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RESEARCH

Indigenous rights and underwater cultural heritage: (de)constructing international conventions

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Abstract

People, ideas and products of all civilisations have been moved by ships, making oceans one of the major drivers for the divergence and convergence of human societies. Furthermore, human beings have interacted and lived on and around oceans, so their heritage provides testimony to many periods and aspects of our shared history. The marine policies to protect underwater and coastal heritage are complex, since this heritage has an intricate two-way relationship with anthropology and law. The legal instruments to specifically protect underwater cultural heritage do not include the consideration of Indigenous communities, although there are nearly 2000 coastal Indigenous communities in 87 countries with coastal heritage and maritime-based traditions. Since it is the law of Coastal States (emphasis on States) that directs how submerged lands and waters that belonged to Indigenous communities are used, the international legal instruments offer little actual leverage to these communities over the management of their cultural resources. This article studies Indigenous rights over their underwater cultural heritage, exploring the legal issues, anthropological arguments and ethical dilemmas. It will also show the complexity of the language and the interpretation of international treaties for these communities. Finally, the article encourages inclusion of the Indigenous concept of intangible cultural heritage, arguing that Indigenous peoples have been, and are, innovative users of natural resources, and their traditional activities can benefit not only their own members but also the international community.

Keywords Underwater cultural heritage · Indigenous rights · Indigenous communities · Anthropological identity · Marine legal instruments

Introduction

The Universal Declaration of Human Rights (UDHR 1954) (Declaration of Human Rights hereinafter) is a milestone document in the history of human rights. Translated to more than 500 languages, when it was being translated into Mapudungun, the language of the Mapuche, it became problematic, with significant differences in each one of the articles (Bustos 2014). Any occidental language translated to the language of this community brings differences to basic conceptions. For this group of Indigenous inhabitants in present-day south-central Chile and southwestern Argentina, the Declaration of Human Rights has similarities with their Az Mapu, a set of principles based on religion, tradition and identity. However, contrary to the Declaration of Human Rights, this set of principles states that, for the Mapuche, all 'living world' has rights, not only humans: animals, rivers, volcanoes, plains, valleys and mountains all have rights. Humans have obligations towards these elements, rather than rights, since humans do not 'own' these things. Consequently, for the Mapuche, the Declaration of Human Rights stipulates very occidental concepts difficult to apply to this Indigenous community. Below is an example of the difficulty of translation into Mapudungun, Article 22 of the Declaration (UDHR 1954):

> Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

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> The translation for the Mapuche article was:
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> Those in charge of this territory have to help, so there is harmony and good health to all the people in this territory. If those in charge cannot help, then they need to be helped by other close territories (translated by author based on Bustos [2014, p. 5]).

As a consequence, for the Mapudungun, the Western right to social security had to be translated as the duty to maintain socio-spiritual behaviour to preserve balance with nature.

As reported by Mamo (2020), there are nine core international human rights treaties that deal with civil and political rights; economic, social and cultural rights; racial discrimination; torture; discrimination against women; child rights; migrant workers' rights; persons with disabilities; and enforced disappearances. Each treaty has its own monitoring body, which are committees of independent experts in charge of monitoring the respect, recognition and protection of the rights affirmed in these treaties and the implementation of the respective treaties. These treaties also adopt general comments and recommendations. A large number of treaty bodies' general comments *make reference* to Indigenous peoples' rights. However, according to Mamo (2020), only the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of the Child have adopted general comments *specifically addressing* Indigenous peoples' rights.

The world's Indigenous peoples are facing numerous challenges and are seeking a voice in world politics. However, conflicts between states and non-state actors, some of them Indigenous peoples, have led to many tensions, such as forced relocation of tens of thousands of tribal people, biopiracy (the exploitation of indigenous natural resources) or the cutting of timber in tropical forests (Hitchcock and Sapignoli 2012). The victims of these forced relocations are being named 'development refugees'. As the anthropologist Pierre Clastres already wrote in 1981, the options offered to Indigenous communities on their lands by Occident have been either to transfer the lands for development or to die: an ethnocide or a genocide. As the author affirmed, 'produce or die' is the Occident's motto (Clastres 1981).

