰ and there was no evidence that the coins were in any immediate risk; to the contrary, the coins were in excellent condition.²³¹

Even if the law of salvage does apply, and indigenous people are given title to the coins, satisfying the salvage award may cannibalize any benefit indigenous people would gain in owning the coins. According to the International Convention on Salvage, although the award “shall not exceed the salvaged value of the vessel and other property,”²³² it provides profit²³³ to the salvor. The amount of profit is determined by several factors, such as the “skill and efforts of the salvor []” and “the risk of liability.”²³⁴ None of these factors take into account the archaeological preservation of underwater cultural heritage, which may not provide an incentive for recovering shipwrecks in an archaeologically sound way.²³⁵ The salvage award in this case will be large²³⁶ because it is undisputed that Odyssey is a skilled salvor, using the most up-to-date technology to locate sites.²³⁷ Moreover, the cost of these salvaging expeditions is high, including the archaeological preservation and transportation costs of these artifacts.²³⁸ If indigenous people have title to the artifacts, then they would be subject to paying

230. Odyssey Complaint, *supra* note 3, at 5.

231. It is on account of their excellent condition that the coins are worth so much. See *Spain Sues Over Shipwreck Bonanza*, *supra* note 2. That is not to say, however, that the coins are not in need of cleaning and preservation. See Aff. of Carol L. Tedesco in Support of Odyssey Marine Exploration, Inc.’s Response to Claimant, Spain’s, Mot. to Dismiss or for Summ. J., Nov. 12, 2008, 2 (“The unconserved coins . . . were darkened and fused together into stacks or clumps . . .”).

232. International Convention on Salvage, *supra* note 111, art. 13, ¶ 3.

233. This is “to encourage salvors to take the risks and expend the effort needed to recover property lost at sea.” Booth, *supra* note 130, at 294.

234. International Convention on Salvage, *supra* note 111, art. 13, ¶ 1.

235. *Id.*

236. Jones, *supra* note 44. Odyssey claims the award should be a 90% share of the proceeds of the ship. *Id.*

237. See *supra* note 1 and accompanying text.

238. Odyssey’s operational expenses for 2007 totaled \$4.5 million, with \$400,000 attributed to the *Black Swan* for the second quarter of 2007 alone. Odyssey Marine Exploration Announces Second Quarter 2007 Results, <http://shipwreck.net/pr145.php> (last visited Apr. 10, 2010).

the salvage award.²³⁹ The salvage award may be paid to the salvor as the artifacts themselves or in cash.²⁴⁰ In either case, indigenous people would lose title to the majority of the coins because it is unlikely they would be able to satisfy a maritime lien without selling the coins,²⁴¹ which would negate the benefit of awarding them title in the first place. Therefore, applying the law of salvage would benefit only Odyssey.

It is important to note, however, the spectrum of opinions on the role of commercial salvage companies regarding underwater cultural heritage. On the one hand, Odyssey sees itself as a for-profit archaeologist, bringing to light lost treasures for the benefit of humankind.²⁴² On the other hand, Odyssey is viewed as a modern-day treasure hunter, plundering gravesites for profit.²⁴³ Concededly, without commercial salvage operations such as Odyssey's, the coins would probably have remained on the seabed, where their cultural significance would not be appreciated.²⁴⁴ As a consequence, Odyssey's operations contribute to the sharing and understanding of underwater cultural heritage in ways that would be impossible if those artifacts remained 1100 meters below sea level.²⁴⁵ Now that the coins have been salvaged, it is possible for indigenous people to use public attention to inform others of the horrific exploitation

239. International Convention on Salvage, *supra* note 111, art. 13, ¶ 2 ("Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salvaged values.").

240. See BOESTEN, *supra* note 95, at 123–24 (noting that the International Convention on Salvage continues the practice of granting a maritime lien on the salvaged property.).

241. See *supra* note 85 and accompanying text.

242. Odyssey Marine Exploration, About Us, <http://shipwreck.net/aboutus.php> (last visited Apr. 10, 2010) (stating that Odyssey contributes to the historical and archaeological understanding of the world through its endeavors).

243. See Cahal Milmo & Jerome Taylor, *Intrepid Treasure-Hunters—Archaeological Vandals?*, INDEP., Feb. 3, 2009, <http://www.independent.co.uk/news/uk/home-news/intrepid-treasurehunters-ndash-or-archaeological-vandals-1543642.html>.

