INDIGENOUS INTERNATIONAL REPATRIATION

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I. INTRODUCTION

Over the past three decades and with the global recognition of indigenous rights, international repatriation has become an important and necessary indigenous right to address. While the repatriation of human remains and the return of stolen objects is certainly not new to international law and is widely accepted as an international norm among non-indigenous peoples, the recognition of these rights *as applied* to indigenous peoples and indigenous communities historically has been denied. It has only been within the current human rights framework over the past twenty years that indigenous rights and international repatriation have gained a foothold in the present-day international law framework. The gradual recognition that indigenous peoples have equal human rights within the international structure is most particularly evidenced by the Repatriation Movement, which indicates the beginning of a rescission of deep-set cultural paternalism and colonialism.[1]

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1. Amy Maguire, *Law Protecting Rights: Restoring the Law of Self-Determination in the Neo-Colonial World*, 12 L. TEXT CULTURE, no. 1, 2008, at 12, 17 *available at* http://ro.uow.edu.au/ltc/vol12/iss1/3.

> The greatest obstacle to claimant peoples who seek to use the right in this way is that international law has not yet engaged with its Eurocentric bias, with the result that colonialism rarely features prominently in international legal analysis (Anghie 2004: 34). Instead, as Antony Anghie (2004) recognises, having been born from colonialism, international law now reproduces colonialism at every turn.

Id.

The issue of international repatriation is intricately woven into the history of the development and globalization of international law. The genesis of this present-day human rights issue begins nearly five centuries ago at the beginning of the written European historic record in the New World (1492). With such historic beginnings in the formative years of international and European domestic legal structures, the collecting of indigenous ancestral remains and cultural objects[2] without indigenous consent became such an accepted concept within legal structures and academia that until recently, indigenous communities had made little headway in repatriation efforts.

As with many movements, the impetus for change and equal consideration under the law began with the people most directly affected—indigenous communities. It was first addressed in domestic legislation[3] and, now, with the full realization of the pervasive extent of this human rights issue, international repatriation has been pursued as a global human rights issue in the international community of nation-states over the past two to three decades.

Influential domestic legislation passed in either founding member nation-states of the United Nations (U.N.), or former commonwealths of these founding member nation-states, has been especially influential in the indigenous Repatriation Movement. This legislation includes the Native American Graves Protection and Repatriation Act (NAGPRA)[4] and the National Museum of the American Indian Act (NMAI Act)[5] in the United States, the Aboriginal and Torres Islander Strait Act[6] in Australia, and the First Nations Sacred Ceremonial Objects Repatriation Act in Alberta, Canada.[7] In addition, New Zealand has initiated an international repatriation

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2. Throughout the rest of this paper, "cultural objects" will refer to funerary objects, sacred objects, and objects of cultural patrimony. I have adopted the general terms used within the Native American Graves Protection and Repatriation Act (NAGPRA) because these are terms the general U.S. audience is familiar with in repatriation efforts within the United States. *See* 25 U.S.C. § 3001 (2006). In addition, NAGPRA has the most extensive grouping of legal definitions for the ancestral remains and cultural objects Native American communities would like to have repatriated. The nuances of NAGPRA, however, will not be used. For instance, "ancestral remains" will cover both affiliated and unaffiliated ancestral remains. Also, "funerary objects" includes both associated and unassociated funerary objects.

3. Domestic legislation refers to legislation passed within a country or a nation-state.

4. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001–3013 (2006) and 18 U.S.C. § 1170 (2006)).

5. National Museum of the American Indian Act, Pub. L. No. 101-185, 103 Stat. 1336 (1989) (codified as amended at 20 U.S.C. §§ 80q to 80q-15 (2006)).

6. *Aboriginal and Torres Islander Strait Act 2005* (Cth) (Austl.).

7. First Nations Sacred Ceremonial Objects Repatriation Act, R.S.A. 2000, c. F-14 (Can.).

effort with its indigenous peoples through the Te Papa Tongarewa Museum. All of these national and international repatriation efforts have been driven by indigenous communities. As these indigenous efforts have progressed, a second wave of responsive efforts in the Repatriation Movement has emerged in nation-states where these indigenous communities do not have traditional homelands. This includes the development of the Working Group on Human Remains in the United Kingdom and efforts to develop international repatriation policies in Scotland. This second-wave response, however, has not coalesced in actual effective repatriation legislation, but rather executive-level government response or responses among the museums themselves. For instance, in 2000, the prime ministers of Australia and the United Kingdom entered into an agreement to repatriate indigenous human remains from the U.K. to Australia. Some may argue that the Human Tissues Acts in England (2004) should be considered repatriation legislation, but as this article will later demonstrate, this law works to limit repatriation and is not enforceable against some of the largest institutions holding Native American collections in the U.K. All of these efforts, both indigenous-driven and second response, have occurred in countries with common law legal systems.

As the full extent of the international human rights issue of repatriation has become more apparent, and the Repatriation Movement has moved from repatriation efforts in individual nation-states into the international arena, indigenous communities are forced to navigate several new and complex legal structures. Not only do these complexities include individual nation-state domestic legislation pertaining to constitutional laws, cultural heritage laws, and museum laws, they also include the international legal structure of the United Nations where indigenous communities remain nonvoting third parties in international legal documents directly pertaining to their communities. This third-party policy is most likely due to a number of historic policies that have been ingrained in the legal framework of domestic laws, making international approaches to indigenous issues difficult to change. Most of these difficulties center around the recognition nation-states give to their indigenous communities and the legal structure upon which nation-states have developed their respective governments and legislative institutions. With regard to international repatriation, these multiple, multifaceted, legal, legislative, executive, and administrative structures are inherently important considerations. Understanding these foundations will assist indigenous communities in negotiating international repatriations, challenging laws that may currently preclude such transnational repatriation to indigenous communities, and in advocating for international repatriation worldwide.

Today, more avenues are available for indigenous peoples to voice concerns to the international community, including the necessity for support for international repatriation. As compared to international indigenous policy before the 1970s when indigenous communities had no representative-based body in the international structure to represent their concerns, in the 1990s, the U.N. created an advisory body called the U.N. Permanent Forum on Indigenous Issues. The U.N. Permanent Forum on Indigenous Issues meets twice a year at the U.N., provides an opportunity for indigenous communities to debrief the U.N. on current indigenous issues, and provides the opportunity to file grievances.[8] Representatives of U.N. member-states are invited to participate and, usually, these government officials are present to submit statements to the U.N. on the state of indigenous issues within their own countries.[9]

The U.N. Permanent Forum on Indigenous Issues actively asserted the tenets of the international Repatriation Movement when it drafted the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP).[10] The UNDRIP was adopted on September 13, 2007, by 144 countries, with 4 countries voting against it (including the United States, Australia, New Zealand, and Canada) and 11 abstentions (including Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine).[11] The United States, New Zealand, Australia, Canada, Colombia, and Samoa, since that time, have all supported the UNDRIP.[12]

Of particular importance to international repatriation is Article 12(2) of the UNDRIP, which specifies that "States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned."[13] On December 16, 2010, the U.S. State Department, under the Obama Administration, released a document in support of the UNDRIP just after President Obama signed the

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8. *About Us*, UNITED NATIONS PERMANENT F. ON INDIGENOUS ISSUES, http://social.un.org/index/IndigenousPeoples/AboutUsMembers.aspx (last visited Mar. 22, 2012).

9. *Id.*

10. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *available at* http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

11. *Voting Record Search*, U.N. BIBLIOGRAPHIC INFO. SYS. (Sept. 13, 2007), http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295.

12. *Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS PERMANENT F. ON INDIGENOUS ISSUES, http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx (last visited Mar. 22, 2012).

13. Declaration on the Rights of Indigenous Peoples, *supra* note 10, at art. 12(2).

UNDRIP on behalf of the United States.[14] In it, the State Department stated, "[t]he Declaration's call is to promote the development of a concept of self-determination for indigenous peoples that is different from the existing right of self-determination in international law,"[15] indicating a shift of international norms pertaining to indigenous peoples within international law. Article 12 of the UNDRIP indicates the adoption of the repatriation of ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony, *as applied* to indigenous peoples and indigenous communities, as an international norm.[16]

This Article will document the full extent of the historic injustice that has led to the human rights issue of international repatriation, as it pertains to Native American communities in the United States, and with a comparative perspective to other indigenous communities who have suffered similar inequities. In addition, this Article will argue for a more robust model for international repatriation, particularly in light of the adoption of repatriation as an international norm through the U.N. Declaration on the Rights of Indigenous Peoples. Parts II and III of this article will lay the foundational basis of European relations with Native American communities over a five-hundred year history and demonstrate how the taking of indigenous ancestral remains and cultural objects has become ingrained in the legal and academic structures of colonial states, former colonial states, and the resulting nation-state international framework. Part IV will delve into the modern Repatriation Movement, which has been initiated by indigenous communities; discuss both domestic and international responses to international repatriation; and demonstrate how international repatriation has been adopted as an international norm. Finally, Part V will describe the three models of international repatriation currently in place, discuss unnecessary barriers that have presented themselves, and argue for a stronger response in domestic and international contexts involving communication with, consent of, and partnership with indigenous communities in international repatriation.

Underlying the basis of the international repatriation human rights issue is a fundamental lack of consent of indigenous peoples, individually and collectively, not only in the original taking of indigenous ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony, but in the continued display, profit from, study of, and possession of indigenous

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14. ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2010), *available at* http://www.state.gov/documents/organization/153223.pdf.

15. *Id.* at 3.

16. Declaration on the Rights of Indigenous Peoples, *supra* note 10, at art. 12.

ancestral remains and cultural objects by international repositories without consent. This Article will actively reveal the global adoption of overriding indigenous consent in matters concerning their person, community, and property in favor of non-indigenous goals throughout history and demonstrate how this policy has made its way to modern times.

II. HISTORY

A. Introduction

Five centuries of collecting indigenous ancestral remains and cultural objects without the free, prior and informed consent of indigenous peoples has created the necessity for international repatriation. Beginning in the fifteenth century with the European discovery of Native America, the practice of grave robbing and stealing cultural objects laid the foundation of taking without consent (or theft) from indigenous peoples and indigenous communities for the next five hundred years.[17] Throughout these five centuries, justifications for not seeking the consent of indigenous peoples, such as exploration, colonialism, science, manifest destiny, paternalism, development, and genetics have all outweighed the right of indigenous peoples to self-determine the future of their person, property, and community.[18]

Colonialism's influence, in particular, on the development of both the current international legal structure and former colonial states, has embedded the practice of overriding the consent of indigenous peoples into international law,[19] most particularly in acquiring indigenous ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony, so that it is no longer questioned and generally never considered. As McGuire asserts, "[t]he greatest obstacle to claimant [indigenous] peoples who seek . . . the [self-determinative] right . . . is that international law has

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17. *See* Frederick C. Waite, *Grave Robbing in New England*, 33 BULL. MED. LIBR. ASS'N 292 (1945). *See generally* WILLIAM D. PHILLIPS, JR. & CARLA RAHN PHILLIPS, THE WORLDS OF CHRISTOPHER COLUMBUS 6 (2000); Geir Ulfstein, *Indigenous Peoples' Right to Land*, 8 MAX PLANCK Y.B. UNITED NATIONS L. 1 (2004).

18. S. JAMES ANAYA, INTERNATIONAL LAW AND INDIGENOUS PEOPLES xii–xiii (2003); *see also* MARIE BATTISTE & JAMES (SA'KE'J) YOUNGBLOOD HENDERSON, PROTECTING INDIGENOUS KNOWLEDGE AND HERITAGE: A GLOBAL CHALLENGE 12–14 (2000); VINE DELORIA JR. & DAVID E. WILKINS, TRIBES, TREATIES, & CONSTITUTIONAL TRIBULATIONS 7 (1999).

19. Anne Perrault et al., *Partnerships for Success in Protected Areas: The Public Interest and Local Community and Rights to Prior Informed Consent (PIC)*, 19 GEO. INT'L ENVTL. L. REV. 475, 476–79 (2007); *see also* BATTISTE & HENDERSON, *supra* note 18.

not yet engaged with its Eurocentric bias . . . . [H]aving been born from colonialism, international law now reproduces colonialism at every turn."[20] This section will discuss the development of the international repatriation issue by laying out its history, how it is interwoven into the development of international law, and how this issue is threaded through time to present itself today as an international human rights issue.

While indigenous communities have historically been denied the equal rights of their nation-state counterparts in international law, it has not been until relatively recently with the advent of human rights that indigenous rights have been recognized within the international framework.[21] The necessity for respect when burying the dead has been translated across cultures into a customary norm of international law, as evidenced by the return of human remains following war and laws surrounding the repatriation of human remains in other countries. It has also been widely accepted as an international norm to return stolen objects. However, this international understanding *as applied* to indigenous human remains and cultural objects has been denied to indigenous communities. Indigenous ancestral remains have been held after death without the consent of families or communities, often in order to serve the needs of non-indigenous communities.[22]

In order to fully understand how the past nonconsensual acquisition of indigenous ancestral remains and cultural objects connects to the present-day issue of repatriation, it is important to understand its historic genesis. Today's ongoing human rights violations persist in the form of the retention of indigenous ancestral remains and cultural objects in international repositories, their display, their study, and profits made from them without the free, prior and informed consent of indigenous communities. This binds the violations committed against indigenous peoples in the past with the human rights violations of the present. In addition, for Native American communities seeking to repatriate internationally, the historic revelations of time, place, and peoples becomes vastly important in making international repatriation claims.

Free, prior and informed consent has been defined by the World Intellectual Property Organization (WIPO) as the "collective right of

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20. Maguire, *supra* note 1, at 17.

21. ANAYA, *supra* note 18, at xi–xix; *see* Declaration on the Rights of Indigenous Peoples, *supra* note 10, at 2 ("*Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources . . . .").

22. ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 14, at 14.

indigenous peoples exercised through their chosen representatives or representative bodies in accordance with their customs and traditions and refers to both activities that are addressed to indigenous peoples directly and those that are not addressed to them directly but will eventually affect them."[23] WIPO further defines "free" ("given without any pressure, manipulation or fraud"[24]), "prior" ("consent is given before any decisions are made or any activities are planned"[25] with sufficient time for indigenous communities to reach internal agreement), and "informed" ("indigenous people concerned [are] provided in accessible (language format) with comprehensive information on proposed activities, including their economic, social and cultural impacts, as well as their possible consequences").[26] In addition, "free, prior and informed consent" has also been used throughout the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) in Articles 10, 11, 19, 28, 29, and 32.[27] With particular regard to the UNDRIP, Article 11 states that "[s]tates shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."[28] Thus, the signing of the UNDRIP and Article 11 and Article 12, in particular, signals the adoption of international repatriation of indigenous ancestral remains and cultural objects as an international norm. To date, the UNDRIP has been signed by all nation-states (except those who abstained), including the United States.

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23. GULNARA ABBASOVA, FOUND. FOR RESEARCH AND SUPPORT OF INDIGENOUS PEOPLES OF CRIMEA, WIPO INDIGENOUS PANEL ON FREE, PRIOR AND INFORMED CONSENT: EXPERIENCES IN THE FIELDS OF GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS: EXPERIENCES FROM UKRAINE 2 (2010), *available at* http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_16/wipo_grtkf_ic_16_inf_5_a.pdf.

24. *Id.*

25. *Id.*

26. *Id.*

27. Declaration on the Rights of Indigenous Peoples, *supra* note 10, at arts. 10, 11, 19, 28, 29, 32.

28. *Id.* at art. 11.