One of the main issues is that many States do not formally recognise the customary tenure rights of Indigenous peoples over their lands so the Indigenous communities do not have the right to establish their own environmental regulations. Very few of them are in control of the governments of the countries where they reside and, as a consequence, they may have de facto control over land and resources but not de jure legal control. Some of them have reached binding agreements with states—such as the Treaty of Waitangi between the Crown in New Zealand and the Māori—but the fact is that Indigenous people have been left out of most international debate on promotion of indigenous rights, and of most deliberation of international laws. There are, however, some notable exceptions. The United Nations Declaration on the Rights of Indigenous Peoples adopted in 2007 is the most comprehensive instrument on the rights of indigenous people (UNDRIP 2007) (Declaration on the Rights of Indigenous Peoples hereinafter). The 1993 Convention on Biological Diversity also recognise the close dependence of Indigenous communities with biological resources and calls for respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities (Article 8.j., CBD 1993). As part of this Convention, in 2010 the 'Tkarihwaié: Ri, the Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities' was adopted. This is the legal instrument more directed to protect the knowledge and heritage of Indigenous communities, since it calls for 'respect for cultural heritage, ceremonial and sacred places' of these communities (Article 12, Tkarihwaié 2011). Also, as part of the Convention on Biological Diversity, in 2000, the 'Akwé: Kon Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites, and on lands and waters traditionally occupied or used by indigenous and local communities' was adopted, recognising that most indigenous communities live in areas of where the most majority of the world's genetic resources are found. The Tenure Guidelines from the Food and Agriculture Organization of the United Nations singed in Rome in 2022 (FAO 2022) also expressively recognises the tenure rights of indigenous peoples and other communities with customary tenure systems, including rights to land, fisheries and forests. In relation to international legal instruments directed expressly to cultural heritage, in 2005, a new UNESCO Convention was approved: the UNESCO Convention for the Protection and promotion of the Diversity of Cultural Expressions (UNESCO 2005). It recognises the dual nature of cultural expressions: cultural and economic, and in particular the knowledge systems of Indigenous peoples. It also acknowledges these communities as creators, produces or distributors of cultural expressions, a highly conflicting issue due to the irregularities of Copyright Law protecting Indigenous Cultures, which requires a whole research article for its own.

However, there is still a very much unaddressed and unresolved issue of Indigenous sovereignty over submerged lands which were—or are—part of their original territories and that is a key matter for the rights of Indigenous communities over their underwater cultural heritage. The submerged paleolandscapes were in many cases places where the ancestors of contemporary Indigenous cultures inhabited, used, and were interred there. Today, these submerged lands and waters today are 'the territorial seas' and 'exclusive economic zones' of the colonisers since the United Nations Convention on the Law of the Sea (UNCLOS 1982) (the Law of the Sea hereinafter)

do not make any accommodation for sovereign Indigenous peoples. As this paper will demonstrate, most of the conventions are directed to the modern concept of 'States', and consequently these legal instruments fail to acknowledge and respect Indigenous communities´ sovereignty and therefore deny them a place at the table when such issues are deliberated. However, until the standing of sovereign Indigenous communities with regard to these places is resolved, the cultural and natural tangible and intangible resources in these submerged lands and waters will continue to be preserved and managed from a colonising point of view.

First of all, this article will look at the concept of underwater cultural heritage of indigenous communities, focusing on the case of the Spanish conquerors in Latin America. After, this article will explore the legal international instruments available for the protection of this heritage and it will analyse the problematic of the language of these conventions. Then, the article will look at some anthropological arguments in relation to the cultural heritage of Indigenous communities and lastly, it will explore the possibilities of the combo Intangible/Underwater cultural Heritage.

Underwater cultural heritage of Indigenous communities

During times of conquer, Indigenous peoples were destitute not only of their land and dominions, but also of their historical and cultural artefacts. Thousands of objects were carried on board ships travelling from conquered domains to conquerors' land. These objects included not only coins, silver and gold, but also sacred and culturally significant objects for those communities. However, for the European countries those objects were only rare objects and cultural objects, which started to collect in the museums that were starting to flourish in the continent (Greenfield 1996). However, some of the ships with those cargo on board sank to the bottom of the ocean *en route*.

In March 2007, Odyssey Marine Corporation discovered the shipwreck of *Nuestra Señora de las Mercedes* with a treasure worth approximately $500 million in silver and gold coins (Cheng 2010). These coins were mined and minted through the exploitation of the Indigenous people of what is now known as Peru. After the discovery of this wreck by Odyssey, the Spanish government decided to take a legal battle against the company in the United States courts. On 14 February 2012, the US courts ruled in favour of the Spanish State. The shipment was deposited in the National Museum of Underwater Archaeology in Cartagena. In addition to the coins, the frigate was carrying, among other things, 403 copper bars and 1. 964 of tin, two useless bronze cannons, medicinal plants, vicuña wool objects, skins of various animals such as chinchilla, guanaco, skunk, tiger and leopard, as well as lions and sea lions, and personal items such as a cutlery set consisting of two ladles, a *mancerina* for drinking chocolate, a small candlestick and twelve small silver spoons; a gold yew tree (similar to an ingot, although flat and slightly curved); and a leather-covered drawer containing, among other objects, a gold mortar (Red Digital de Colecciones de Museos de España, n. f.). However, any rights Indigenous people could have to the coins and objects on board are ignored in state-centric international legal instruments and declarations, such as the 2001 UNESCO Convention (Cheng 2010).

The discovery of the New World brought the exploitation of gold, silver and precious materials. Consequently, mines in Latin American lands began to be heavily exploited for these materials. These and also local cultural artefacts that were new for the conquerors, were shipped to the mainland. Objects from Indigenous communities become symbols of conquest and were transported to Europe.