244. See Booth, *supra* note 130, at 296 ("[O]nly the tiniest fraction of mankind are licensed scuba divers.").

245. See *id.* (stating that without underwater recovery efforts, the items would remain "[l]ying on the ocean floor, out of reach and out of sight of essentially all of mankind" instead of on display in museums or in private art collections).

of the *mita* and its immense cost to Andean indigenous peoples²⁴⁶ or to possibly receive the coins back as redress for the wrong they suffered. Nevertheless, if the coins remained *in situ*, then no one would be able to further profit from the exploitation of the indigenous people, and there would be no risk the coins would be disbursed throughout the world and subject to decay or destruction. There are many arguments on both sides for commercial salvage, and there is no clear international consensus on whether cultural property should be subject to commercial salvage operations.

C. Demand Redress for Harm Caused by Colonization

DRIP provides redress for both cultural property and land and resources taken without consent.²⁴⁷ Whether the coins are categorized as cultural property or land and resources leads to different treatment under DRIP. The DRIP redress provision for cultural property specifies that “States shall provide redress through effective mechanisms . . . with respect to their culture, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”²⁴⁸ This provision permits claims against States only; therefore, if Odyssey were awarded title to the coins, indigenous people would be unable to seek redress from Odyssey. Indigenous claims to cultural property must be filed through “effective mechanisms” created by the State.²⁴⁹ Because there is no uniform mechanism established by DRIP for redress, indigenous people would be disadvantaged by high transaction costs.²⁵⁰ Another barrier to redress is that indigenous people would have to establish that the coins were

246. BROWN, *supra* note 199, at 246 (“The symbolic power of indigenesness . . . provides a global network of sympathizers who quickly rally to the cause in a time of crisis. For corporations that worry about their public image, the power to shape opinion is never to be taken lightly.”).

247. DRIP, *supra* note 165, arts. 11, 28.

248. *Id.*, art. 11, ¶ 2.

249. *Id.*

250. Additionally, “[w]ith its compartmentalization of cultural heritage and emphasis on proprietary interests, international and domestic laws were not designed with indigenous peoples and their cultures in mind.” *Reparations for Cultural Loss*, *supra* note 160, at 202–03.

taken without their consent or in violation of their laws and customs.²⁵¹ This could be difficult to establish two hundred years later because records may be lost or destroyed. Finally, application of DRIP fails to address competing claims to ownership. It is left open whether indigenous claims to restitution should trump subsequent titleholders or claims of other descendants, who may be innocent third parties.²⁵²

Alternatively, DRIP provides redress for “lands, territories and resources which [indigenous peoples] have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”²⁵³ Instead of emphasizing the coins’ character as cultural property, the coins may alternatively represent “taken” resources from traditionally owned indigenous land.²⁵⁴ The silver and gold mined to mint the coins constitute resources that are now no longer available for the development of the indigenous people.²⁵⁵ Although indigenous people would have the burden of proving that the resources were taken without consent,²⁵⁶ redress is not expressly limited from or through States as it is for cultural property.²⁵⁷

DRIP favors different forms of redress in a particular order: first as the thing taken, second as a like-kind substitute, and third as monetary compensation.²⁵⁸ Therefore, the best

251. It is likely that the *mita* system, which was fundamentally exploitative under colonial Spain, violated the indigenous law of reciprocity. *See supra* note 64 and accompanying text.

252. *See Is International Law Ready to Ensure Redress for Historical Injustices?*, *supra* note 221, at 40 (“[T]he question can be raised whether natural or legal persons should not be liable in terms of civil responsibility . . . relat[ing] to injustices committed in a distant past and by individuals who have long been dead.”).

253. DRIP, *supra* note 165, art. 28, ¶ 1.

254. *Id.*

255. *See* ELAZAR BARKAN, *THE GUILT OF NATIONS* 331 (2000) (“There is a general public agreement that resources are important for what they enable people to do.”). Removal of resources represents a lack of choice, which “emphasizes the practical relationship of ethics to human needs . . .” *Id.*

256. DRIP, *supra* note 165, art. 28, ¶ 1.

257. *Id.* art. 11, ¶ 2 (allowing redress for the taking of property not associated with a government or state but limiting it to that of a people’s heritage, including “cultural property”).