B. Introduction of European International Law to Native America

1. 15th Century: Europe Adopts Historic Practice of Non-Consent and Grave Robbing

The international repatriation issue begins in Native America, in 1492 when Christopher Columbus made Europe aware of the existence of the continents.[29] With him, Columbus brought a European legal system and structure that provided him with the authority to take land from indigenous peoples and impose Spanish law and European international law on them without their consent.[30] This power was not bestowed upon him by Native Americans, but by the Spanish crown through the Vatican, which constituted the most powerful legal entity in Europe in the fifteenth century.[31] While such authority had little meaning to indigenous peoples in the Americas whom Glenn argues followed a chthonic legal structure, or law that by "criteria [is] internal to itself, as opposed to imposed criteria,"[32] the evolution of this imposed authority over Native American peoples would eventually become acutely devastating to Native American nations.[33] As opposed to the Vatican and Spanish legal structures, which were written, the chthonic legal tradition is characterized, in part, by its orality.[34] Thus, the written documentation from the Spanish crown and the Vatican papal bulls, would have held little meaning to indigenous peoples in their legal systems and ways of life (at least initially), and, similarly, indigenous oral legal traditions were largely disregarded by Europeans as not legally authoritative, an issue that indigenous communities still face today.

Upon the arrival of Christopher Columbus in Native America, two very distinct types of international law existed: Native American chthonic international law and European western international law.[35] The fifteenth

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29. DELORIA & WILKINS, *supra* note 18, at 3.

30. *Id.* at 3–4.

31. Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 26, 30 (1983).

32. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 57 (2000).

33. VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 1–24 (1983).

34. GLENN, *supra* note 32, at 58.

35. While Malanczuk compares Grewe's post-sixteenth century division of international law into three orders, Spanish (1494–1648), French (1648–1815), and English (1815–1919), to Bernhardt's regional developments of international law in Africa, the Far East, the Islamic world, Latin America, and South and South-East Asia, arguments for the development of an international legal system in Native America by Strickland and Glenn suggest that a Native American international legal system was in place in Native America. *Compare* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 9 (7th ed. 1997),

century arrival of Christopher Columbus signals the first interaction of both legal structures with each other. This Article will address how Columbus's initial international relations with indigenous peoples were ultimately adopted as European international policy. After Columbus, these policies were adopted by trading posts, and then early colonial governments. Today, these policies continue to regurgitate their colonial roots "at every turn," as McGuire suggests, and to impose early, racially oppressive tenets on indigenous communities through the retention of Native American ancestral remains and cultural objects within international repositories. The topic of Native American international law will be left to discussion in a future publication.

In Europe during the fifteenth century, the Vatican wielded enormous political and religious power over European countries and papal bulls were "the highest form of legal instrument"[36] in European international law. Because popes generally came from influential aristocratic families throughout Europe, the Catholic Church was politically influenced by European monarchs, and European monarchs were heavily influenced by the Vatican.[37] The issuance of papal bulls became especially significant in the context of Native America (the New World), when the Church issued a series of papal bulls demarcating ownership of non-European land to two European sovereigns: Spain and Portugal.[38] The struggle between these two strong, maritime countries over Native America and the West Indies became especially apparent as the papacy changed hands and subsequent papal bulls began to contradict those of the past.[39] For instance, the Papal Bull of 1481, *Aeterni regis*, declared land "south of the Canaries and west of Africa" within the jurisdiction of Portugal.[40] However, through the machinations of Spanish-Papal alliances, the 1493 Papal Bull, *Inter caetera* I and *Inter caetera* II, under the Spanish Pope Alexander VI, declared the land discovered by Columbus to belong to the Spanish.[41] Soon thereafter, Spain and Portugal agreed on acceptable boundaries for claims in the New

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with GLENN, *supra* note 32, *and* RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975).

36. PHILIP E. STEINBERG, THE SOCIAL CONSTRUCTION OF THE OCEAN 76 (2001) (quoting EDGAR GOLD, MARITIME TRANSPORT: THE EVOLUTION OF INTERNATIONAL MARITIME POLICY AND SHIPPING LAW 35 (1981)).

37. *See* Robert J. Miller et al., *The International Law of Discovery, Indigenous Peoples, and Chile*, 89 NEB. L. REV. 819, 826–30 (2011).

38. *Id.* at 830–33.

39. WILLIAM D. PHILLIPS, JR. & CARLA RAHN PHILLIPS, THE WORLDS OF CHRISTOPHER COLUMBUS 187–89 (1992).

40. *Id.* at 187.

41. Miller et al., *supra* note 37, at 833.

World in the Treaty of Tordesillas.[42] These papal bulls and the resulting claims under then-acceptable European international legal principles for land and jurisdiction in Native America during this era, formed the basis of what came to be known as the Doctrine of Discovery in later judicial analyses, a concept that persists in federal Indian law in the United States to this day.[43]

The constantly changing territorial boundary divisions between Portugal and Spain by papal bulls were primarily driven by the potential for economic profit through discovery of an alternative route for the spice trade and were heavily veiled in the guise of Catholic conversion of indigenous peoples.[44]

In addition, the Spanish crown was heavily invested in the Spanish Inquisition.[45] Lasting from 1480 to 1824, with its most atrocious practices taking place between the end of the fifteenth century and beginning of the sixteenth century, the Spanish Inquisition and its tribunals terrorized Catholics, non-Catholics, and *conversos*, or those who had converted to Catholicism and were suspected of reversion to their traditional religions.[46] Spanish tribunals during the Inquisition burned people at the stake, tortured victims into conversion, and ordered Jews and Muslims to convert or leave the country by royal decree.[47] Some scholars argue that the Inquisition's

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42. *Id.* at 833–34. International agreements developed around the European discovery of Native America almost immediately upon its discovery. In 1494, in response to the recent papal bull, Spain and Portugal signed an international treaty called the Treaty of Tordesillas. *Id.* This treaty divided all newly discovered lands by Europeans between Spain and Portugal. *Id.* Lands 370 leagues west of Cape Verde were declared under the jurisdiction of Spain and those to the east were under the jurisdiction of Portugal. *Id.* In *Lines of Division, Lines of Connection: Stewardship in the World Ocean*, Philip E. Steinberg contends that the oceanic demarcations made in the Papal Bulls of this time period and the Treaty of Tordesillas did not indicate legal ownership of the ocean, but rather marine stewardship, which granted jurisdictional powers, but did not encompass a full bundle of property rights. Philip E. Steinberg, *Lines of Division, Lines of Connection: Stewardship in the World Ocean*, 89 GEOGRAPHICAL REV. 254, 255–57 (1999). He was not clear on whether this stewardship extended to the land within these boundaries or not, but the Papal Bull and Treaty of Tordesillas appear to clearly state that land, both main land and islands, was possessory by each sovereign. *Id.* While the Papal Bull reflected the desire of the papacy to convert indigenous peoples of the Americas, the Treaty of Tordesillas left church matters out and instead focused on Spain and Portugal's possession of land within the boundaries it set forth. *Id.* at 256.

43. Miller et al., *supra* note 37, at 820.

44. Larry Sager, *Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations*, 76 U. DET. MERCY L. REV. 745, 760–65 (1999).

45. *Id.* at 761.

46. HENRY KAMEN, THE SPANISH INQUISITION: A HISTORICAL REVOLUTION 10–17 (1997).

47. *Id.* at 62–63, 301.

primary purpose was for financial gain and political power,[48] while others argue it was to ensure the Vatican remained intact.[49]

However, the practices of the Spanish Inquisition were not limited to the confines of Europe. They extended into Native America in written form as the *Requerimento*[50] and in physical form where similar tactics of European torture were used against Native Americans to force indigenous peoples under duress to accept the authority of Spain and its interpretation of European international law.[51] Evidence of these practices was documented by Columbus himself, who enumerated his practices of torture, non-consensual acquirement of property, and grave robbing that he inflicted upon the indigenous peoples of Native America.[52]

Columbus instituted the practice of robbing Native American graves, believing these graves to be sources of wealth in gold.[53] In addition, he enslaved, raped, tortured, and oppressed the indigenous peoples of Native America.[54] Yet, despite these acts, Columbus was granted the title of Admiral of the Seas and the positions of Governor and Viceroy of the newly discovered lands,[55] titles that could be inherited by his progeny.[56] While Columbus was Viceroy, indigenous peoples were required to pay a tax in gold every few months. If they did not, their hands and feet were cut off.[57] Although Columbus was eventually arrested, he was released from jail only having lost his titles.

While merely in its infancy, the development of international law became intricately interwoven into the European discovery of Native America and other non-European lands.[58] With it also developed specific practices pertaining to indigenous communities that have, since that time, denied the legitimacy of indigenous self-determination, the importance of indigenous history, and the respectful application of international norms to

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48. *The Spanish Inquisition*, DON QUIJOTE, http://www.donquijote.org/culture/spain/history/inquisition.asp (last visited March 22, 2012).

49. *Id.*

50. DELORIA & WILKINS, *supra* note 18, at 4.

51. Miller et al., *supra* note 37, at 835–37.

52. Sager, *supra* note 44, at 763–64.

53. *See id.* at 765; *see also* WILLIAM D. PHILLIPS & CARLA RAHN PHILLIPS, THE WORLDS OF CHRISTOPHER COLUMBUS 6 (1993).

54. PHILLIPS, *supra* note 39, at 6; Sager, *supra* note 44, at 760–61.

55. Christopher Columbus, *Contract Between Columbus and the Sovereigns* (Apr. 13, 1492), *in* 1 THE AUTHENTIC LETTERS OF COLUMBUS 181–82 (William Eleroy Curtis ed., José Ignacio Rodríguez trans., 1894); s*ee also* Sager, *supra* note 44, at 763.

56. Christopher Columbus, *supra* note 55, at 181–83.

57. 1 THE ENCYCLOPEDIA OF NORTH AMERICAN INDIAN WARS, 1607–1890: A POLITICAL, SOCIAL, AND MILITARY HISTORY, at xxxviii (Spencer C. Tucker et al. eds., 2011).

58. ANAYA, *supra* note 18, at xi–xix.

indigenous peoples as equal peoples, particularly those norms involving the free, prior and informed consent of indigenous peoples to issues that directly affect them.[59] Along with these practices adopted by Europeans at the outset of the development of international law, Europeans also adopted the practice of plundering Native American graves, disturbing Native American ancestral remains, and acquiring Native American cultural objects without consent. These practices and policies have all given rise to the necessity for international repatriation today.

2. 15th–16th Centuries: Columbus Dictates the Future of European Relations with Native American Nations

Though Columbus was eventually arrested on multiple charges and forced to return to Spain to face them, ultimately, he was not convicted by the Spanish monarchs for the atrocities of his actions in Native America, and the monarchy funded his fourth and final trip to the continent.[60]

Columbus's writings about the potential for gold profit in indigenous lands in the Americas influenced future explorations.[61] Myths of cities of gold abounded in Europe and later brought brutal *conquistadores* (the "conquerors" in Spanish) to Native America, such as Hernán Cortés and Hernando de Soto, whom, together with their thousands of soldiers, killed indigenous peoples believed to be hiding these mythical hoards of gold. These brutal policies more thoroughly embedded the practice of grave robbing and stealing Native American cultural objects into acceptable European practices.[62]

As *conquistadores* began traveling to Native America with more frequency, the slave trade of indigenous peoples of the Americas continued,[63] but it was not without loss to the individuals seeking profit.[64] While traveling across the ocean to Europe, large numbers of Native American slaves died from diseases not encountered in Native America, as

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59. *Id.*; *see also* Declaration on the Rights of Indigenous Peoples, *supra* note 10, at 4; DELORIA & WILKINS, *supra* note 18, at 3–12.

60. PHILLIPS & PHILLIPS, *supra* note 17, at 227–30.

61. Miller et al., *supra* note 37, at 835–37.

62. Lola Clayton Rainey, *Monopolistic Land Tenure and Free Trade in Mexico: Resurrecting the Ghost Porfirian Economics*, 23 AM. INDIAN L. REV. 217, 220 (1998); *see also* BENJAMIN KEEN & KEITH HAYNES, A HISTORY OF LATIN AMERICA: ANCIENT AMERICA TO 1910, at 70 (2009).

63. JUNIUS P. RODRIGUEZ, SLAVERY IN THE UNITED STATES: A SOCIAL, POLITICAL AND HISTORICAL ENCYCLOPEDIA 80 (Junius P. Rodriguez ed., 2007); Rainey, *supra* note 62, at 251–52.

64. *See* RODRIGUEZ, *supra* note 63, at 80.

well as the harshness of the voyages.[65] After many years, this led investors to fully focus the slave trade toward Africa, a continent whose people had already encountered many European diseases and had significant immunities to these diseases, unlike Native Americans with almost no previous contact with Europeans.[66] This did not lead to a complete abandonment of Native American slavery, however.[67] Over the next few centuries, slavery of Native Americans by Europeans continued less frequently, although it resurged again in smaller numbers when the whaling and rum industries emerged off the eastern coast of Native America in the sixteenth and seventeenth centuries.[68]

These practices of brutality, land acquisition, torture, grave robbing, stealing, and enslavement signify the early adoption by European society of the practice of not seeking consent of Native American peoples and communities over their person, property, and communities. This practice was adopted into the European international law framework as early as the fifteenth century and evidence of its existence continues today both in the present-day international legal structure, as well as in the domestic European legal structure, in the form of museum laws and cultural heritage protection laws, which this Article will address later.

3. 16th–17th Centuries: European Trading Companies Adopt Practices of the Spanish

During the sixteenth and seventeenth centuries, nonconsensual practices persisted in the international and domestic legal structures of European nations through the development of trading posts and within the founding charters of these trading companies. Seeking to bolster the emerging European free market, European nations sent whaling, fishing, and fur traders to Native America in order to extract resources from the land, water, and indigenous peoples.[69] Thousands of trading posts were established throughout the present-day United States and Canada to trade beads, brandy, guns, and tools, among other things, with Native American communities in exchange for fur pelts.[70] As demand in Europe grew for

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65. *Id.*

66. *Id.* at 80–81.

67. CAROL BERKIN, FIRST GENERATIONS: WOMEN IN COLONIAL AMERICA 54–55 (1996).

68. *Id.*; Richard B. Morris, *Chapter 1: The Emergence of American Labor*, U.S. DEPARTMENT LAB., http://www.dol.gov/oasam/programs/history/chapter1.htm (last visited March 24, 2012).

69. DELORIA & LYTLE, *supra* note 33, at 2–3.

70. Several hundred trading posts were recorded within the United States and its Territories in 1898 by the U.S. Government. 1 J.W. POWELL, SEVENTEENTH ANNUAL REPORT OF

these furs, trading companies multiplied and expanded farther westward.[71] Native American communities, likewise, traded easily-found furs for things demanded within their communities, such as beads, guns, metal kitchen utensils, brandy, and other inexpensively acquired items in European markets.[72] This barter exchange market was well known to Native American nations and historic evidence of extensive trade networks and trails among Native American communities has been documented through Native oral histories, anthropological studies, and historic writings.[73] The participation of European countries in this Native American international trade market signaled an acknowledgment of Native American international law by European sovereigns. It also indicated the beginning of a merging of Native American international law and European international law with both structures acknowledging each other as nation-participants in international trade.

Throughout the sixteenth and seventeenth centuries, European international and domestic law reached its jurisdictional arms across the Atlantic Ocean with even further strength than papal bulls, in the form of chartered trading companies, which effectively established pseudo-governments in Native America.[74] These pseudo-government trading companies were granted limited sovereign powers from their origin European countries to make laws and conduct international trade. Many of these trading companies eventually became the colonial governments that make up the present-day east coast states of the United States.[75]

The trading companies in Native North America also adopted the practice of taking ancestral remains and cultural objects from Native American communities. Such evidence of this practice presently exists in international repository collections, which have acquired some of their

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THE BUREAU OF AMERICAN ETHNOLOGY TO THE SECRETARY OF THE SMITHSONIAN INSTITUTION 1895–96, at 381-388 (1898). The government of Canada has produced a map of its trading posts. *The Atlas of Canada: Posts of the Canadian Fur Trade*, NAT. RESOURCES CAN., http://atlas.nrcan.gc.ca/site/english/maps/archives/4thedition/historical/079_80 (last visited March 24, 2012).