The Spanish conquerors disembarked in Latin America land in 1492. The vanquished regions were not states, fundamentally, before the appearance of the Christopher Columbus, yet exceptionally coordinated networks of native individuals. The Peruvian, Colombian or Mexican 'countries' did not yet exist. However, when the Spanish showed up, the territories were divided into various forms of societies. At the point when the Spanish settled, the European and the Aboriginal ethnic gatherings converged into another race called *mestizo* or *criollo*. The domains were then controlled by the conquerors but they were also part of them. In fact, the lands were viceroyalties, viewed as provinces as opposed to colonies. After 1809, the vast majority of the Spanish-American regions became autonomous and by 1830, 13 autonomous state-run administrations had been established in Latin America (Flores 2003). However, colonialism had gone on for a long time and, as Jakubowski (2015) explores, heritage is a vehicle of memory and identity, difficult to compartmentalise. During the process of decolonisation, restoration of dispersed cultural property was essential to reconstruct historical memories and national identities. In this case, the today autonomous states can difficult separate the influences of native civilisations from those impacts under Spanish control which, over hundreds of years, had formed their language, culture and cultural objects.

As a consequence, the return of these cultural objects to their original communities has been a long-contested topic. Anthropological, legal and cultural history perspectives need to be considered. Countries petitioning for the return of treasures removed by another country during a period of colonial status are very often in the news.[1]

[1] See for instance: https://greekcitytimes.com/2023/02/04/restitution-of-looted-ancient-artefacts-from-switzerland/ or https://asianews.network/repatriation-ceremony-marks-return-of-30-looted-treasures-to-cambodia/

There are many examples of Indigenous communities' representatives litigating for their rights and interest in the Inter-American Court of Human Rights, as well as cases in the UN Human Rights Council (Granger 2007). The issue sometimes is if these cultural objects were legally shipped, as in the case of a Spanish province, as it could be Peru or Chile in the Spanish domination to mainland Spain. Although these objects from ancient cultures do not represent the democracies of today's Peru, Chile or Colombia, they are symbols of their cultures—the Inca or Aztec civilisations, for example—deeply linked to the occupants of the territories. The issue is even more complicated with some of the sinks carrying those cultural objects sank, either accidentally or due to armed attacks. The issue becomes complicated not only because of the territorial contestation but also because of the confusing maritime, heritage and international laws applied to underwater cultural heritage's ownership. Shipwrecks are today a source of international conflict not only between States, but also between diverse groups and communities. The submerged world produces an interest which has recently derived into a development of underwater exploration, with private companies and nations claiming rights over cultural treasures with the rights and privileges of Indigenous communities being neglected.

Legal issues

The Law of the Sea (UNCLOS 1982) is an international agreement to regulate activities in the world's oceans and seas. When the Convention was being negotiated, the rights of Indigenous people were largely neglected. In fact, most Indigenous people openly challenge the conventional system of state frontiers, including international maritime boundaries (Schug 1996, p. 209). In addition, the wording of the Convention brings complications for the rights of these communities. Article 149 of UNCLOS, 'Archaeological and historical objects' states:

> 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.

The issue with this article is the use of the concept 'state or country of origin', 'state of cultural origin' and 'state of historical and archaeological origin' which were not defined by the Convention. For Dromgoole (2013), the presence of all three formulas means that 'there is a broad basis for states to claim preferential rights […] including situations where one state has succeeded to another, or where several countries share, or shared, the same culture' (Dromgoole 2013, p. 123). For the author 'state of origin' implies the that underwater cultural heritage that originated in a certain place—for instance, where it was built—does not mean that the state is, or ever was, the owner. This brings many barriers for the rights of Indigenous communities to claim ownership over certain objects. Watters (1983) states that these concepts are very controversial, since they give options for more than one state to claim preferential rights to the pieces of heritage setting out various questions: does the state of origin have preferential rights to the vessel, whereas the various states of cultural, archaeological, or historical origin have preferential rights to goods transported by such vessel? Or does that state of origin also have preferential rights to the goods if they originally were legitimately acquired through purchase? What if they were seized as booty? What is done with vessels or cargos from states that no longer exist?

The concepts 'state of cultural origin' and 'state of historical origin' are not easily applicable to the civilisations prior to the arrival of the Spaniards, or to Indigenous communities of any kind. The concept of statehood is quite a contemporary one and can only be applied to Peru, Chile or Mexico. However, Indigenous peoples were the first peoples in their own land, a land taken by force by those who settled there (Higgins 2003). However, since Indigenous communities are not considered states; they need a state to represent their interests (Cheng 2010). However, Indigenous interests may be incompatible with those of the rest of the state, as in the Canadian case.

Currently, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities defines Indigenous people as.