258. *Id.* art. 28, ¶ 2; *see* Charters, *supra* note 175, at 170–71.

restitution for the loss indigenous peoples suffered may be the coins themselves, as the return of the minerals extracted. The coins are now historic relics rather than silver extracted from the mountains and may provide a source of income separate from the mining industry.²⁵⁹ Because indigenous people would have a “choice” over the development of the coins as resources, some of the moral taint on the coins would be removed.²⁶⁰ Nevertheless, the silver coins discovered by Odyssey represent only a small amount of the silver extracted from the Andes during the colonial Spanish Empire, and therefore would not be “equal in quality, size and legal status.”²⁶¹ Additionally, because the coins may also be considered cultural heritage, they are less alienable²⁶² than silver in the mountains and may be expensive to preserve or display. Consequently, it could be disputed whether restitution of the coins would sufficiently pay Spain’s debt to the indigenous people. Restitution may also not be preferable from the archaeologist’s standpoint because in awarding the indigenous people possession of the coins, access for research may be restricted.²⁶³

Therefore, because restitution of the coins may not be in everyone’s best interest, the next best form of redress would be monetary compensation²⁶⁴ in recognition of the indigenous people’s property rights in the coins. Indigenous people should be granted a property interest in the coins because

259. For example, the coins could be leased to museums or displayed locally as a tourist attraction. See Cosmosphere, Artifact Leasing, http://www.cosmo.org/mu_ar_leasing.htm (last visited Apr. 10, 2010) (“[T]he Cosmosphere can lease space artifacts from its collection to museums and institutions around the world.”).

260. See BARKAN, *supra* note 255, at 331.

261. DRIP, *supra* note 165, art. 28, ¶ 2.

262. See *Culture, Heritage and Human Rights: An Introduction*, *supra* note 200, at 7 (“The increasing value of art works and antiquities, and their non-fungible character, may add economic relevance to [cultural property] claims.”).

263. See *id.* at 6. However, preservation may be furthered because not all the coins of a certain era are kept in one collection. See André Emmerich, *Improving the Odds: Preservation through Distribution*, in WHO OWNS THE PAST? CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 247 (Kate Fitz Gibbon ed., 2005).

264. In-kind substitute would not eliminate the problems already discussed regarding restitution because the coins’ cultural value is irreplaceable. Therefore, the next-best form of redress under DRIP would be monetary compensation. DRIP, *supra* note 165, art. 28.

“[w]hatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, . . . and joyned to it something that is his own, and thereby makes it his *Property*.”²⁶⁵ Accordingly, if Odyssey were to take title to the coins, then indigenous people should receive a fair share of the profits Odyssey makes from selling the coins because of their uncompensated effort in creating them. This argument is further bolstered in equity, where other parties should not be permitted to profit from human rights abuses committed against indigenous people during the Spanish Empire.²⁶⁶ DRIP does not foreclose such a result against private parties in the case of redress for traditionally owned “lands, territories and resources.”²⁶⁷ Therefore, indigenous people’s interests would be best protected if the coins constitute “resources” under DRIP.

V. CONCLUSION

International law is still in its formative stages regarding the treatment of indigenous underwater cultural heritage. The Law of the Sea, the Convention on Underwater Cultural Heritage, and the 1970 Convention are State-centric and therefore inadequately represent the interests of indigenous peoples. The application of the law of finds threatens not only the preservation of underwater cultural property but also prejudices indigenous claims to it through “abandonment.” Although the law of salvage permits indigenous claims to underwater cultural heritage, the salvage award effectively cannibalizes such claims, leaving the indigenous people in the same, if not worse, position as before. Because indigenous interests in the protection of cultural heritage are inadequately considered in international law under UNCLOS, the Convention on Underwater Heritage, and the 1970 Convention, the indigenous people must either hope that States will represent their interests or wait until title is established before demanding

265. JOHN LOCKE, *THE TWO TREATISES OF GOVERNMENT* 288 (Peter Laslett ed., 2003).

266. See *Is International Law Ready to Ensure Redress for Historical Injustices?*, *supra* note 221, at 41 (“[I]t is logical that a secondary right to reparation from the wrongdoer should correspond to the breach of a primary norm of international law.”).

267. DRIP, *supra* note 165, art. 28, ¶ 2.

redress. The success of such a claim is contingent on who has title to the property and whether it is a traditionally owned resource or cultural property.

Although it is unlikely that the international community will confer States' rights to indigenous peoples under the relevant international treaties and declarations, it ought not preclude their valuable participation in the disposition and preservation of underwater cultural heritage. Given that indigenous cultural property constitutes a significant contribution to the heritage of mankind, particularly in the "New World",²⁶⁸ and the importance of these objects to indigenous culture as "integral to [their] cultural and spiritual integrity,"²⁶⁹ indigenous participation would help preserve history in a socially responsible way. Such participation is especially important in this case, where the cultural property and the destructive process of colonization are inextricable. Despite the passing of two hundred years, the cycle of poverty and disillusionment continues. It is time to include indigenous voices in the disposition of their history and to treat them as essential participants in that history instead of its victims.

268. See Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 562-63 (1995) ("The irony of American cultural history is that although the North American continent is blessed with a significant indigenous culture, this culture has gone largely unrecognized and unprotected.").

269. *Reparations for Cultural Loss*, *supra* note 160, at 227.