71. DANIEL FRANCIS & TOBY ELAINE MORANTZ, PARNTERS IN FURS: A HISTORY OF THE FUR TRADE IN EASTERN JAMES BAY 1600–1870, at 7–11 (1983).

72. *Id.* at 25.

73. *See* Angelique EagleWoman & Wambdi A. WasteWin, *The Eagle and the Condor of the Western Hemisphere: Application of International Indigenous Principles to Halt the United States Border Wall*, 45 IDAHO L. REV. 555, 557–58 (2009).

74. Charlie Cray & Lee Drutman, *Corporations and the Public Purpose: Restoring the Balance*, 4 SEATTLE J. SOC. JUST. 305, 309 (2005); *see also* Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 LAW & SOC. INQUIRY 315, 328–32 (2001).

75. *See* Tomlins, *supra* note 74, at 328–32.

Native American collections from these European trading companies or their traders. The Hudson's Bay Company[76] is a good example. It was founded in London through a 1670 charter issued by England's King Charles II[77] and recruited heavily from the Orkney Islands in Scotland.[78] In fact, several Orkney Island recruits became active fur traders for the Hudson's Bay Company throughout Native America.[79] As time progressed, Hudson's Bay Company employees also became active collectors for the Industrial Museum of Scotland (the present-day National Museum of Scotland).[80] Today, early Native American collections amassed, in part, from these fur traders are located in international repositories, and, collections specific to the Hudson's Bay Company are scattered throughout collections in the United Kingdom, such as the Native American collections at the Marischal Museum at the University of Aberdeen in Aberdeen, Scotland,[81] and Glasgow Museums in Glasgow, Scotland.[82] While both institutions have been among the few active international museum participants with indigenous communities in international repatriations to date, their collections nonetheless indicate that the historic non-consensual taking of indigenous ancestral remains and cultural objects in the sixteenth and seventeenth centuries (and throughout the eighteenth through twentieth centuries, as well) occurred throughout the trading company era.

The multidisciplinary extent of the international repatriation human rights issue can even be demonstrated through the retelling of the modern development of international and domestic corporate law. The European

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76. The Hudson's Bay Company still exists today with annual revenue of approximately $7 billion. Marina Strauss, *Hudson's Bay Makes Plans for an IPO*, GLOBE & MAIL (May 19, 2011, 10:00 PM), http://www.theglobeandmail.com/globe-investor/hudsons-bay-makes-plans-for-an-ipo/article2029064/. The company is currently owned by Hudson's Bay Trading Company. *About HBC*, HUDSON'S BAY CO., http://www2.hbc.com/hbc/about/abouthbc/ (last visited March 24, 2012). From 1670–1970, HBC was a British owned company. *Our History*, NORTH AM. FUR AUCTIONS, http://www.nafa.ca/about/our-history (last visited March 24, 2012). From 1970–2008, it was a Canadian owned company. *Our History: Timelines*, HUDSON'S BAY CO., http://www2.hbc.com/hbcheritage/history/timeline/hbc/ (last visited on March 24, 2012). Since 2008, HBC has been an American owned company. *The Hudson's Bay Company*, CBC NEWS, July 16, 2008, http://www.cbc.ca/news/background/hbc/.

77. THE ROYAL CHARTER FOR INCORPORATING THE HUDSON'S BAY COMPANY (1670).

78. *Material Histories: Scots and Aboriginal Peoples in the Canadian Fur Trade*, UNIV. ABERDEEN, http://www.abdn.ac.uk/materialhistories/collections.php (last visited March 24, 2012).

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.*; *North American Plains of North America*, GLASGOW MUSEUMS, http://www.glasgowlife.org.uk/museums/collections-research/online-collections-navigator/Pages/home.aspx (last visited March 24, 2012).

trading companies that emerged in the sixteenth and seventeenth centuries under charters formed the basis of modern corporations today, and the practice of multi-national corporate law.[83] These early corporations were granted even more extensive powers than corporations enjoy today and created what could be described as multiple pseudo-governments throughout Native America[84] that were given "monopoly powers by their respective governments."[85] Powers granted to trading companies mimicked many of the sovereign federal powers of a nation. For instance, the Plymouth Company's charter granted it the ability to "fortify territory, coin money, and to impose custom duties,"[86] and outlaw crimes.[87]

Smith argues that "[c]orporations, then as now, were not incidental to international relationships but rather key drivers of such relationships . . ."[88] and "[t]he very 'publicness' of corporations once gave them a relative advantage over individualized peoples."[89] In addition to power, trading companies were often granted vast territories by European countries, without the consent of the Native American nations who lived there. For example, the founding charter of the Hudson's Bay Company provided jurisdiction to the Company over what constitutes approximately 40% of present-day Canada,[90] as well as land within the present-day boundaries of the United States. The Charter renamed this massive jurisdiction Rupert's Land.[91]

While extensive power was granted to trading companies and the land conveyed to them from European countries was massive, input by Native American nations was never sought, except when it benefited the trading company. Law operating within trading posts generally left Native Americans without the protections of European citizenry. Baffoe notes that "[i]n assuming the right to grant the [Hudson's Bay] Company jurisdiction over this huge tract of territory, British authorities disregarded both the rights of the Aboriginal inhabitants, and the competing claims of France."[92]

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83. Cray & Drutman, *supra* note 74, at 309.

84. *Id.*

85. Janet McLean, Lecture, *The Transnational Corporation in History: Lessons for Today? The George P. Smith, II Distinguished Visiting Professorship Lecture April 4, 2003*, 79 IND. L.J. 363, 365 (2004).

86. *Id.* at 366.

87. *Id.*

88. *Id.* at 374.

89. *Id.*

90. *The Royal Charter of the Hudson's Bay Company*, HUDSON'S BAY CO., http://www2.hbc.com/hbcheritage/collections/archival/charter/ (last visited Mar. 24, 2012).

91. *Id.*

92. Kwesi Baffoe, *Cultural Eclipse: The Effect on the Aboriginal Peoples in Manitoba*, 5 TRIBAL L.J., ¶ 18 (2004-2005).

Baffoe observes that the Aboriginal peoples of Native America were not under the jurisdiction of the English law under which the Hudson's Bay Company was chartered (or simply left out of it):

> The Hudson's Bay Company ignored the autonomy of the Aboriginal people and dragged them into the Company's criminal justice system, while at the same time, excluding the Aboriginal people from the benefits of the civil side of the same legal system.[93]

This imposition of the law of European nations on Native Americans in limited circumstances by trading companies is evidence of the continued evolution of European international law practices of exclusion of Native Americans and other indigenous peoples from the decision-making powers of laws and policies that directly affect them. It also demonstrates the practice of overriding Native American systems of government when European interests were in discordance with Native decisions. Native American peoples were generally not considered "people" with the same protections as Europeans under European international law and English law. However, Native American nations were regarded as nations within the international legal structure,[94] particularly in times of conflict. Evidence of this recognition may be seen in the negotiation of legal instruments of international law, "peace treaties,"[95] both oral and written from this period through the nineteenth century. Regardless of any duress involved in the signing of these treaties, or with or without the actual or apparent authority of Native governmental leaders,[96] it was necessary in the European international legal structure for the leader (whether he was or was not the actual leader) of a Native American nation as a sovereign nation to sign such documentation.

Thus, as Europe pushed into Native America, it began to establish jurisdictional reach in the form of the trading companies that emerged during the sixteenth through eighteenth centuries. These companies and their inhabitants adopted the practices of early explorers, such as Christopher Columbus, in Native–European international relations. They perpetuated the practice of non-consensual taking, and, as was provided in the representative example of the practices of the Hudson's Bay Company, these takings and theft extended to the practice of grave robbing and acquiring cultural objects without the free, prior and informed consent of

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93. *Id.* ¶ 25.
94. DELORIA & LYTLE, *supra* note 33, at 58.
95. DELORIA & WILKINS, *supra* note 18, at 8–12.
96. DELORIA & LYTLE, *supra* note 33, at 3–6.

Native American communities.[97] As this Article will later explain, these practices have transcended the centuries and are now deeply set in European legal structures.

4. 17th–18th Centuries: Colonial Settlements

European international power shifts over Native America are especially important to understand given the present-day human rights issue of international repatriation. In addition to revealing deep-set colonialism in European international and domestic laws, these European power struggles and boundary shifts will help Native American communities to identify where the ancestral remains and cultural objects of their communities initially arrived when they first reached Europe.

Colonial permanent inhabitances in Native North America began, for the most part, in the seventeenth century, a time in European history when legal authority shifted from the Vatican during and after the Protestant Reformation toward distribution among the individual nation-states of Europe.[98] Papal bulls as instruments of absolute legal authority lost their over-reaching power among many European countries, and tithing to the Vatican was discontinued among several of them,[99] which in turn, helped to fuel European economies. Religious persecution also led many Europeans, whether by choice or not,[100] to be removed from European society and populate colonial settlements, generally up and down the eastern coast of Native America.[101]

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97. An example of the disinternment of Native American graves may be viewed in FRANK RUSSELL, EXPLORATIONS IN THE FAR NORTH 2–4 (1898).

98. THE TIMES ATLAS OF WORLD HISTORY 160–61, 182–85 (Geoffrey Barraclough ed., 2d ed. 1988).

99. *See generally* MADELINE GRAY, THE PROTESTANT REFORMATION: BELIEFS AND PRACTICES (2003).

100. Voluntary and involuntary European settlement of the Americas occurred throughout the seventeenth and eighteenth centuries. Many Europeans prosecuted by the English crown were sent to the Americas as indentured servants. This was an especially prevalent practice after the Scottish Jacobite rebellions in 1715 and 1745. Captured and separated from their families, several Jacobites were sent to the colonies as indentured servants and unable to return. Some married into American Indian tribes originally from the present-day southeastern United States. Voluntary European settlements also occurred, particularly among religious sects wishing to be freed from persecution in Europe and companies that had shares owned by settlers. *See* DAVID DOBSON, SCOTTISH EMIGRATION TO COLONIAL AMERICA, 1607–1785, at 96–98 (2004); s*ee also* STEPHEN M. MILLET, THE SCOTTISH SETTLERS OF AMERICA: THE 17TH AND 18TH CENTURIES 155 (2009). *See generally* JOHN POWELL, ENCYCLOPEDIA OF NORTH AMERICAN IMMIGRATION (2005).

101. *See generally* POWELL, *supra* note 100.

In addition, with increased wealth coming into European nation-state treasuries from trading companies, the exploration of the interior of Native America increased.[102] These explorations were often followed by the establishment of additional trading posts and, eventually, more expansive colonial settlements.[103] As the self-appointed pseudo-government jurisdiction of European nations continued to expand westward through the establishment of these trading posts while co-habiting the land with tribal chthonic Native American legal systems, well-established colonial governments began to emerge and push Native American peoples from their traditional lands entirely.[104] During this period, hostility increased among Native American communities and European colonial settlements,[105] as well as between one European colonial settlement and another.[106] The practice of treaty-making with Native American communities was used in order to prevent and decrease conflict.[107]

As Deloria writes, "Treating with the Indians . . . brought an air of civility and legitimacy to the white settlers' relations with the Indians and provoked no immediate retaliation by the tribes."[108] At the time, treaty-making was an integral part of international law and policy among sovereigns, and the adoption of this practice signaled the European recognition of the legal and authoritative power of Native American governments.[109] As time progressed, treaty-making with Native American nations was also adopted by the United States.[110]

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102. Wilbur R. Jacobs, *British Indian Policies to 1783*, *in* 4 HANDBOOK OF NORTH AMERICAN INDIANS: HISTORY OF INDIAN-WHITE RELATIONS 5–12 (Wilcomb E. Washburn ed., 1988); Francis Jennings, *Dutch and Swedish Indian Policies*, *in* 4 HANDBOOK OF NORTH AMERICAN INDIANS: HISTORY OF INDIAN-WHITE RELATIONS, *supra*, at 13–19; Mason Wade, *French Indian Policies*, *in* 4 HANDBOOK OF NORTH AMERICAN INDIANS: HISTORY OF INDIAN-WHITE RELATIONS, *supra*, at 20–26.

103. Jacobs, *supra* note 102, at 5–12; Jennings, *supra* note 102, at 13–19; Wade, *supra* note 102, at 20–26.

104. Jacobs, *supra* note 102, at 5–12; Jennings, *supra* note 102, at 13–19; Wade, *supra* note 102, at 20–26.

105. *See generally* THE ENCYCLOPEDIA OF NORTH AMERICAN INDIAN WARS, 1607–1890: A POLITICAL, SOCIAL, AND MILITARY HISTORY, *supra* note 57.

106. Jacobs, *supra* note 102, at 5–12; Jennings, *supra* note 102, at 13–19; Wade, *supra* note 102, at 20–28.

107. DELORIA & LYTLE, *supra* note 33, at 3.

108. *Id.*

109. *Id.*

110. *Id.* at 3–5.

Trading Company/Colony	Year Established	European Country of Origin	Present-day Territorial Location
London Company	1606	England	Virginia
Fort Caroline	1564	France	Jacksonville, FL
Spanish military post	1565	Spain	St. Augustine, FL
Roanoke Colony	1584	England	Roanoke Island, NC
Jamestown	1607	England	Jamestown, VA
Plymouth Colony	1620	England	Plymouth, MA
New Amsterdam	1625	Netherlands	New York, NY
Massachusetts Bay Colony	1629	England	Northeast
Company of New France	1627	France	Louisiana (and Canada)
Dutch West India Company Colonies	1621	Netherlands	Connecticut, Delaware, New Jersey, New York
Virginia Colony	1624	England	Virginia
Georgia Colony	1732	England	Savannah, GA
San Miguel de Gualdape Colony	1526	Spain	Georgia
Pánfilo de Navárez Expedition	1527	Spain	Florida
Puerto de Santa Maria/Santa Cruz	1559	Spain	Pensacola, FL
Fort San Juan	1566	Spain	Morgantown, NC
Ajacán Mission	1570	Spain	Virginia
Parris Island	1562	France	South Carolina
Saint Croix Island	1604	France	St. Croix Island, ME
Fort Saint Louis	1685	France	Inez, TX
Popham Colony (Sagadohoc Colony)	1607	England	Phippsburg, ME
St. Augustine	1565	Spain	St. Augustine, FL
San Juan de Los Cabaleros (Onate settlement)	1598	Spain	Ohkay Ohwingeh Pueblo (NM)
Santa Fe	1609	Spain	Santa Fe, NM
Mission San Francisco Solano de Sonoma	1823	Spain	Sonoma, CA
Mission San Rafael Arcángel	1817	Spain	San Rafael, CA
Mission San Francisco de Asís (Dolores)	1776	Spain	San Francisco, CA
Mission San José de Guadalupe	1797	Spain	Fremont, CA
Mission Santa Clara de Asís	1777	Spain	Santa Clara, CA
Mission Santa Cruz	1791	Spain	Santa Cruz, CA
Mission San Juan Bautista	1797	Spain	San Juan Bautista, CA
Mission San Carlos Borroméo del río Carmelo	1770	Spain	Carmel, CA
Mission Nuestra Senora de la Soledad	1791	Spain	Soledad, CA
Mission San Antonio de Padua	1771	Spain	Monterey County, CA

Table 1. This table is representative of some of the colonial settlements throughout Native America that would be within the present-day boundaries of the United States. The charter may have encompassed a much greater area than the settlement. This table may provide helpful information to Native American tribes seeking international repatriation claims.