> [I]ndigenous communities, peoples and nations having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, considered themselves distinct from other sectors of the societies […] and are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity.[2]

These Indigenous communities are still present as we have seen in the Latin American territories: they have a

[2] United Nations, Department of Economic and Social Affairs, Division for Social Policy and Development, & Secretariat of the Permanent Forum on Indigenous Issues. (2004). The perspective of information received and collected within the context of ILO Conventions Nos. 107 and 169, and other relevant ILO Conventions. *Workshop on data collection and disaggregation for indigenous peoples*, New York. www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=0ahUKEwj149eo1d_RAhXpBcAKHQ-pCwIQFggcMAA&url=http%3A%2F%2Fwww.un.org%2Fesa%2Fsocdev%2Funpfii%2Fdocuments%2Fworkshop_data_background.doc&usg=AFQjCNFMb2Ln4AqUEFKk_8ozGuEM8LvcYw&sig2=toAgV2YCEXKFMpfDqifLnw

continuity from before the Spanish arrived. They remained during the Spanish domination and survived after the independence of the new states. It is, therefore, difficult to see the Spanish domination, from the point of view of cultural heritage, as a breach between the existing cultures and modern nations of Peru, Chile, Colombia, etc. The Indigenous communities—and their cultural heritage—are abiding civilisations that have survived state succession, although they have lost the material expressions of their cultures.

Jakubowski (2015) offers the solutions to benefit Indigenous communities with the introduction of the term 'territorial provenance', offering a link between a territory, its human communities and their collective cultural identity. It is the relation between an object, its land and the people who lived therein. For Indigenous communities, the relations between nature, land and heritage are intrinsic to their identity, and this term would include that link, not a link with a state or a nation, but with a civilisation. As indicated, the spiritual intrinsic link of Indigenous peoples with natural resources and land has also been recognised by international jurisprudence such as the Convention on Biological Diversity (1993), for instance.

The final text of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (UNESCO 2001) does not have either into consideration the rights of Indigenous communities over their underwater cultural heritage. However, the issue of whether the underwater cultural heritage of Indigenous peoples should be included in the draft was raised, particularly by Australia since, for this country, issues of underwater cultural heritage involve Aboriginal subaquatic archaeology. However, the Convention finally did not include any mention to their heritage (Johnson 2000). The 2001 UNESCO Convention (UNESCO 2001)—just as UNCLOS—grants special preferential rights to 'states of cultural, historical or archaeological origin', using the excluding concept of 'states'. Article 12 of the 2001 UNESCO Convention provides:

> […] 6. In coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations pursuant to this Article, the Coordinating State shall act for the benefit of humanity as a whole, on behalf of all States Parties. Particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned.

The other issue is the wording 'benefit of mankind' (UNESCO 2001, Article 12), since there is no definition of 'mankind' in the treaties, which may be positive and desirable so each country or/and community can have their own definition. Consequently, interpretations depend on each nation's cultural and philosophical backgrounds. Benefit of mankind for some states can mean to store coins in a national museum away from Indigenous communities. For some Indigenous communities, it could mean using those coins for sacred rituals and that their heritage should be protected for future generations as sacred places (Hitchcock and Sapignoli 2012).

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970) may be an alternative instrument for regulating indigenous underwater cultural heritage. Article 4 indicates that cultural property forms part of the cultural heritage of each state:

> (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;

If Indigenous communities fell into the category of 'stateless persons', then their cultural heritage could have been protected. However, according to the Introduction, paragraph 10. the Convention is not retroactive. The Convention says that 'a State Party can seek the recovery and return of any illegally exported, illegally removed or stolen cultural property imported into another State Party only after the entry into force of this Convention in both States concerned'. As Indigenous communities are not a State Party, it very difficult provide them with any rights. The same is true for Article 11, which states that.

> the 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.

The Indigenous and Tribal Peoples Convention 169 (ILO, 1989) creates obligations among ratifying states to Indigenous peoples' demands. However, their field of application does not comprise underwater cultural heritage, although, according to Article 5 'the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected […]'.

As a consequence, the supposed and possible repatriation of this piece of heritage would have many anthropological complexities, mixed with legal issues. Nowadays, repatriation of artefacts is a fairly common practice. It is the governments themselves that have been colonisers in the past that are taking firm positions on objects acquired in the past, many of which are now in their public museums. Germany is pioneering this initiative. Along with a 2019 declaration by the country regarding the reconsideration of cultural objects taken during the colonial era, we have seen a series of repatriations to Namibia (a former German colony) and the announcement of the return of Benin bronzes to Nigeria. The Netherlands and Belgium seem to be moving in a similar direction. And France passed a law at the end of 2020 to return 27 important cultural objects to Benin and Senegal.

There are several reasons why countries want their cultural treasures returned to them, such as that they are central to the formation of their own identity as a new nation or that these cultural objects are key to fostering and sustaining a tourist economy. Objects might encourage European tourists to visit the museums in Chile, Peru or Bolivia where they are on display. Sometimes the return of cultural objects is also simply a matter of dignity for the communities or countries concerned. The problem is that, in this case, Spain might also have reasons for not returning the object, such as that it was legally acquired because the land was a Spanish colony, or that the success of the National Museum of Underwater Archaeology depends on the importance of objects like those ones.