Sweden, Spain, the Dutch Republic, France, England, Russia and Portugal all developed colonial settlements during the seventeenth and eighteenth centuries on the east coast of Native America,[111] and several new trading posts pushed westward, while earlier Spanish missions expanded into present-day New Mexico and California.[112] Similar to most colonial settlements was the adoption of Spanish international relations with Native Americans, most especially by the English.[113] This is demonstrated in the English Virginia Company's founding charter.[114] Granted by the King of England, the charter granted full authority to the colonial governor to create laws and regulations.[115] Captain John Smith, Governor of the Virginia Company promoted the adoption of Columbus's Spanish policies in the English colony, by forcing "the treacherous and rebellious Infidels to do all manner of drudgery, work and slavery" so that the Virginia colonists may prosper.[116]

The conflicts of Europe found their way to Native America, where European settlements fought with each other over European power of Native American land and natural resources.[117] For instance, the Dutch and English fought over jurisdiction of the Hudson River Valley, home to the Delaware people, in present-day New York, leading to Anglo–Dutch Wars, the second of which culminated in the defeat of New Netherland in 1664 and European land control transference to England.[118] Ultimately, England took over all European colonial settlements on the east coast of the present-day United States.[119]

A contributing factor to the eventual dominance in Native America's colonial settlements that England achieved was its ability to populate its colonial settlements.[120] This was largely done through indentured servitude and sending to the Americas large numbers of subjugated peoples who had little choice in the question of their freedom.[121] For instance, England first

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111. DELORIA & WILKINS, *supra* note 18, at 4–5.

112. Jacobs, *supra* note 102, at 5–12; Jennings, *supra* note 102, at 13–19; Wade, *supra* note 102, at 20–28.

113. RICHARD MIDDLETON, COLONIAL AMERICA: A HISTORY, 1565–1776, at 49 (3d ed., 2002).

114. THE FIRST CHARTER OF VIRGINIA (1606).

115. *Id.*

116. MIDDLETON, *supra* note 113, at 49 (quoting John Smith).

117. Jacobs, *supra* note 102, at 5–12; Jennings, *supra* note 102, at 13–19; Wade, *supra* note 102, at 20–28.

118. Jennings, *supra* note 102, at 18–19.

119. Jacobs, *supra* note 102, at 5–12; Jennings, *supra* note 102, at 5–12.

120. Jacobs, *supra* note 102, at 5–12; Jennings, *supra* note 102, at 5–12.

121. Laura Seawright, *Scots Link to Native American Tribe Celebrated*, BBC NEWS (Jan. 9, 2010, 00:45 GMT), http://news.bbc.co.uk/2/hi/uk_news/scotland/north_east/8447105.stm.

tested its colonial settlements and reservation systems that were used in Native America in Ireland and Scotland, countries populated by non-English, Celts.[122] Like Native Americans, the English characterized these peoples as "uncivilized savages," a practice that continued well into the twentieth century.[123] On September 11, 1649, Oliver Cromwell confiscated 70 percent of Ireland's land from its people, gave the land to English Parliamentarians, and created a reservation in the west of Ireland for transplanted Irish.[124] Cromwell had similar campaigns in Scotland and England's international policies of subjugation toward Scotland continued in the eighteenth and nineteenth centuries.[125] Highland Scots and their clans who rebelled against England in a series of eighteenth-century rebellions called the Jacobite Rebellions were imprisoned and sent to Native America to be sold as indentured servants (unpaid workers for a set number of years) to populate English settlements.[126] Some eventually married into eastern tribes.[127] Slavery also contributed to the increased populations in European colonial settlements.[128]

Voluntary European settlements also occurred, particularly among religious sects wishing to be free from persecution in Europe, and by trading companies that had shares owned by settlers, such as the Massachusetts Bay Company.[129] Patents and grants were given to these settlers by Britain, the Netherlands, France, and Sweden.[130] However, at the time of these grants, most European boundaries were very different than they are today. For instance, Sweden included the present-day countries of Finland and Estonia and parts of Russia, Germany, Poland, and Latvia.

In addition to increases in population, a large part of the expansion and strong foothold England made as a colonial entity in Native America was fueled by the autonomy persecuted religious sects enjoyed in its colonial

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122. IAN BARNES, THE HISTORICAL ATLAS OF THE CELTIC WORLD 190–193 (Sarah Stubbs ed., 2009).

123. *Id.*

124. *Id.*

125. Cynthia A. Lohman, *Crofting: Securing the Future of the Scottish Highlands Through Legislative Challenge and Cultural Legacy*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 663, 669 (2007).

126. DOBSON, *supra* note 100, at 106.

127. Seawright, *supra* note 121. Ludovic Grant married into the Cherokee Nation and is now related to a large percentage of the tribe.

128. William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 41–42 (1996).

129. Jacobs, *supra* note 102, at 5–12; Jennings, *supra* note 102, at 13–19; Wade, *supra* note 102, at 20–28.

130. Jacobs, *supra* note 102, at 5–12; Jennings, *supra* note 102, at 13–19; Wade, *supra* note 102, at 20–28.

settlements.[131] For instance, the Plymouth Colony in Massachusetts was founded as a haven for fleeing Puritan (Congregationalists) religious separatists in 1620, shortly before Oliver Cromwell began his colonial land acquirement and reservation systems.[132] Puritans began as a religious sect of the Church of England, which believed that the Church of England still clung too heavily to Catholicism and was largely supported by major English educational institutions, such as Emmanuel College, Cambridge, Sidney Sussex College, Cambridge, and Trinity College.[133] Upon arrival, the Plymouth Colony (more commonly known as the Pilgrims) plundered a Native American gravesite.[134] At present, several of the English institutions mentioned above have or had Native American collections, some of which are Native American ancestral remains, funerary objects, sacred objects, and/or objects of cultural patrimony.[135] The large migration of Puritans to Native America occurred until 1640 when Parliament reconvened, when some returned to England after 1641 (the beginning of the English Civil War), and Oliver Cromwell took over the country.[136] Oliver Cromwell carried out some of the most egregious colonial usurpations of the English Empire.

Other colonies were also founded upon religious precepts. Maryland was founded as a religious colony for Roman Catholics in 1634,[137] Rhode Island was founded in 1636 as a European religiously tolerant colony,[138] and Connecticut was founded in 1639 for Congregationalists, along with Massachusetts and New Hampshire.[139] New York and New Jersey were founded by the Episcopal and Dutch Reformed Churches, respectively.[140]

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131. Richard Albert, *American Separationism and Liberal Democracy: The Establishment Clause in Historical and Comparative Perspective*, 88 MARQ. L. REV. 867, 881–882 (2005).

132. J.C. DAVIS, OLIVER CROMWELL 41–42 (Anke Ueberberg ed., 2001); EUGENE AUBREY STRATTON, PLYMOUTH COLONY: ITS HISTORY & PEOPLE 1620-1691, at 19–20 (1986).

133. Albert, *supra* note 131, at 887–88; JOHN BROWN, THE ENGLISH PURITANS 36–40, 125 (1912).

134. Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L. J. 35, 40 (1992); *see also* MOURT'S RELATION: A JOURNAL OF THE PILGRIMS AT PLYMOUTH 27–28 (Dwight B. Heath ed. 1963).

135. *See Collections*, UNIV. OF CAMBRIDGE MUSEUMS, http://www.cam.ac.uk/museums/ (last visited Mar. 24, 2012).

136. Peter C. Mancall, *Introduction* to ENVISIONING AMERICA: ENGLISH PLANS FOR THE COLONIZATION OF NORTH AMERICA, 1580-1640 1, 22–23 (Peter C. Mancall ed. 1995); Claire Hopley, *The Puritan Migration: Albion's Seed Sets Sail*, BRIT. HERITAGE MAG., Sept. 2005, at 20, *available at* http://www.historynet.com/the-puritan-migration-albions-seed-sets-sail.htm.

137. Albert, *supra* note 131, at 886–87.

138. *Id.* at 892–93.

139. *Id.* at 884.

140. *Id.* at 882.

The Province of Carolina was founded in 1663, and the English gained control of New Netherlands in 1664, renaming it New York.[141] The colony of Pennsylvania was founded in 1681 by William Penn and became a Quaker refuge.[142] The autonomy of a religious refuge for English in Native America attracted them to populate trading company posts in what became the thirteen colonies of today's present-day United States, manifesting themselves in Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts (Bay), Maryland, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island and Providence Plantations.[143] With the population explosion of settlers, indentured servants, and slaves, the pseudo-governments of the trading companies expanded jurisdiction. Between 1625 and 1775, the population of the colonies grew astronomically from 1,980 people to 2,400,000 people.[144] The common law of England was predominantly adopted in the colonies.[145] A General Assembly was elected by male-land holding voters, and the assemblies were structured from English common law.

Understanding the continually changing boundaries of both North America and European countries over the past five hundred years is especially important in international repatriation. It helps to explain different interactions among settlements and Native American tribes, and provides historic context that explains how certain collections came to reside in international museums and other repositories throughout the world that would normally not be readily obvious. While studying the movement of Native American ancestral remains and cultural objects from Native America to Europe, the changing boundaries in both Native America and Europe, the changes in historic European and American town names, and the movement of Native American communities throughout the present-day boundaries of the United States, Canada, and Mexico can become imminently important in identifying Native American ancestral remains and cultural objects. For example, a Native American cultural object in a museum may identify its origin as Wiltwayck. However, today, Wiltwayck, a Dutch settlement in the seventeenth century, is the present-day town of Kingston, New York, and no longer identified by that name. Nevertheless, the identification of the town as Wilwayck may date the cultural object to

141. Jennings, *supra* note 102, at 18–19; Richard S. Dunn, *The English Sugar Islands and the Founding of South Carolina*, S.C. HIST. MAG., Apr. 1971, at 83.

142. Albert, *supra* note 131, at 891–92.

143. *See generally* Albert, *supra* note 131.

144. U.S. BUREAU OF THE CENSUS, A CENTURY OF POPULATION GROWTH FROM THE FIRST CENSUS OF THE UNITED STATES TO THE TWELFTH, 1790–1900, at 3–15 (1909).

145. Gwynne Skinner, *When Customary International Law Violations Arise Under the Laws of the United States*, 36 BROOK. J. INT'L L. 205, 224 (2010).

the time the Republic of the Seven United Netherlands had a colony in this area. Matching this narrowed period, with the historic and related Native American nations living in and around this area may assist with tribal identification. It also provides some information that is not obvious, such as the area (then encompassed by the Republic of the Seven United Netherlands) in which the cultural object first reached Europe. Additional information pertaining to its movement in private collections or museums throughout Europe can also uncover further information for a repatriation claim.

Generally speaking, Native American tribes were perceived as little substantive threat among these growing absentee European colonial superpowers whose customary principles in maritime and international policy eventually developed into accepted principles in international law.[146] As Prucha notes, however, "the great distinguishing feature of English relations with the Indian groups was replacement of the Indians on the land by white settlers . . . ."[147] However, colonialists encountered resistance by Native American nations, as a result, and European international law was forced to officially recognize the legitimacy of tribal governments in international law through treaties.[148] The recognition of Native American legal systems and their role as active participants in a newly developing, globalized international law system was also bolstered by early evidence of the participation of European sovereigns in Native barter systems and trade.

III. THE UNITED STATES

A. Introduction

Native Americans in the present-day boundaries of the United States have endured five centuries of attacks upon their cultural survival and autonomy, yet they continue to survive today as self-determinative peoples with tribal governments and recognized legal rights within the United States.[149] In the infancy of the United States, however, the historic international policies of European sovereigns were adopted on a federal level from the already established and previously autonomous thirteen

146. JILL NORGREN, THE CHEROKEE CASES: TWO LANDMARK FEDERAL DECISIONS IN THE FIGHT FOR SOVEREIGNTY 28 (Univ. Okla. Press 2004).

147. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 11 (unabr. ed. 1995).

148. *Id.* at 12–14.

149. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010).

colonial governments that became the first thirteen states in the United States of America.[150] Although treaty making continued until 1871, the United States was the first governmental entity asserting jurisdiction over tribal lands that sought to redefine its own recognition of tribal governments as something legally different from foreign nations.[151]

When the highly prestigious judgeships still lingered in the state (former colonial) judiciaries during the first half of the nineteenth century, Chief Justice of the Supreme Court John Marshall in 1831 formulated the federal concept of "domestic dependent nations" and applied this to Native American communities.[152] In addition, Marshall engaged in an analysis of international law in the 1830s and concluded that the Doctrine of Discovery automatically granted lands to European nations without the consent of tribal nations and reduced the property rights of tribal nations to a sliver of the full bundle of property rights: occupation.[153]

As the Cherokee cases (also known as the Marshall trilogy) took place, the Cherokee Nation newspaper, the *Cherokee Phoenix*, covered the debate, which came to be known as the "Indian Question" across the United States.[154] The *Cherokee Phoenix* had national readership and, as one person from New Jersey commented:

> The king of England had no right to [Cherokee lands]. He never acquired a right to it: neither by occupation, nor by purchase, nor by conquest, nor by gift. I cannot conceive of any right he could have unless he could obtain it by looking at a map. As if the Chief of the Cherokees were to look at the map of Russia and very liberally bestow it on France.[155]

Marshall also referred to Native Americans as "savages" and "uncivilized" throughout his analyses in the Cherokee cases. Asserting that Native peoples were afflicted with the inability to make their own decisions, Marshall declared the necessity for the United States to become "wards" and make decisions for tribes, robbing them of the ability to provide consent to the decisions that most affected them.[156]

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150. NORGREN, *supra* note 146.

151. Cherokee Nation v. Georgia, 30 U.S. 1, 16–17 (1831).

152. *Id.* at 17.

153. *Id.*; *see also* Johnson v. M'Intosh, 21 U.S. 543, 574 (1823).

154. *Extracts of a Letter from a Gentleman in New Jersey to a Friend in the Cherokee Nation*, CHEROKEE PHX. & INDIANS' ADVOC., Feb. 10, 1830, at 2, *available at* http://www.wcu.edu/library/DigitalCollections/CherokeePhoenix/Vol2/no43/pg2col4c-5.htm.

155. *Id.*

156. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582, 590 (1832); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

The Cherokee cases formed the judicial basis of federal Indian law in the United States, as this is the series of cases called upon by the Supreme Court of the United States today in reflecting upon the political, government-to-government relationship that federally recognized tribes in the United States have with the U.S. government.

Despite the advent of the Civil Rights Movement in the 1960s, which turned the tide in United States legal precedent toward recognizing the equal rights of all peoples, U.S. federal courts continue to refer to and quote antiquated and often racist opinions of the past in federal Indian law cases.[157] For instance, in *United States v. Jicarilla Apache Nation*, Justice Sotomayor in her dissenting opinion criticizes the majority opinion for their revival of antiquated and long-since abandoned concepts in federal Indian law. She states that the Court's majority opinion is "troubling" because of the "majority's disregard of our settled precedent that looks to common-law trust principles to define the scope of the Government's fiduciary obligations to Indian tribes"[158] and that "aspects of the majority's opinion suggest that common-law principles have little or no relevance in the Indian trust context, a position this Court rejected long ago."[159] She also commented that the holding of the majority opinion "may well be a further dilution of the Government's fiduciary obligations that will have broader negative repercussions for the relationship between the United States and Indian tribes."[160]

As the Director of the Smithsonian National Museum of the American Indian, Kevin Gover, recently reflected in the *Fact or Fiction: The United States Courts' Use of History to Shape Native Law Jurisprudence* law symposium, the U.S. Supreme Court has adopted fiction as fact as the basis for legal opinions throughout history and the effects on Native Americans have been both prejudicial and harmful.[161] While after the Civil Rights Movement in the United States, U.S. courts generally abandoned referencing legal precedent laden in racist decisions and unfounded in fact, this has not occurred with regard to cases involving Native Americans, particularly in the Supreme Court.[162] In essence, Gover reiterates within the federal Indian law context McGuire's assertion that:

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157. *See, e.g.*, United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011).