International instruments and treaties, as we have seen, does not shed much light in favour of indigenous arguments. UNESCO has formulated numerous recommendations and conventions for the repatriation of cultural objects. For example, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention) (UNESCO 1954) states that treasures stolen in wartime should be returned to their original owners. The looting of museums by invading armies in World War II was the catalyst. It is especially important today, given the movement to return treasures taken by Nazi armies from Jewish homes before and during the Second World War. However, in this case it would not serve our object of study. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris Convention) (UNESCO 1970) states that a nation must define its national treasures in a list and that these will be protected in case of theft. It provides mechanisms for states to recover stolen cultural property. But the cultural property proposed must be of national importance. This convention does not grant these rights to individuals or institutions, so the convention needed the support of another convention in 1995. As we can imagine, this would be of little use in the case of indigenous interests. The 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT 1995) attempts to solve the problems of the 1970 Convention. It does so by recognising the rights of individuals and institutions to have their property returned to them. However, there is no reference to indigenous property. Moreover, it applies to the restitution of stolen cultural property and to the return of illegally exported cultural property, and as said, in the case of Spanish domination it would be difficult to defend that it has been illegally exported.

The problematic of the language component

One main problem is that, although in the 1970s Indigenous peoples extended their efforts through direct appeals to international intergovernmental institutions, international instruments and treaties are still difficult to apply in indigenous languages. Indigenous languages are not only methods of communication, but they are also central to the identity of Indigenous peoples, the preservation of their cultures, worldviews and visions (United Nations 2019). If international agreements are not translated into their language, their beliefs and consequent actions cannot be expected to accord with those international agreements. There are between 370 and 500 million Indigenous peoples worldwide in over half of the world's countries. They make up 5% of the global population (World Bank 2021). Of these, coastal Indigenous communities have a total of about 27 million people in nearly 2000 communities in 87 countries (Fears 2016). According to the United Nations (2019), there are more than 4,000 indigenous languages spoken today.

Two examples of the deficiency of language in international treaties include the following. The official languages of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (UNESCO 2001) are English, French, Spanish, Russian, Arabic and Chinese, with an official translation in Portuguese and an unofficial translation in German, for information purposes. The 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, a convention that recognises the connection between Indigenous people and their practices, representations, expressions, knowledge and skills, has six authoritative languages (Arabic, Chinese, English, French, Russian and Spanish) and has been translated, officially or unofficially, into other languages: Albanian, Armenian, Bulgarian, Catalan, Chichewa, Croatian, Czech, Dutch, Estonian, Finnish, Galician, German, Greek, Hungarian, Italian, Japanese, Kiswahili, Korean, Laotian, Latvian, Lithuanian, Luganda, Mongolian, Nepali, Northern Sami, Persian, Portuguese, Romanian, Slovak, Tajik, Tigrinya, Turkish, Uzbek and Vietnamese (UNESCO 2003).

New Zealand, for instance, has not ratified either the 2001 Convention or the 2003 Convention. The country's explanation for not ratifying the 2003 UNESCO Convention is their concerns about the provisions of the Convention. A main issue for them was that intangible and tangible heritage are inextricably linked and that the cultural property of Indigenous peoples is not referred to in the Convention (Ministry of Culture New Zealand, n.d.). However, the main point for not ratifying the Convention was that, for Māori people, language is not simply a vehicle for transmission of cultural heritage as the UNESCO 2003 Convention states in Article 2.2:

> The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains:
> (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; […]

This article stresses the importance of language for some Indigenous communities.

Greenland, also, has not ratified either of the two conventions, also based on the importance of language for Inuit communities. In fact, this case proves new complexities on the relation between Indigenous communities and their States. Arctic waters have distinctive features regarding historical titles combined with Indigenous rights (Aznar 2021). Under the 1993 Nunavut Land Claims Agreement (NLCA), the Inuit people conceded Aboriginal title to their lands and waters in Canada. Canada fabricated the region of Nunavut, concluding that Inuit-owned lands are expected to encompass areas of archaeological, historical or cultural importance (NLCA 1993). Following the discoveries of two shipwrecks, the *Erebus* and the *Terror*, the Inuit claimed their rights to the original artefacts and the wrecks associated with Inuit intangible heritage, since the Inuit shared stories and knowledge that helped better understand the Arctic and the fate of the Franklin ships and their crews. They were first-hand witnesses to the Franklin Expedition, and they helped contribute to the search for the lost vessels over the ensuing years. In 2017, it was agreed that the UK would transfer ownership of both shipwrecks to the government of Canada to be co-owned by the Inuit, although they would keep the 65 items already recovered in one of the shipwrecks. Canada 'used' the historical presence of Indigenous people, and both British shipwrecks, to claim ownership of the Northwest Passage.

Anthropological arguments

The Indigenous community could put forward several arguments if the piece were of interest to them under an anthropological interpretation of the legal discourse:

1. Cultural heritage VS historical heritage. Some pieces cannot be considered a cultural object. For example, the Ikenga, Nigerian sculptures have symbolic connotations for the members of their community, as it dignifies the individual, his family or community and speaks of their worldview and aspirations. It symbolises the inalienable rights of the holder(s) to be and to become (Hannum 1988). Many of these objects are now held in museums in the UK, 7000 km from Igboland, Nigeria. In the case of a Spanish tobacco box found in a shipwreck for instance, an object very dear to conquerors, would first be questionable whether it is an indigenously made piece. The style would suggest that it was made by a Spanish goldsmith or a Spanish school of goldsmiths who may have been in the territory for 300 years, perhaps teaching goldsmithing to the locals and Indigenous people. It is doubtful whether an Indigenous person would like to have a tobacco box returned, not for economic reasons, but for cultural and heritage identity reasons. According to Cruces (1998), the idea of heritage has a lot to do with a twofold process that first separates or splits objects from ordinary social life and then tries to return them to it, albeit already interpreted by a work of mediation. However, a tobacco box may not be a cultural object for the Indigenous community but it can be an object that is part of the historical heritage. The Real Academia de la Lengua Española (Royal Academy of the Spanish Language) defines historical heritage (first entry, translated by author) as:

> Set of real estate and movable objects of artistic, historical, paleontological, archaeological, ethnographic, scientific or technical interest, as well as documentary and bibliographic heritage, archaeological sites and areas, natural sites and gardens and parks, which have artistic, historical or anthropological value.

A tobacco box may not have cultural value for the Indigenous community because it is not an object that is part of their traditions, but it may well have artistic, historical or anthropological value for them, as a witness of an era.

2. Source materials from indigenous lands. The precious metals of the Peruvian Andes are a very important part of the indigenous history of Peru. In fact, the Incas developed metallurgical technology specially adapted to high altitude mining. The Incas developed used these precious metals to create spectacular palaces and temples, establishing the relationship of gold as symbolism for the Sun and silver for the Moon. When the Spanish discovered these temples, they were impressed and decided to use them for their own benefit. Furthermore, in 1545 silver was discovered in Potosi. As a consequence, this mine produced a wealth of great impact (Cole 1985). Normally, this gold and silver was transported to the port city of Callao, and then loaded onto ships to cross the Atlantic. In this sense, Indigenous communities interested in the repatriation of a tobacco box, for instance, could appeal to the definition of the 1970 UNESCO Convention (Article 1) where heritage is:

> property which, for each State, on religious or secular grounds, possesses archaeological, prehistoric, literary, artistic or scientific value and which belongs to the following categories:
> [...] (b) Property relating to history, including the history of science and technology, military history and social history. as well as the lives of national leaders, thinkers, scholars and artists and events of national significance;
> c) The product of archaeological excavations (both authorised and clandestine) and archaeological discoveries [in this case underwater archaeology];

(d) Elements resulting from the dismemberment of artistic or historical monuments and sites of archaeological interest [in this case underwater archaeological];
(e) Antiquities more than 100 years old, such as inscriptions, coins and engraved seals;
f) Ethnological material;

The tobacco box could be protected by the Convention under any of these definitions, and Indigenous communities could use this inclusion to claim repatriation of the piece. As Cruces (1998) argues, legal definitions of heritage always assume the value of its contents as if it were something prefixed and indisputable. The interpretation of definitions could play in the Indigenous community's favour in negotiations.

3. Indigenous labour. The production of gold and silver required a large workforce. For this, the Spaniards created a compulsory labour force, where Indigenous people had to work in the mines. It is estimated that one seventh of the Indigenous men who were able to work, worked at least four months without a stop in the mines for very low wages. This system of forced labour was called *mita* (Cole 1985). The system was a mechanism of colonial exploitation with no benefits for the community because the wealth was used by the Spaniards to buy European goods. Although these workers were in the minority, they were forced into the most difficult jobs, which resulted in Indigenous depopulation. In fact, and according to Dell (2010) the influence of *mita* still lingers today with an impact on land ownership: the descendants of those who worked under the *mita* system are less integrated into society today and are poorly educated farmers. It may be that the Indians themselves did not mould and engrave the piece, although after 300 years of occupation, Spanish goldsmiths who may have migrated to the Viceroyalty from the peninsula could have already spread their knowledge, which could have been inherited and developed by the locals. The authorship of the piece may never be known, but the indigenous labour force and the system of forced labour could be arguments in favour of the Indigenous communities.

The final question is what would happen if a piece such as a tobacco box if it is eventually returned by Spain. It is conceivable that, if returned to Peru, or Bolivia or Chile, it could be exhibited in a national or regional museum. However, this would mean that it would not return to the Indigenous community; would this community be interested in keeping the piece or would it be a reminder of the forced labour to which they were subjected? It remains to be seen whether the local Indigenous communities are interested in making all these arrangements in order to finally attract—as Francesch Díaz (2016) calls tourists—the new peaceful armies of neo-colonialism.

As demonstrated, the international instruments and treaties around the issue of Indigenous communities' underwater cultural heritage is state-centric and inadequately represents the rights of Indigenous peoples. Reisman (1995) observes that '[t]he tribunals address only the issues raised by the formal parties before them, which, under the rules of the game established by states, can only be states'. Consequently, if more shipwrecks are to be found, Indigenous communities will not have a voice for their heritage on board those shipwrecks. Only when states have needed the voice of Indigenous populations before international adjudicative bodies has it been possible to address the will of these populations (Aznar 2018).