158. *Id.* at 2331–32 (Sotomayor, J., dissenting).

159. *Id.* at 2332.

160. *Id.*

161. Smithsonian Videos, *Fact or Fiction Pt 1: The US Courts' Use of History to Shape Native Law Jurisprudence*, YOUTUBE (Oct. 7, 2010), http://www.youtube.com/watch?v=UjIhXyGRYl8.

162. *Id.*

> The greatest obstacle to claimant [indigenous] peoples who seek the [self-determinative] right in this way is that international law has not yet engaged with its Eurocentric bias . . . having been born from colonialism, international law now reproduces colonialism at every turn.[163]

The thread of early international relations with Native American peoples that began in the fifteenth century has been pulled through history and incorporated into the legal structure of the United States. Yet, despite these colonial roots, the United States is unique among countries in the way it recognizes its indigenous peoples, most particularly as it is juxtaposed against other former colonial states throughout the world. For museums, it is vitally important in international repatriation to recognize that federally recognized tribes in the United States have a government-to-government relationship with the U.S. federal government and that a majority of laws, most particularly NAGPRA, which directly affect Native American communities, reflect this political relationship in a repatriation context.[164]

The legal fictions entrenched in U.S. court systems are only one indication of a pervasive historic problem in scholarly writings about Native American peoples. As a result, early assertions about Native peoples that may have been wildly inaccurate have continued to be referenced over time to the extent that the original source of information is no longer apparent and the information is regarded as a truth because of its viral reproduction in publications over time. To guard against this, it is absolutely vital for international museums to make direct connections with Native American communities, instead of solely relying upon literature that may be inaccurate. For museums seeking to identify the origin of Native American ancestral remains and cultural objects, more fully understanding these early jurisdictional assertions, the movement of Native American tribes, and the location of colonial settlements and trading posts will assist in the identification of collection origins. Ultimately, however, Native American nations will hold the most precise and accurate information about their culture and history throughout time.

B. United States: 18th–19th Centuries

Over 1,000 explorers and scientific expeditions came to the shores of what is the present-day United States and took extensive numbers of Native

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163. Maguire, *supra* note 1, at 17.

164. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001–3013 (2006) and 18 U.S.C. § 1170 (2006)).

American human remains and funerary objects from graves and battlefields.[165] Additionally, sacred objects and objects of cultural patrimony were obtained in surreptitious manners, oftentimes in moments of substantial duress for the individual or community.[166] In the nineteenth century, Native American human remains were used in medical schools without the consent of Native American governments, communities, or families.[167]

After the Indian Removal Act of 1830, which forced large numbers of eastern Native American nations to move west of the Mississippi River, Native American graves in North America were largely left unprotected and became targeted sites for the accumulation of specimens for scientific study or collections of curiosity.[168] It was in this way that an international market in looting began to emerge in Native American ancestral remains and cultural objects.[169] Today, this indigenous looting market is estimated to take in close to $1 billion a year.[170]

As a result, collections of Native American ancestral remains and cultural objects currently reside in international repositories around the world, having come from medical museums, curio collections, expeditions, anthropological and archaeological studies, national or city collections, looting of other European museums during World Wars, or through exchange among museums seeking to increase the breath and depths of their collections.

Additionally, the Indian Removal of the nineteenth century brought large numbers of Native American peoples from their ancestral lands to areas that were located far from U.S. state boundaries.[171] Removal occurred in a time when polygenism[172] was gaining momentum in the scientific communities in the United States. This time period's scientific studies, particularly those based around polygenism and anthropometry, or measuring skulls, also

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165. HARPER COLLINS ATLAS OF WORLD HISTORY 156–57, 160–61, 164–65, 220–21 (Geoffrey Barraclough ed., 2001).

166. Trope & Echo-Hawk, *supra* note 134, at 38–45.

167. *Id.*

168. *Id.*

169. *Id.* at 43–44.

170. Robert Travis Willingham, Note, *Holding States and Their Agencies Accountable Under the Museum Provisions of the Native American Graves Protection and Repatriation Act*, 71 UMKC L. REV. 955, 957 (2003).

171. *See generally* PRUCHA, *supra* note 147.

172. Polygenism claims that "racial groups were permanently distinct kinds and had always been so," as compared to monogenism, which asserts that "all humans were members of a single kind." Roberta M. Berry, *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of* Buck v. Bell, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 405 n.13 (1998).

created many of the legal fictions of federal Indian law precedent that persist today.[173] During this time and later when Native American nations were moved onto reservations, science and manifest destiny were used as justifications to override seeking free, prior, and informed consent from Native American peoples.[174] Many ancestral remains and funerary objects were exhumed and experimented upon, and many sacred objects and objects of cultural patrimony were taken without the consent of Native American communities.[175]

It was through these nineteenth-century studies and experiments on the ancestral remains of Native American peoples that scientists theorized an evolutionary racial hierarchy and created false proof for its justification.[176] This social hierarchy was used as a defense and social justification for slavery, particularly during the American Civil War in the 1860s.[177] Scientific experimentation in the nineteenth century, which included a vast number of medical experiments on human subjects, applied Darwinian theories on plant species to human subjects.[178] English anthropologist Herbert Spencer's best-selling article in the Westminster Review, *The Social Organism*, prompted international interest over the "survival of the fittest" theory he posed in his paper,[179] whereby the civilized races he defined would inevitably survive uncivilized races through evolution.[180] As one might predict, the races of the colonial empires defined the concept of "civilization" in these theories, while indigenous peoples were deemed "uncivilized."[181] As a later conclusion of these theories, the disappearance of Native American communities was predicted to occur shortly,[182] prompting a massive increase in collecting Native American ancestral remains and cultural objects.

Anthropologists, explorers, museum experts, and private collectors from Europe and the United States conducted numerous studies on Native

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173. *See* Beverly Horsburgh, *Schrödinger's Cat, Eugenics, and the Compulsory Sterilization of Welfare Mothers: Deconstructing an Old/New Rhetoric and Constructing the Reproductive Right to Natality for Low-Income Women of Color*, 17 CARDOZO L. REV. 531, 538–39 (1996); *see also* Trope & Echo-Hawk, *supra* note 134, at 40.

174. Trope & Echo-Hawk, *supra* note 134, at 38–45.

175. *Id.*

176. Horsburgh, *supra* note 173, at 538–39.

177. *Id.*

178. *Id.* at 538–41.

179. Herbert Spencer, *The Social Organism*, WESTMINISTER REV., Jan. 1860, *available at* http://www.bolenderinitiatives.com/sociology/herbert-spencer-1820-1903/herbert-spencer-social-organism-1860.

180. *Id.*

181. *Id.*

182. Trope & Echo-Hawk, *supra* note 134, at 40.

American cultures and human remains throughout the nineteenth and twentieth centuries.[183] The United States and England, specifically, conducted studies on the cranium sizes of thousands of Native American human remains removed from numerous grave sites.[184] Many of the graves were those of the recent dead, the families and communities of whom were never asked for consent to exhume and study the ancestral remains of their family members.[185] At the time, overriding the consent of Native American peoples was condoned within the legal system of the United States, which had deemed Native American peoples wards of the government in earlier Supreme Court cases.[186] Native Americans were not considered naturalized U.S. citizens until 1924.[187] In addition, European laws did not prevent the collecting of Native American human remains and cultural objects. This practice has come to be called "paternalism" in the United States, which has historically removed the ability of Native peoples to vote, determine the future of their own communities, and make decisions of person, property, and community.[188]

Samuel G. Morton,[189] one such plunderer of Native American gravesites and now renowned as the "father of American physical anthropology,"[190]

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183. *Id.* at 38–45.

184. *Id.*

185. *Id.*

186. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1 PET. 1831).

187. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2006)).

188. *See, e.g.*, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) (noting that Congress enacted the Indian Reorganization Act of 1934 "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." (citations omitted)).

189. Morton, a graduate of the University of Edinburgh, arguably studied under Dr. Robert Knox. Patsy Gerstner, *The Influence of Samuel George Morton on American Geology*, *in* BEYOND HISTORY OF SCIENCE: ESSAYS IN HONOR OF ROBERT E. SCHOFIELD 126 (Elizabeth Garber ed., 1990). Robert Knox was a private anatomy lecturer at the Medical College who opened a Museum of Comparative Anatomy in 1823 where Darwin studied. I. MacLaren, *Robert Knox MD, FRCSEd 1791-1862: The First Conservator of the College Museum*, 45 J. ROYAL CS. SURGEONS EDINBURGH & IR. 392, 393 (2000). Only a few years later, Knox became involved in the serial murders of at least 17 individuals by William Burke and William Hare. *Id.* at 395. At the time, corpses were difficult to obtain due to the limitation of one corpse per student set forth by the Royal College of Surgeons. *Id.* Dr. Knox paid Burke and Hare a substantial amount of money to provide him with corpses for his classes between 1827 and 1828. *Id.* Burke and Hare set about murdering a number of individuals for payment. *Id.* Around the same time Morton took his courses at the University of Edinburgh, Charles Darwin took Knox's anatomy class. Morton continued his anatomical studies in Philadelphia, where he later taught anatomy at the University of Pennsylvania. Emily S. Renschler & Janet Monge, *The Samuel George Morton Cranial Collection*, EXPEDITION MAG., Winter 2008, at 30 (2008), *available at* http://www.penn.museum/documents/publications/expedition/PDFs/50-3/renschler.pdf. At the time, Philadelphia, New York and Baltimore were notoriously known for

published *Crania Americana* in 1839 after collecting Native American human remains from graves forced to be abandoned by tribes after they were removed by the U.S. government, following the 1830 Indian Removal Act.[191] Morton conducted numerous studies on the crania of individuals of different races.[192] His paper, *Crania Americana: or, A Comparative View of the Skulls of Various Aboriginal Nations of North and South America. To Which is Prefixed An Essay on the Varieties of Human Species*, gave scientific support to Spencer's "survival of the fittest" theory because it allegedly provided biological evidence in favor of a hierarchy of races.[193] Morton's conclusions about Native Americans, who fell under Europeans and Asians and just above African Americans in the hierarchy of races, included the following:

> In their mental character the [Native] Americans are averse to cultivation, and slow in acquiring knowledge [6]. . . . They are crafty, sensual, ungrateful, obstinate and unfeeling . . . . Their mental faculties from infancy to old age, present a continued childhood [54] . . . . [Native Americans] are not only averse to the restraints of education, but for the most part incapable of a continued process of reasoning on abstract subjects [81].[194]

Such a study concluded scientifically, although erroneously, that a patrimonial position with regard to Native American affairs was necessary, and that political and scientific leaders in the United States were justified in making decisions for Native American tribes and peoples.[195] These studies, in turn, disallowed recognition by the U.S. government and judiciary of tribal self-determination and discredited choices made by Native American peoples and their tribal governments.[196]

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body snatching. *See* MICHAEL SAPPOL, A TRAFFIC OF DEAD BODIES: ANATOMY AND EMBODIED SOCIAL IDENTITY IN NINETEENTH-CENTURY AMERICA (2002).

190. Trope & Echo-Hawk, *supra* note 134, at 40.

191. *See id.*; CHRISTINA SNYDER, SLAVERY IN INDIAN COUNTRY: THE CHANGING FACE OF CAPTIVITY IN EARLY AMERICA 235 (2010).

192. Trope & Echo-Hawk, *supra* note 134, at 40.

193. Morton's paper claimed that Native American crania were smaller than European crania, thereby providing evidence for Spencer's survival of the fittest theory. These studies were later revealed to be skewed and invalid. R. JON MCGEE & RICHARD L. WARMS, ANTHROPOLOGICAL THEORY: AN INTRODUCTORY HISTORY 51 (2000).

194. SAMUEL GEORGE MORTON, CRANIA AMERICANA; OR, A COMPARATIVE VIEW OF THE SKULLS OF VARIOUS ABORIGINAL NATIONS OF NORTH AND SOUTH AMERICA, TO WHICH IS PREFIXED AN ESSAY ON THE VARIETIES OF THE HUMAN SPECIES 6, 54, 81 (photo. reprint 1978) (1839).

195. *See generally id.*

196. *See generally* PRUCHA, *supra* note 147.

The consequences of the United States choosing to no longer recognize choices made by Native American peoples and their communities within its legal structure created dangerous precedent in the common law, which became acutely devastating to the peoples themselves. In the latter half of the nineteenth century and into the twentieth century, Native American children were forced into government-run Indian boarding schools, often without the consent of either the children's parents or tribal communities, with the goal to assimilate them into American Protestant society (the most civilized race in the world according to polygenists).[197] Land was taken without the consent of Native American peoples, either forcibly through duress in boilerplate treaties that minimized the traditional land base or moved the peoples off their lands completely, or by finding tribal members without the authority of their government to sign documentation as true representatives.[198] The land was redistributed to non-Indian peoples, who often received it free.[199] Courts of Indian Offenses were established to legally punish Native American peoples for practicing their religions, speaking their languages, and engaging in ceremonial activity.[200] Native American ancestral remains and funerary objects were exhumed without consent, and sacred objects and objects of cultural patrimony were taken without consent.[201]

Many of the studies conducted during the polygenist and Social Darwinist eras were later revisited by scholar Stephen Gould, most particularly those done by Samuel Morton.[202] In a book published in 1981 called *The Mismeasure of Man*, Gould exposed the fallacies within Morton's studies, completely debunking all of the theories he postulated with regard to scientific evidence for a hierarchy of races.[203] He reassessed the measurable data and found it to be skewed in favor of Morton's theories, which had been analyzed incorrectly.[204] Yet, today, while this scientific evidence, which justified early legal decisions to take away the ability of Native American nations and peoples to make choices about their person, property, and community, was proven false, the legal precedent of

197. *See* John P. LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL'Y 533, 538 (2001).

198. *See generally* PRUCHA, *supra* note 147 (charting the history of Native American peoples through Indian Removal, Reservation, and Allotment).

199. *See generally id.*

200. *Id.* at 646–48.

201. Trope & Echo-Hawk, *supra* note 134, at 38–45.

202. STEPHEN JAY GOULD, THE MISMEASURE OF MAN (rev. & expanded ed. 1996).

203. *See generally id.*

204. *See generally id.*

the legal fictions remain and continue to be regurgitated at every turn by the U.S. Supreme Court.

C. World's Fairs and Winnetou: The Results of Ignoring the Native Voice

Native American ancestral remains collected from the nineteenth and twentieth centuries generally were not reburied or given back to Native communities and families, but moved to emerging museums throughout the United States and Europe that educated the public about theories surrounding the hierarchy of civilizations and also promoted nationalism.[205] In the United States and Europe, the World's Fairs made elaborate displays of European-based civilizations that were wildly popular amongst the European and American public.[206] The 1851 Great Exhibition of All the Nations Industries in London's Crystal Palace brought in six million visitors within four months.[207] In the Exhibition's catalogue, descriptions of Native Americans included:

> Twelve civili[z]ed Indians of Mexico and its environs, laden with produce and manufactures. Twelve savage Indians, male and female, called *Mecos*, inhabitants of the interior of Mexico. . . . North American Indian preparing to scalp a white traveler. Anatomical specimen, portraying the last hour of life in consumption (from nature).[208]

Subsequent World's Fairs in the United States exhibited Native American peoples, such as the 1893 World's Columbian Exposition.[209] Native Americans were often put on display to demonstrate ancient civilizations that would eventually die as a result of evolution unless they assimilated.[210] The catalogue of the 1893 exhibition had several listings of living Native American peoples, for instance:

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205. *See generally* Trope & Echo-Hawk, *supra* note 134.

206. *See, e.g.*, EDWARD P. ALEXANDER & MARY ALEXANDER, MUSEUMS IN MOTION: AN INTRODUCTION TO THE HISTORY AND FUNCTIONS OF MUSEUMS 35 (2d ed. 2008) (1979).