Law is both shaped by society and shaping society. For instance, few international judges and arbitrators, when deciding over a territorial dispute, have assessed human circumstances, such as indigenous claims (Aznar 2018). According to Aznar (2018),

> several causes justify the lack of impact of the human dimension in international territorial adjudication, [such as] a structural and ethnographic cause, which describes how a particular social model of organization – the western-type state model – has been (and still is) the *clef de voûte* of the international system, thus neglecting other actors' interests in adjudication. (p. 293)

Indigenous preferences for the protection of underwater cultural heritage may be an acknowledgment of the significance of the sea, land claims that may need to be extended beyond resource uses to include spiritual sites over oceans or that the ocean floor (including the continental shelf) may have significant heritage value in relation to ancient occupation sites that are now submerged (Johnson 2000). The indigenous eco-politics that has developed recently purposely links human rights with the environment. It may be an example for sustainable development based on indigenous practices. In 2021, the Magpie River in Canada was granted legal personhood by local authorities and given nine rights, including, for instance, the right to flow or the right to sue. The Innu community campaigned for this recognition, since, for them, the river is a place for healing. Many rivers and natural features may become recognised as a living entity. Ecuador, Bolivia, Mexico and Colombia have created this legal mechanism to protect nature. The Whanganui River in New Zealand also has rights as an independent entity as part of the treaty settlement between the Māori people and the government. These rights for nature are being asserted more where Indigenous people strive to protect their lands (Barkham 2021). The question is if this legal personhood for nature is, as always, a Western construct, although this re-orientation of the law around indigenous relationships to nature can be beneficial.

In the case of underwater cultural heritage management, there is a need in countries with Indigenous communities to

be inclusive of indigenous sites, associated cultural practices and intangible heritage (Jeffery and Parthesius 2013). But, the West can 'indigenise' their laws, activities or societies. If indigenous values played a more prominent role in managing the oceans, there could be real balance in sustainable development. The activities of Indigenous peoples can benefit not only their own members, but their success may also point the way for the negotiated resolution of other conflicts among states, groups and individuals (Hannum 1988). As Santos (1993) defends, there is a need for 'decolonisation' with the valorisation of more human experiences.

Intangible cultural heritage/underwater cultural heritage

Some Indigenous communities have lifestyles and practices linked to respect for nature and the environment. According to Bustos (2014), indigenous mentalities do not have individual goals in mind, but collective ones. They are objective, maintaining the balance and collective harmony of the group.

Indigenous peoples hold a rich diversity of living heritage, including practices, representations, expressions, knowledge and skills. The 2003 Convention (UNESCO 2003) provides a platform for Indigenous peoples to ensure that their needs in safeguarding living heritage are taken into account (UNESCO 2019). If the 2001 Convention (UNESCO 2001) does not protect the underwater cultural heritage of Indigenous communities, it may be time to create co-operation between this Convention and the 2003 Convention that can benefit Indigenous communities. The separation of laws brings many conflicts. Intangible heritage is as powerful as tangible material, although protecting it is particularly difficult. One option explored in this article is whether underwater cultural heritage should have the status of 'sacred place' as intangible heritage. According to Article 1 of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (UNESCO 2003), intangible heritage is defined as:

> 1. The 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage [...], provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.
> 2. The 'intangible cultural heritage', as defined in paragraph 1 above, is manifested inter alia in the following domains: […] (c) social practices, rituals and festive events.

Intangible heritage does not include physical material that has been destroyed, and a shipwreck does not constitute a ritual practice, although it can be 'a cultural space associated therewith'. Due to the organic, evolving nature of intangible cultural heritage, legal protection may be difficult. However, Rule 5 of the Annex of the 2001 UNESCO Convention (UNESCO 2001) introduces the term 'venerated sites'. For O'Keefe (2010), 'venerated sites' means those that have spiritual meanings for certain people. As a consequence, shipwrecks considered 'venerated sites' would be included in the definition of intangible heritage for being 'cultural spaces associated with a community'. Their preservation as intangible heritage, therefore, can not only be a monument part of the heritage of a community, but also a tool to shape collective memory. Underwater cultural heritage can act as a trigger for a set of emotions and, more importantly, historical memories and that is considered intangible cultural heritage. In addition, underwater cultural heritage, which may contain human remains on board, can be considered watery graves and would fall right in the middle of the delicate issue between the definition of intangible cultural heritage—living cultural practices passed from generation to generation—and human rights. For instance, during the transatlantic slave trade, up to 1000 slave ships ended up as wrecks, and over two million African slaves died en route. These shipwrecks became mass watery graves. Despite the importance of the subject, the number of excavated slave shipwrecks has been undeniably small, so information about the victims' identities is limited. This is mainly due to complicated ethnic identity issues about who should manage these shipwrecks: the flag states or the nations from which the slaves came? Or the Indigenous communities of some of these slaves? In addition, some of these slave shipwrecks had slaves on board from Indigenous communities, impacting ethnic identity issues today. The intangible and tangible heritage lines get blurred in these circumstances.

However, there is a very clear distinction between underwater cultural heritage and intangible cultural heritage within UNESCO, and the division may not need to be altered (Finney, n.d.). However, practical considerations can serve to collect information on underwater sites, such as collecting oral histories to prepare for the survey of underwater sites, helping these stories to be preserved, integrating tangible and intangible aspects of underwater heritage (Finney, n.d.). Some underwater cultural heritage training programmes and projects that have been carried out in Guam, Saipan, Hawai ʻi and Chuuk are directed to empower Indigenous people to implement underwater cultural heritage management from their perspectives (Jeffery et al. 2021).