207. *See id.* at 88–89; *1851 London Great Exhibition of the Works of Industry of All Nations*, WORLD EXHIBITIONS, http://www.worldexhibition.org/worldexpo/1851-london-great-exhibition-of-the-works-of-industry-of-all-nations/ (last visited Mar. 20, 2012).

208. 2 OFFICIAL DESCRIPTIVE AND ILLUSTRATED CATALOGUE OF THE GREAT EXHIBITION OF THE WORKS OF INDUSTRY OF ALL NATIONS 833–34 (1851), *available at* http://archive.org/stream/officialdescrip03goog.

209. 12 WORLD'S COLUMBIAN EXPOSITION 1893: OFFICIAL CATALOGUE, ANTHROPOLOGICAL BUILDING, MIDWAY PLAISANCE AND ISOLATED EXHIBITS 4 (1893).

210. David R.M. Beck, The Myth of the Vanishing Race (Feb. 2001) (unpublished manuscript), *available at* http://memory.loc.gov/ammem/award98/ienhtml/essay2.html.

> Class 964. Progress of Indian civilization through the efforts of the Government, missionaries, or by his own efforts and choice. His industrial pursuits and capabilities, as exemplified in the shop, on the farm and in the school-room. Inventions, etc.[211]

It was upon these notions that many of today's museums were founded. Since then, little has changed in European depictions of Native peoples.

World's Fairs and Wild West shows that toured Europe, as well as subsequent European museum depictions of Native peoples, inspired popular fictional literature about Native Americans, which often created conjectural and wildly inaccurate characters that eventually became embedded in Europe's education about Native Americans.[212] For example, a German author named Karl May created a popular series of books in the late nineteenth century depicting a fictional Apache character named *Winnetou*.[213] These books were a favorite of Adolf Hitler, who would not ban them in Nazi Germany, despite his ban on books depicting non-Aryan minorities.[214] In fact, Hitler drew parallels to this fictional character's people (whom he perceived as real Native Americans) and Germans, and used Native Americans as an example of a race whose downfall was the result of an inability to create racial bonds amongst themselves strong enough to resist America's empire.[215] The *Winnetou* books were wildly popular in Germany. Dr. Peter Bolz, the curator of the Native American collections at the Ethnologisches Museum in Berlin, Germany, likens the popularity of the Karl May books to Harry Potter.[216] He stated that the Karl May books were extremely popular until about 2000, but "Harry Potter has [since] taken over."[217]

The *Winnetou* books also fueled the emergence of a phenomenon called Indian hobbyists—Europeans who invest their time and money into studying (largely Plains-based) Native American cultural objects, while reinterpreting the true meaning and purpose of these cultural objects from a Native perspective into a European (or German, in this case) perspective of

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211. 12 WORLD'S COLUMBIAN EXPOSITION 1893: OFFICIAL CATALOGUE, ANTHROPOLOGICAL BUILDING, MIDWAY PLAISANCE AND ISOLATED EXHIBITS, *supra* note 209.

212. JACQUELYN KILPATRICK, CELLULOID INDIANS: NATIVE AMERICANS AND FILM 12–15 (1999).

213. Christian F. Feest, *Europe's Indians*, *in* THE INVENTED INDIAN: CULTURAL FICTIONS AND GOVERNMENT POLICIES 313, 324–26 (James A. Clifton ed., 1990).

214. LYNN H. NICHOLAS, CRUEL WORLD: THE CHILDREN OF EUROPE IN THE NAZI WEB 79 (Vintage 2011) (2005).

215. *Id.*

216. Interview with Dr. Peter Bolz, Curator, Dep't of Native Am. Ethnology, Ethnologisches Museum of Berlin, in Berlin, Ger. (Apr. 12, 2010).

217. *Id.*

Native American culture.[218] Their study goes beyond books and manifests itself in elaborate Native American collections and physical recreations of powwows.[219]

Dr. Johannes Zeilinger, who curated a Karl May exhibit at the Deutches Historiches Museum in Berlin, commented on May's influence on Indian hobbyists: "May framed a popular image of North America, with Indians as a dying race, tragically killed off by fate and by the spread of a new empire."[220] Today, many Indian hobbyists believe that they are doing a service to Native Americans by preserving their historic artistic handicrafts.[221] They believe Native peoples have become so assimilated into American society that they no longer remember their historic cultural practices.[222] At present, some of the largest collectors of Native American ancestral remains and cultural objects are not from the United States, but Germany.[223] Ancestral remains, funerary objects, objects of cultural patrimony and sacred objects are bought and sold within European markets.[224]

In addition to the emergence of fictional literature about Native Americans that created mythical interpretations of Native American peoples, the results of the World Fairs have often been the establishment of national museums.[225] For instance, World Fairs created elaborate displays of modern architecture that were initially thought to be temporary.[226] Instead, many of the structural displays of this architecture eventually developed into or funded nationally renowned museums throughout the United States and Europe.[227] This includes the South Kensington Museum, which ultimately became the Victoria and Albert Museum in the United Kingdom and parts of the collection of the Science Museum;[228] the Kelvingrove

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218. Feest, *supra* note 213, at 326–30.

219. *Id.*

220. Michael Kimmelman, *In Germany, Wild for Winnetou*, N.Y. TIMES, Sept. 12, 2007, at E1.

221. James Hagengruber, *Sitting Bull: Bush-Hating Germans Might Not Sing "Hail to the Chief"*, SALON (Nov. 27, 2002), http://www.salon.com/2002/11/27/indians/.

222. *Id.*

223. PAUL C. ROSIER, CONTEMPORARY AMERICAN ETHNIC ISSUES: NATIVE AMERICAN ISSUES 88 (2003).

224. *See* Christian F. Feest, *The Collecting of American Indian Artifacts in Europe, 1493–1750*, *in* AMERICA IN EUROPEAN CONSCIOUSNESS 1493–1750, at 324 (Karen Ordahl Kupperman ed., 1995).

225. ALEXANDER & ALEXANDER, *supra* note 206, at 36–39.

226. *Id.*

227. *Id.*

228. *Id.*

Museum in Glasgow, Scotland;[229] the Philadelphia Museum of Art, originally the Pennsylvania Museum of Art, which was funded by the Centennial Exposition in Philadelphia; and the Field Museum in Chicago, which was initially housed in the 1893 World's Columbian Expedition,[230] to name a few. Many of these museums have or had Native American ancestral remains and cultural objects within their collections.[231]

With the explosion of Eurocentric museums during the World's Fair Era, also came state, university, and museum-funded excavations of Native American sacred, ceremonial, and grave sites.[232] Many early anthropologists hung their professional careers on studying Native civilizations that were believed to shortly sunset into non-existence.[233] Museums in Europe and the United States developed a practice of collegial exchange at the end of the nineteenth century to increase the breadth and depth of collections within national museums.[234] As a result, Native American ancestral remains and cultural objects were exchanged from well-known institutions, such as the Smithsonian Museum and the Museum of Man, to European museums.[235] In a report compiled for the Second Biennial Conference of the International Council of Museums in 1950 on the *Exchanges or Interchange Between Anthropological Sciences Museums*, Daniel R. Rubin de la Borbolla stated: "To sum up, there are vast collections of surplus prehistorical and archaeological material throughout the world, which are immobilized in

229. *History of Kelvingrove*, GLASGOWLIFE, http://www.glasgowlife.org.uk/museums/our-museums/kelvingrove/about-Kelvingrove/History%20of%20Kelvingrove/ (last visited Mar. 9, 2012).

230. *History of the Museum*, FIELD MUSEUM, http://fieldmuseum.org/about/history-museum (last visited Mar. 9, 2012).

231. Ass'n on Am. Indian Affairs, International Repatriation Project Notes, Study on International Repositories with Native American Collections (2010-2012) [hereinafter International Repatriation Project Notes] (on file with author).

232. James A.R. Nafziger, *The Protection and Repatriation of Indigenous Cultural Heritage in the United States*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 175, 183–86 (2006); *see also* Trope & Echo-Hawk, *supra* note 134, at 38–45.

233. Franz Boas, Alfred Kroeber, Robert Lowie, Edward Sapir, Ruth Benedict, and Margaret Mead, to name a few. ALEXANDER & ALEXANDER, *supra* note 206, at 69; Trope & Echo-Hawk, *supra* note 134, at 41; Deanna Smith et al., *Anthropological Theories: Historicism*, U. ALA., http://anthropology.ua.edu/cultures/cultures.php?culture=Historicism (last visited Mar. 9, 2012).

234. *See* Chris Torch, *European Museums and Interculture: Responding to Challenges in a Globalized World*, INTERCULTURAL CITIES NEWSL., Feb. 2011, at 3, *available at* http://www.coe.int/t/dg4/cultureheritage/culture/Cities/Newsletter/newsletter13/museumsTorch_en.pdf.

235. *See, e.g.*, AM. MUSEUM BRITAIN, http://www.americanmuseum.org/ (last visited Mar. 9, 2012).

museum storerooms but could perform a most useful function if they were put into circulation for the purpose of exchanges."[236]

De la Borbolla went on to state that legal restrictions prevented the free movement of ethnographical material, but that a mechanism should be established to make the process easier.[237] As a result of the increasing legal pressures and insurance costs, many times exchanges between museums were not recorded.[238]

The Working Group on Human Remains in the United Kingdom acknowledges that museums throughout the United Kingdom participated in these international exchanges.[239] This practice occurred from the turn of the nineteenth century well into the 1980s, just prior to when the Native American Graves Protection and Repatriation Act was passed.[240] Unfortunately, one of the results of these exchanges has been the loss (or temporary loss) of complete provenances of Native American ancestral remains and cultural objects after the exchange.[241] Therefore, while a museum in the United States may have an identified community origin, location of collection, and additional pertinent information necessary for repatriation, the European museum with whom the exchange took place may not have recorded this information.[242]

D. World War II: The Movement of Native American Collections in Europe

World War II has added an additional layer of complexity to identifying some unidentified or misidentified Native American ancestral remains and cultural objects. As Nazi Germany advanced throughout the continent of Europe and took over cities with large museum collections, many of them were removed and brought to Germany.[243] Inclusive among these

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236. DANIEL F. RUBIN DE LA BORBOLLA, NAT. ANTHROPOLOGICAL SCIS. MUSEUMS, EXCHANGES OR INTERCHANGE BETWEEN ANTHROPOLOGICAL SCIENCES MUSEUMS 3 (1950), *available at* http://unesdoc.unesco.org/images/0014/001453/145348eb.pdf.

237. *See id.*

238. International Repatriation Project Notes, *supra* note 231.

239. DEP'T FOR CULTURE, MEDIA AND SPORT, U.K. GOV'T, THE REPORT OF THE WORKING GROUP ON HUMAN REMAINS 22–23 (2007) [hereinafter REPORT OF THE U.K. WORKING GROUP ON HUMAN REMAINS], *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.culture.gov.uk/images/publications/wghr_reportfeb07.pdf.

240. International Repatriation Project Notes, *supra* note 231.

241. *Id.*

242. *Id.*

243. HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 16 (Tim Bent trans., rev. ed. 1997) (1995); *see also* Leah J.

collections, were Native American collections. As pointed out earlier, Hitler had a particular interest in Native American peoples, an interest that allegedly developed from reading the earlier and vastly popular Karl May books.[244] Evidence of the movement of Europe's collections during World War II has been revealed through the studies of organizations such as the International Foundation for Art Research (IFAR), which have sought to have art returned to the Jewish families from whom the Nazi's stole it.[245]

In *Museums in Motion*, Edward Alexander reveals that many of the collections of Berlin's Museum Island holdings now housed in Berlin's Dahlem were hidden in salt mines during the World War II.[246] Dr. Peter Bolz, the curator of Native North American collections in Berlin revealed in an interview that many of the collections in Germany, including Native American collections within the Ethnologisches Museum in Berlin (in the Dahlem), were taken by the Red Army after World War II ended, but not all of these collections were returned in 1958.[247] The Ethnologisches Museum in Berlin has seen former Dahlem collections come back to the Museum through bequests, which provides evidence of its entrance after World War II into the private art market.[248] Bolz's observations contradict Alexander's in *Museums in Motion* who claims that "[t]he Russians took many of the collections with them for safekeeping but returned them in excellent condition to East Germany in 1958."[249] While after World War II, many of Europe's museum collections were returned from Germany, it is a period when provenances of Native American collections had a high potential for being lost and for entering the private market.

While Germany presently does not have laws pertaining to the return of Native American ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony, it does have precedent with regard to stolen art from Jewish communities during World War II.

Weiss, Note, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 CARDOZO ARTS & ENT. L.J. 837, 867–71 (2007).

244. NICHOLAS, *supra* note 214, at 79.

245. Interview with Dr. Peter Bolz, *supra* note 216. *See generally Past Event: Saturday, April 29, 2000: Provenance and Due Diligence*, INT'L FOUND. FOR ART RES., http://www.ifar.org/past_event.php?docid=1192514072 (last visited Mar. 9, 2012).

246. ALEXANDER & ALEXANDER, *supra* note 206.

247. Interview with Dr. Peter Bolz, *supra* note 216.

248. *Id.*

249. ALEXANDER & ALEXANDER, *supra* note 206.

E. Conclusion

This recitation of history over nearly five hundred years reveals important truths about the origins of European approaches to Native American nations and their peoples. It documents and establishes the starting point of Native American grave robbing and the acquisition of Native American cultural objects without consent and demonstrates how this devastating practice has continued to violate the human rights of indigenous peoples to the present day. In addition, it exposes how these practices were present within the foundational building blocks of the international legal framework and further demonstrates the integration of these principles into both the academic and modern domestic legal framework. The final revelation of this section has discussed the context in which Native American people have been placed into a framework of global paternalism, ultimately left without the voice of consent to this day to self-determine the future of ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony taken from their communities.

IV. THE GLOBAL REPATRIATION MOVEMENT IN THE MODERN ERA

A. Introduction

Over the past four decades, domestic legislation within countries with indigenous populations has emerged to support their self-determinative rights as peoples and engage in the slow removal of paternalism to restore choice and consent in issues that directly affect them. Examples of this re-emergence of the recognition of indigenous self-determination in domestic legislation may be represented through the global Repatriation Movement, which in large part has been initiated and driven by indigenous communities. Such indigenous legislation is seen in the U.S. through the Native American Graves Protection and Repatriation Act (NAGPRA) and the NMAI Act, within Australia through the Torres Strait Islander Heritage Protection Act, and in Alberta, Canada, through the First Nations Sacred Ceremonial Repatriation Act. In addition, the Te Papa Tongarewa/Museum of New Zealand and the New Zealand government have supported the international repatriation efforts of its indigenous peoples through government funding. All are modern-day responses recognizing the egregious history surrounding the unquestionable necessity for returning the ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony. As a result of this indigenous Repatriation Movement, other countries have been forced to respond and the responses have been anything

but consistent. Repatriation has been viewed through a five-hundred year old lens of indigenous-European relations and the threads of history pull through to modern responses. Acknowledging the necessity for the consent of indigenous communities has become the hinge of the International Repatriation Movement, allowing the door to swing open to indigenous peoples and welcome the tenets of the U.N. Declaration on the Rights of Indigenous Peoples or forcing the door to swing shut, perpetuating a long-time human rights violation and knowingly miseducating the public.

B. Indigenous Initiated Legislation and Efforts in the Repatriation Movement

1. The United States

The first piece of legislation passed within the United States pertaining to the repatriation of Native American ancestral remains and cultural objects is called the National Museum of the American Indian Act (NMAI Act).[250] After years of efforts by Native Americans and tribal communities in the 1980s, and through tribal organizations, such as the Association on American Indian Affairs (AAIA), Native American Rights Fund (NARF), and the National Congress of the American Indian (NCAI), the NMAI Act was passed in 1989 (and amended in 1996) to address the thousands of Native American ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony within the Smithsonian Institution. Former tribal leader and traditional Dakota practitioner, Jerry Flute (Sisseton-Wahpeton Oyate), and then-Executive Director of the NCAI, Suzan Shown Harjo (Hodulgee Muscogee/Cheyenne), were two among many Native American peoples leading efforts to create repatriation legislation to return not only ancestral remains, but funerary objects, sacred objects, and objects of cultural patrimony, in a museum environment initially unwilling to recognize Native peoples' voices.[251] However, this all soon changed when Native communities and museum professionals opened dialogue with each other about repatriation.[252] Only applicable among the Smithsonian museums, the NMAI Act was a significant piece of legislation for tribes within the United States and served as a basis for the Native American

250. *See* National Museum of the American Indian Act, Pub. L. No. 101-185, 103 Stat. 1336 (codified as amended at 20 U.S.C. §§ 80q to 80q-15 (2006)).

251. NAGPRA AT 20: INTENT, IMPACT AND FUTURE (Sangita Chari & Jaime Lavallee eds., forthcoming 2013).

252. *Id.*

Graves Protection and Repatriation Act (NAGPRA), which has arguably become the most influential piece of domestic legislation in the world regarding repatriation.[253]

A year after the NMAI Act was passed, the United States passed the Native American Graves Protection and Repatriation Act (NAGPRA) in an effort to require repatriation among federally funded institutions and facilitate museums and federal agencies in the monumental task of returning Native American ancestral remains and cultural items to their tribes and descendants.[254] Within NAGPRA, Congress acknowledges that NAGPRA is part of its trust responsibility, one that "reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations . . . ."[255] This piece of legislation, although a domestic law without jurisdiction internationally, helped to advance the international repatriation movement and influence the creation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), as well as other domestic repatriation laws in other countries.

NAGPRA forces federal museums, federally funded museums, and federal agencies to inventory their Native American collections and notify tribes of their holdings.[256] Museums and tribes are assisted through grants provided from the United States government to aid in repatriation efforts.[257] In order to monitor the repatriation process, NAGPRA also established a Review Committee to oversee federal repatriations.[258]

NAGPRA has defined burial sites, cultural affiliation, cultural items, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony within its legislation and made these cultural items eligible for repatriation to Native American peoples.[259] NAGPRA's regulations also prohibit illegal trafficking of Native American human remains and cultural items within the United States by stating:

> Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months,

253. *Id.*

254. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001–3013 (2006) and 18 U.S.C. § 1170 (2006)).

255. 25 U.S.C. § 3010.

256. *Id.* § 3003.

257. *See id.* § 3008.

258. *Id.* § 3006.

259. *See id.* § 3001.

> or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.[260]

A similarly worded section prevents the illegal trafficking of Native American cultural items. In Section 7(a)(4) of NAGPRA, the Act specifies that a Native American tribe may prove affiliation with the human remains or cultural object if they "can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."[261]

NAGPRA provides a domestic example of how international and domestic laws may be used to facilitate international repatriation efforts. However, NAGPRA has its problems as well. Not all repatriations are easily done and sometimes, litigation results because certain language within the statute itself is not fully defined. The ultimate interpretation of statutory language comes within the purview of the federal government and federal courts, not tribal courts or a group of arbiters with a guaranteed indigenous vote.[262] NAGPRA establishes a claim under federal law for tribes to bring in federal court.[263] In addition, the assignation of culturally unidentifiable human remains and associated funerary objects by federally funded institutions has prevented a number of repatriations from occurring. Effective March 14, 2010, the Department of Interior promulgated regulations pertaining to the culturally unidentifiable human remains for whom "no relationship of shared group identity can be reasonably traced, historically or prehistorically, between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."[264] If no cultural affiliation can be made, "then the Indian tribe or Native Hawaiian organization may request disposition of the remains."[265] This rule has been met with significant backlash from the scientific communities in the United States. For instance, the Natural Science Collections Alliance stated in a comment letter to the National Park Service that "[m]useums have property rights and other legal bases for preserving these items in perpetuity. They

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260. 18 U.S.C. § 1170(a).

261. 25 U.S.C. § 3005(a)(4).

262. *See id.* § 3013.

263. *Id.*

264. NAGPRA Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378, 12,379 (Mar. 15, 2010) (codified at 43 C.F.R. § 10).

265. *Id.*

also have important research and educational interests in their retention and study."[266]

Surprisingly, NAGPRA sometimes comes under harsh criticism in the UK and Canada by museum professionals.[267] Viewed as a piece of legislation that is too strictly defined to be helpful to indigenous communities,[268] a trend toward more broadly defined repatriation policies has unofficially emerged, particularly in Scotland, a country where repatriation beyond ancestral remains has begun and broad repatriation policies are currently being negotiated.[269] Some English, Scots, and Canadian museum professionals argue that these broader policies will allow for broader interpretations by museum professionals, which in turn will be able to encompass all possible categories of human remains and cultural material that should be repatriated to such culturally different indigenous communities.[270] Catherine Bell observes that "[s]trict interpretation of legal provisions, different cultural understandings and misunderstandings of words, and unconscious and conscious bias in application of evidentiary standards are some of the potential problems feared when the possibility of mandatory repatriation legislation is raised."[271] Nevertheless, such broader policies among museums without specific definitions may arguably make repatriation more difficult when museum administrations with broad decision-making abilities are less willing to repatriate and interpret their broad decision making powers in a narrower manner. In addition, it limits the opportunity to have courts review agency and museum decisions within a common law legal system.

The Smithsonian National Museum of the American Indian complies with the NMAI Act but has also adopted repatriation policies beyond the requirements of the Act. Within their repatriation policies are compliance with the requests of indigenous communities pertaining to the handling and care of ancestral remains and cultural objects; special areas set aside with

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266. Letter from Michael A. Mares, President, Natural Science Collections Alliance, to Sherry Hutt, Manager, Nat'l NAGPRA Program, Nat'l Park Serv. (Jan. 9, 2008), *available at* http://nscalliance.org/wordpress/wp-content/uploads/2008/01/nsca-statement-re-nagpra_010808-1.pdf.

267. *See* Catherine Bell, *Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform*, *in* PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAWS, POLICY, AND REFORM 15, 53–55 (Catherine Bell & Robert K. Paterson eds., 2009).

268. *See id.*

269. Honor Keeler, *Contacts at the Marischal Museum*, INT'L REPATRIATION BLOG (Mar. 1, 2010), http://internationalrepatriation.wordpress.com/2010/03/01/contacts-at-the-marishal-museum/; *see also* Bell, *supra* note 267; Neil G. W. Curtis, *Repatriation from Scottish Museums: Learning from NAGPRA*, 33 MUSEUM ANTHROPOLOGY 234 (2010).

270. *See generally* Bell, *supra* note 267; Curtis, *supra* note 269.

271. Bell, *supra* note 267, at 16.

limited access; and a welcoming policy at the NMAI Cultural Resources facility to indigenous communities who wish to view the collection and speak to staff.[272]

These progressive efforts made by the NMAI take into account intellectual property issues that many international museums do not. In addition to the materials eligible for repatriation within the Smithsonian NMAI collections, all materials produced and associated with that object may also be repatriated, if requested by the community.[273] While intellectual property has not advanced to the point of identifying photographic and other archival material as necessarily part of the repatriation process, the World Intellectual Property Organization (WIPO) has increasingly acknowledged the need to protect indigenous traditional knowledge (TK), genetic resources (GRs) and traditional cultural expressions (TCE's), as "economic and cultural assets of indigenous and local communities and their countries."[274] The problem associated with intellectual property protection within the historic framework of intellectual property law is that, eventually, this material will enter the public domain. Many Native American communities, however, do not want photographs and other archival material about Native American ancestral remains and cultural objects, particularly those they have requested to be repatriated, to ever be in the public domain. Unlike traditional intellectual property law, which is geared to promote commercialization and industry, indigenous intellectual property pertaining to repatriating human remains and cultural objects is not.

2. Australia

As much as the United States began as a leader in domestic repatriation laws and efforts, Australia has progressed much further in supporting its indigenous communities in international repatriations. Australia's domestic repatriation efforts began in 1984 by passing the Aboriginal and Torres Strait Islander Heritage Protection Act.[275] Unlike NAGPRA, this Act does not require museums in Australia to create inventories of their aboriginal (indigenous) holdings and send out notices to indigenous communities.

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272. NAT'L MUSEUM OF NATURAL HISTORY, SMITHSONIAN INST., GUIDELINES AND PROCEDURES FOR REPATRIATION (2006), *available at* http://anthropology.si.edu/repatriation/pdf/guidelines_and_procedures.pdf.

273. *Id.*

274. *Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore*, WIPO, http://www.wipo.int/tk/en/ (last visited Mar. 25, 2012).

275. *See Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (Austl.).

However, the Aboriginal and Torres Strait Islander Heritage Protection Act does require people within the country to report the discovery of burial grounds suspected to be Aboriginal remains.[276] Under Section 20(1), the Aboriginal and Torres Strait Islander Heritage Protection Act states, "[a] person who discovers anything that he has reasonable grounds to suspect to be Aboriginal remains shall report his discovery to the Minister, giving particulars of the remains and of their location."[277]

As far as repatriation is concerned, the Minister in Section 21(1)(a) is required to "return the remains to an Aboriginal or Aboriginals entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition . . . ."[278] As far as already discovered human remains and cultural objects, particularly those in museums and collections, the Aboriginal and Torres Strait Island Heritage Protection Act places the onus on the aboriginal people to contact the museum and request the return of these items. Additionally, Section 21(X) specifies that:

> If a local Aboriginal community has reason to believe that any Aboriginal remains held by a university, museum or other institution were found or came from its community area, the local Aboriginal community may request the Minister to negotiate with the university, museum or institution for the return of the remains to the community.[279]

Australia also prevents objects of significant cultural heritage from being exported out of the country through its Protection of Movable Cultural Heritage Act.[280]

Australia has bypassed the United States in its international repatriation efforts. In July of 2000, Australia and the United Kingdom released the Prime Ministerial Joint Statement on Aboriginal Remains, which committed both governments to repatriating indigenous human remains from museums within the United Kingdom.[281] This statement has propelled international repatriation forward in the United Kingdom. However, it is not a binding

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276. *Id.* s 20(1).

277. *Id.*

278. *Id.* s 21(1)(a).

279. *Id.* s 21X.

280. *See generally Protection of Movable Cultural Heritage Act 1986* (Cth) (Austl.).

281. John Howard, Australian Prime Minister & Tony Blair, British Prime Minister, Prime Ministerial Joint Statement on Aboriginal Remains (July 4, 2000), *available at* http://www.eniar.org/news/repat11.html.

document and institutions such as the British Museum have protested their compliance with it.[282]

In the years since this statement, there have been a number of successful repatriations, the most of which have occurred since 2007. In addition to the UK, the Australian government has created a number of relationships with international museums, including museums in Germany, the United States, Scotland, and France. From 2007 to 2008, approximately $4.7 million was budgeted toward repatriations from the Australian government. This money went toward research to establish the provenance of human remains, establish inventories of overseas collections of indigenous human remains, consult with indigenous communities, and assist with reburials.

In August of 2011, the Australian government released the Australian Government Policy on Indigenous Repatriation through the Department of the Prime Minister and Cabinet Office for the Arts.[283] In it, Minister of the Arts Simon Crean fully supports international repatriation and states:

> Over a period o[f] more than 150 years from the late 18th Century, Aboriginal and Torres Strait Islander remains and significant secret sacred objects were collected, usually without consent, and transported to collecting institutions in Australia and overseas. The essential dignity of people's remains was not honoured.
>
> Today, the repatriation of Aboriginal and Torres Strait Islander human remains and secret sacred objects provides an opportunity to right the wrongs of the past, and to build positive relationships between the collecting institutions and Indigenous communities.
>
> The return of ancestral remains is extremely important to Aboriginal and Torres Strait Islander peoples and other Australians. It is a matter of justice and healing.[284]

The International Repatriation Policy cites Article 12 of the U.N. Declaration on the Rights of Indigenous Peoples and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions as supporting documents for seeking international repatriation, and the Australian government goes on to fully support the international repatriation of Aboriginal and Torres Strait Islander ancestral remains and

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282. *See UK Museum Urged to Negotiate over Aboriginal Remains*, ABC NEWS (Oct. 21, 2006, 9:20 AM), http://www.abc.net.au/news/2006-10-21/uk-museum-urged-to-negotiate-over-aboriginal/1291296.

283. *See generally* OFFICE FOR THE ARTS, DEP'T OF THE PRIME MINISTER & CABINET, AUSTRALIAN GOVERNMENT POLICY ON INDIGENOUS REPATRIATION (2011) [hereinafter AUSTRALIAN GOVERNMENT POLICY ON INDIGENOUS REPATRIATION], *available at* http://www.arts.gov.au/sites/default/files/indigenous/repatriation/repatriation-policy.pdf.

284. *Id.* at 4.

sacred objects.[285] Part II, section 3 states, "[i]nternationally, the Australian Government seeks, on behalf of Aboriginal and Torres Strait Islander communities, the voluntary and unconditional return of their ancestral remains and associated notes and data."[286] Part II, section 4, in effect, is a NAGPRA-esque provision in the International Repatriation Policy, which states, "[t]he Australian Government seeks the return of secret sacred objects only from within Australia."[287] While the Australian International Repatriation Policy does not yet go so far as to seek international repatriations of cultural objects beyond ancestral remains, it is unlike any other international repatriation policy because it puts the support of a nation-state behind its indigenous peoples in support of international repatriation.

3. New Zealand

New Zealand has also surpassed the United States in supporting its indigenous communities in their international repatriation efforts. Like Australia, the New Zealand government is also funding international repatriation efforts. However, unlike Australia, the program is also funded through the Te Papa Tongarewa/Museum of New Zealand to assist the Maori tribes and the Moriori tribes of Rekohu (Chatham Islands).[288] Te Herekiekie Herewini, the Repatriation Manager of the Program, explained that the New Zealand government has partially funded the program through an annual fund of $500,000 per year and this money is only for the repatriation of Maori and Moriori human remains.[289] The funding was obtained through a competitive funding round with other New Zealand institutions and not necessarily for the sole purpose of international repatriation.[290] The funding is due to end on June 30, 2013.[291]

Te Papa Tongarewa/Museum of New Zealand, previously known as the National Museum and the Dominion Museum, acquired recognition for its expertise in repatriation beginning in the 1970s.[292] This led to the creation of the Te Papa international repatriation program, which holds consultations

285. *Id.* at 5.
286. *Id.* at 6.
287. *Id.* at 7.
288. E-mail from Te Herekiekie Herewini, Kaiwhakahaere Kaupapa Pütere Köiwi – Manager Repatriation, Te Papa Tongarewa/Museum of N.Z., to author (Sept. 8, 2009) (on file with author).
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*

with Maori and Moriori people continuously so that indigenous perspectives are shared and indigenous goals are sought.[293] As of September 2009, a meeting was to be held to discuss the creation of a national urupa (cemetery) for all unprovenanced human remains that have gone back to New Zealand.[294] Te Herekiekie Herewini states that "[f]or Maori the return of the ancestors from overseas is important and significant. We view them not only as ancestors coming home, but our own family returning from a long journey overseas."[295]

Herewini contends that "most known Museums (up to 70 percent) with Maori ancestral remains are willing to discuss repatriations."[296] This outlook is a good indication for U.S. tribes to open up discussions about international repatriation. The Te Papa international repatriation program model has been extremely successful. Since 1992, New Zealand has completed approximately 72 separate international repatriations from Argentina, Australia, Canada, Denmark, England, France, Germany, Ireland, the Netherlands, Norway, Scotland, Switzerland, Sweden, the United States, and Wales.[297] The repatriations occur in conjunction with a museum in New Zealand and bi-cultural management through the Museum of New Zealand Te Papa.[298]

4. Canada

The Alberta Province of Canada has adopted a repatriation law entitled "First Nations Sacred Ceremonial Objects Repatriation Act."[299] This Act is limited to sacred ceremonial objects and came about due to heavy lobbying on the part of the Blood tribe, part of the Blackfoot Confederacy in Alberta, which has been actively engaged in international repatriation efforts for decades.[300] The Act asserts that First Nations have the right to apply for repatriation to the Minister who ultimately determines whether the repatriation should occur.[301]

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293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *International Repatriations*, MUSEUM OF N.Z./TE PAPA TONGAREWA, http://www.tepapa.govt.nz/AboutUs/Repatriation/Pages/InternationalRepatriations.aspx (last visited Mar. 25, 2012).
298. *See* E-mail from Te Herekiekie Herewini, *supra* note 288.
299. *See* First Nations Sacred Ceremonial Objects Repatriation Act, R.S.A. 2000, c. F-14, *available at* http://www.canlii.org/en/ab/laws/stat/rsa-2000-c-f-14/latest/rsa-2000-c-f-14.html.
300. Bell, *supra* note 267, at 41.
301. First Nations Sacred Ceremonial Objects Repatriation Act, R.S.A. 2000, c. F-14, § 2.