According to Hannum (1988), domestic treatment of Indigenous peoples falls into two categories. Either the state accords Indigenous inhabitants a special legal status, which is intended to protect them and free them from certain

civil obligations (also limiting their enjoyment of certain rights), or the state recognises that Indigenous inhabitants possess all of the rights and obligations of other nationals of the state, but it also takes account of the special needs of Indigenous populations as is done for other 'disadvantaged' groups.

> If decolonization is the removal or undoing of colonial elements, then Indigenization could be seen as the addition or redoing of Indigenous elements. Indigenization moves beyond tokenistic gestures of recognition or inclusion to meaningfully change practices and structures. Power, dominance and control are rebalanced and returned to Indigenous peoples, and Indigenous ways of knowing and doing are perceived, presented, and practiced as equal to Western ways of knowing and doing.[3]

What if the Law of the Sea would have been drafted with the inclusion of Indigenous perspectives? How would underwater cultural heritage be protected under an indigenised 2001 UNESCO Convention?

As mentioned, the Convention on Biological Diversity is the legal international instrument more directed to protect the rights of Indigenous communities over their lands, resources and heritage. Both, the Tkarihwaié:ri code of ethical conduct and the Akwé: Kon Voluntary Guidelines are directed to achieve the respect and preservation of the knowledge and practices of Indigenous communities. The guidelines highlight the role of Indigenous communities in informing responses to global challenges and they look at how intangible cultural heritage can bring societies together and anticipate new approaches to provide a response to the challenges set out in the 2030 Agenda of the United Nations. In fact, Indigenous peoples have been engaging in national, regional and global processes related to the 2030 Agenda for Sustainable Development and the Sustainable Development Goals of the UN General Assembly (Mamo 2020). Their main objective is to include Indigenous peoples' perspectives and initiatives to contribute to sustainable development. For instance, the Indigenous Peoples Major Group for Sustainable Development co-ordinates the engagement of Indigenous peoples in the High-level Political Forum, which is the global review process of the Sustainable Development Goals (Mamo 2020). Intangible heritage can increase knowledge, exploring uses of the oceans and how this heritage can serve to achieve effective conservation practices and sustainable economic development. The results can bring to the field the immateriality and atemporality of oceans to serve as a tool to the United Nations' agendas by exploring how intangible cultural heritage and underwater cultural heritage can serve to reduce gender, political and ethnic inequalities. As Hannum (1988) affirms:

> The unique position of most Indigenous societies, their relative powerlessness in real political and military terms, and the increasing coordination of their efforts at the international level offer a rare opportunity to advance international legal norms and respond to real needs of these Indigenous communities at the same time. (p. 678)

The local community emphasis in the management of the intangible meaning of underwater cultural heritage by Indigenous communities is part of a more holistic approach than the Western one. The impact on Indigenous lives and their cultural heritage in general should always be considered, even when dealing with non-indigenous underwater cultural heritage because it will teach us new necessary approaches to its management (Jeffery et al. 2021).

Conclusions

This article has demonstrated that Indigenous communities face many barriers when adhering to international practices. In some instances, it is not just that there is no translation into their main language, but also that the interpretation of these Western-orientated legal instruments is very confusing for these communities because they do not have the same traditions, concerns or solutions as the West. However, Indigenous communities should have the right, not to have those laws translated to their own langue, but to be participants in the drafts of these international treaties in order to choose their own path of development when preserving their own culture.

Indigenous peoples in general emphasise the spiritual nature of their relationship with the land or the oceans, which is basic to their existence and to their beliefs, customs, traditions and cultures. In developing countries, a focus on intangible cultural heritage can help engage the local communities by giving a larger role to local people. The management of underwater cultural heritage calls for a holistic approach more than may any other heritage to collecting information, in which intangible cultural heritage can increase our knowledge of the underwater environment.

This paper has highlighted one of the major handicaps in the protection of the Indigenous cultural heritage in submerged lands: it is necessary to resolve the sovereignty issue of these waters and lands and recognise them as the coastal corridors of Indigenous communities. Only by acknowledging that most submerged paleo-landscapes—that are now

[3] Queen's University. Centre for Teaching and Learning What is Decolonization? What is Indigenization? Available at: www.queensu.ca/ctl/resources/decolonizing-and-indigenizing/what-decolonization-what-indigenization

directed by Coastal Sates—might or could have been places where the ancestors of Indigenous communities lived, used and were interred, there will be an opportunity to include the Indigenous communities in an equitable and appropriate disposition of underwater cultural heritage.

This article has studied the complexities of defending indigenous rights in the form of claiming a shipwreck in the court system. The indigenous concepts of intangible and tangible understanding of heritage can be of benefit for the protection, interpretation and management of underwater cultural heritage. This shows that Indigenous people can pioneer indigenous-based development in many areas, which is both sustainable and can benefit the international community.

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