Repatriation is defined more narrowly and differently than in NAGPRA as "(i) the transfer to a First Nation by the Crown of the Crown's title to a sacred ceremonial object, and (ii) the acceptance by the First Nation of that transfer . . . ."[302] This must all occur after consultations with the tribe. Furthermore, "sacred ceremonial object" is defined as:

> an object, the title to which is vested in the Crown, that (i) was used by a First Nation in the practice of sacred ceremonial traditions, (ii) is in the possession and care of the Royal Alberta Museum or the Glenbow-Alberta Institute or on loan from one of those institutions to a First Nation, or is otherwise in the possession and care of the Crown, and (iii) is vital to the practice of the First Nation's sacred ceremonial traditions.[303]

Unlike provisions within the Native American Graves Protection and Repatriation Act, Alberta's Repatriation Act is concerned with liability. One of the provisions states that:

> No action lies against the Crown or the Glenbow-Alberta Institute in respect of any loss or damage arising out of the repatriation of any sacred ceremonial object pursuant to this Act, the regulations or the Blackfoot agreements, or in respect of anything done or omitted to be done in good faith pursuant to this Act, the regulations or the Blackfoot agreements.[304]

Of particular concern in the discussion of liability is the toxic use of pesticides in museum collections. Pesticides are often difficult to detect, most especially because museums have historically not kept detailed records of pesticide use.[305] Testing for pesticides may be expensive.[306] Specific time periods may suggest the most prevalent pesticide used at the time, but cannot absolutely determine chemicals on objects.[307] Furthermore, historically, companies hired to administer pesticides often used their own formulas, which were never shared with the museum.[308]

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302. *Id.* § 1(d).

303. *Id.* § 1(e).

304. *Id.* § 4. During the February 2010 Sacred Objects Workshop at the University of Aberdeen in Aberdeen, Scotland, a discussion about liability arose and centered around the use of pesticides among museums.

305. *See* Nancy Odegaard, *The Issue of Pesticide Contamination*, *in* CARING FOR AMERICAN INDIAN OBJECTS: A PRACTICAL AND CULTURAL GUIDE 69, 69–72 (Sherelyn Ogden ed., 2004).

306. *Id.* at 72.

307. *Id.*

308. *Id.*

C. International Domestic Responses to International Repatriation

1. England

Given that England was the primary colonial occupier in many of these nation-states where the global movement in repatriation began among its indigenous populations, the United Kingdom has been forced to respond to those communities seeking international repatriations. In 2000, a Working Group on Human Remains through the Minister for the Arts and the Select Committee on Culture, Media and Sport, prepared a report entitled, "Cultural Property: Return and Illicit Trade," which addressed indigenous ancestral remains held in repositories in the United Kingdom.[309]

The 2000 Report, "Cultural Property: Return and Illicit Trade," acknowledged in Section 65 that the collection of indigenous cultural items was "unethical even by the standards of the time, including duress, deceit, unlawful removal and, very occasionally, murder."[310] It further pinpoints 132 institutions in England that currently hold human remains.[311] Estimates of ancestral remains residing within these institutions approximate 1,643 human remains.[312] Of those, 1,074 come from the Americas.[313] Out of 33 requests from indigenous peoples to repatriate cultural items from these institutions, only 7 had occurred at the time of this study, 5 were pending, and 20 had been rejected on the grounds of legality.[314] Of the 20 refusals, British institutions cite the British Museum Act of 1963 as problematic for repatriation.[315]

The British Museum Act of 1963 specifies the duties of the Trustees of the British Museum and how the Trustees may dispose of objects within the collection. According to Article 3(1), the duty of the Trustees of the British Museum is "to keep the objects comprised in the collections of the Museum within the authorized repositories of the Museum."[316] The Trustees also

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309. *See generally* CULTURE, MEDIA AND SPORT COMMITTEE, CULTURAL PROPERTY: RETURN AND ILLICIT TRADE, 2000, H.C. 371-I (U.K.) [hereinafter CULTURAL PROPERTY].

310. REPORT OF THE U.K. WORKING GROUP ON HUMAN REMAINS, *supra* note 239, at 23.

311. *Id.* at 14; *see also* JANE WEEKS & VALERIE BOTT, SCOPING SURVEY OF HISTORIC HUMAN REMAINS IN ENGLISH MUSEUMS UNDERTAKEN ON BEHALF OF THE MINISTERIAL WORKING GROUP ON HUMAN REMAINS 8 (2003) [hereinafter SCOPING SURVEY], *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.culture.gov.uk/images/publications/ScopingSurveyWGHR.pdf.

312. REPORT OF THE U.K. WORKING GROUP ON HUMAN REMAINS, *supra* note 239, at 14.

313. *Id.*

314. *Id.* at 17-18; *see also*, SCOPING SURVEY, *supra* note 311.

315. *Id.* at 20.

316. British Museum Act, 1963, c. 24, § 3(1), *available at* http://www.britishmuseum.org/PDF/BM1963Act.pdf.

"may sell, exchange, give away or otherwise dispose"[317] of objects within the collection in three ways: (1) if it is a duplicate in the collection, (2) if the object was made prior to 1850 and is printed matter that has a photographed copy or other copy within the collection; or (3) "in the opinion of the Trustees the object is unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students,"[318] as long as the gift or bequest is not inconsistent with this disposal.[319] In the press release of the 2006 international repatriation of Tasmanian bundles, the British Museum cites the Human Tissues Act 2004 as legislation that "enabled the Trustees of the British Museum and other national museums to transfer human remains out of their collections."[320] However, later, in 2007, the Working Group on Human Remains Report cites the British Museum Act 1963 as an Act that continues to be used in refusals to repatriate to indigenous communities.[321] While arguably ancestral remains will never fall into the first two ways to dispose of collections, it is difficult to maintain justification to refuse repatriation based on Article 5(3) of the British Museum Act 1963, as ancestral remains could be easily argued as "unfit" for the collection due both to the nature in which they were obtained and because indigenous communities wish to repatriate.[322]

Further documentation within England acknowledges the necessity for international repatriation and cites other repatriation legislation around the world. In Section 225, "Cultural Property: Return and Illicit Trade" acknowledges the international importance of the NAGPRA legislation by stating:

> Despite the difficulties, it is our impression that much of the impact of NAGPRA has been positive. The legacy of NAGPRA has moved the museum profession and linked research bodies

317. *Id.* at §5(1).

318. *Id.*

319. *Id.*

320. *British Museum Decides to Return Two Tasmanian Cremation Ash Bundles*, BRIT. MUSEUM (Mar. 24, 2006), http://www.britishmuseum.org/pdf/tasmania.pdf.

321. REPORT OF THE U.K. WORKING GROUP ON HUMAN REMAINS, *supra* note 239, at 20.

322. Despite these reports in 2007, the British Museum may find its much-needed justification for international repatriation in the UNDRIP Article 12, which recognizes international repatriation as an international customary norm. *See* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 7, 2007). With an executive level agreement signed between the prime ministers of the U.K. and Australia to repatriate ancestral remains; an express piece of legislation stating that the British Museum could repatriate ancestral remains up to 1000 years old (Human Tissues Act); and now an international document supporting international repatriation (the UNDRIP) that the United Kingdom signed, indigenous communities are hopeful that international repatriations from the British Museum will be less likely to be refused and more expeditious.

> significantly towards new attitudes, policies and procedures that acknowledge Native rights in human remains and heritage materials, and involve Native people in institutional and professional policy-making.[323]

Unfortunately, the findings of the "Cultural Property: Return and Illicit Trade" are not binding in British law and many significant British museums with large collections eligible for repatriation refused to participate in the 2000 study,[324] so the information provided in the study was largely incomplete. This non-participation of English repositories has assisted many of these institutions in keeping the full inventories of indigenous ancestral remains a secret. As a result, indigenous communities are unable to locate ancestral human remains and other cultural objects that they would like to repatriate.

In July of 2000, both Australia and the United Kingdom issued a Joint Prime Ministerial Agreement, stating that they "endorse the repatriation of indigenous human remains wherever possible and appropriate from both public and private collections."[325] It stated that "much of the overseas human material in English museums was removed from its original location after the death of the subject without the informed and prior consent of that person, or his or her kind or community,"[326] which confirms that England committed the human rights violation of not seeking the free, prior, and informed consent of the indigenous community before taking ancestral remains.

The United Kingdom passed the Human Tissues Act in 2004, a repatriation act of sorts, which only pertains to England, Wales, and Northern Ireland within the United Kingdom.[327] Although seeming to address the issue of repatriation, such limiting provisions apply to the Act that it often renders the Act useless for repatriations, both because it has a 100-year time limit and because large repositories within England are excluded entirely.[328] The Guidelines explain that "existing holdings, imported remains and human remains that are older than 100 years fall within exemptions to the requirement for consent."[329] One hundred years

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323. REPORT OF THE U.K. WORKING GROUP ON HUMAN REMAINS, *supra* note 239, at 93.

324. *See generally id.*

325. Howard & Blair, *supra* note 281.

326. REPORT OF THE U.K. WORKING GROUP ON HUMAN REMAINS, *supra* note 239, at 31-32.

327. *See* Human Tissues Act, 2004, c. 30 (U.K.).

328. *Id.* at pt. 1 §§ 1(5)(b), 40(2).

329. DEP'T FOR CULTURE, MEDIA AND SPORT, U.K. GOV'T, GUIDANCE FOR THE CARE OF HUMAN REMAINS IN MUSEUMS 11 (2005), *available at* http://webarchive.nationalarchives.gov.uk/+/http://www.culture.gov.uk/images/publications/GuidanceHumanRemains11Oct.pdf (citations omitted).

prior to 2004 only puts human remains eligible for repatriation as far back as 1904, well after the Trading Post Era, Colonial Era, Indian Removal, and when numerous human remains were obtained for various studies in the nineteenth century. The 2006 Department of Culture Media and Sport, which issued Guidelines for the Human Tissues Act (2004) states that: "It is [recognized] that some human remains were obtained in circumstances that are considered unacceptable. For example, some were acquired between 100 and 200 years ago from Indigenous peoples in colonial circumstances, where there was a very uneven divide of power."[330]

In Section 47, the Human Tissues Act (2004) gives the Royal Armouries, British Museum, Imperial War Museum, Museum of London, National Maritime Museum, National Museums and Galleries on Merseyside, Natural History Museum, Science Museum, and Victoria and Albert Museum the power to de-accession human remains where they are those of a person reasonably believed to have died less than 1000 years before the date of enactment of the law.[331] Such a provision suggests that the decision to repatriate is entirely up to the nine museums named and these nine museums fall out of the purview of the Human Tissues Act 2004. In fact, the 2007 Working Group on Human Remains Report states that the British Museum Act 1963 has been cited in refusals to repatriate to indigenous communities by the British Museum and the Natural History Museum as legislation that actively prevents repatriation and suggests that "express relaxation of the British Museum Act 1963 would enable the relevant museums to return remains at their discretion without any concern that such return is contrary to law."[332] The implications of these narrow interpretations of the British Museum Act 1963 have affected more than just indigenous communities seeking to repatriate. In 2005, England's High Court denied the return of four pieces of art stolen by Nazis from the Jewish collector Arthur Feldmann.[333] Nevertheless, in 2009, the U.K. passed the Holocaust (Stolen Art) Restitution Act, a law that permits national museums to return art stolen by Nazis during World War II.[334]

In 2007, the Working Group on Human Remains updated The Report of the Working Group on Human Remains. Members of the Working Group included representatives from British Institutions, including: The

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330. *Id.* at 8.

331. Human Tissues Act, 2004, c. 30, § 47(2) (U.K.).

332. REPORT OF THE U.K. WORKING GROUP ON HUMAN REMAINS, *supra* note 239, at 20.

333. *UK High Court Plugs Loophole on Marbles*, COMMISSION FOR LOOTED ART EUR. (May 28, 2005), http://www.lootedartcommission.com/MF6UY212947.

334. *UK Museums Can Return Looted Art*, BBC NEWS, http://news.bbc.co.uk/2/hi/entertainment/arts_and_culture/8358902.stm (last updated Nov. 13, 2009).

Manchester Museum; The Natural History Museum; the Museums Association; Solicitor, Hunters, and Chair, ArtResolve; Petrie Museum of Egyptian Archaeology, University College, London; The British Museum; University of Oxford The Royal College of Surgeons; Research School of Asian and Pacific Studies, Australian National University; the Pitt Rivers Museum, University of Oxford; and the University of Cambridge.[335] The 2007 Working Group Report was much more extensive than the prior report in that it analyzed various pieces of repatriation legislation, requested comments from the international public, and incorporated the U.N. Draft Declaration on the Rights of Indigenous Peoples. The 2007 Working Group limited its scope to indigenous ancestral remains and associated funerary objects obtained by English institutions prior to 1948.[336] The scope of the report is extended to publicly funded institutions, but not privately funded museums.[337] The 2007 Report goes on to state that from the survey conducted during the first report, "[m]ore than two-thirds of the institutions have some, most or all of their collection of human remains on public long-term display (more than one year)."[338]

The 2007 Report also discusses the debates and conflicts among indigenous communities and the scientific community, who

> believes that it is in the public interest to retain such collections for scientific study, while some indigenous communities assert both a right and a responsibility to repatriate and bury their dead (while also contending that the respectful treatment of the dead by all communities is itself in the public interest).[339]

The Working Group also acknowledged that ancestral remains were taken from graves, obtained after military battles, or taken from hospitals, and that Native American peoples were unable to prevent this removal.[340] Later, the 2007 Working Group Report acknowledges that "the majority of repatriation requests come from communities where the removal of human remains occurred in historic situations of coloni[z]ation and imbalances of power."[341]

However, most importantly, the 2007 Working Group Report reaches seven conclusions acknowledging that: (1) the free prior and informed consent of the indigenous individual and his or her community or family

335. REPORT OF THE U.K. WORKING GROUP ON HUMAN REMAINS, *supra* note 239, at 2-3.
336. *Id.* at 9.
337. *Id.* at 10.
338. *Id.* at 15.
339. *Id.* at 21.
340. *Id.* at 23.
341. *Id.* at 30.

were never obtained prior to removal;[342] (2) "this lack of consent persisted throughout the later acquisition of the material by the museum, and extends to its current holding and other treatment, such as research";[343] (3) that this has caused great pain to indigenous communities;[344] (4) that English museums and other museums executed these practices;[345] (5) while some acquisitions conformed to the standards of the time, others "may have occurred in circumstances affording no clear ethical or professional guidance";[346] (6) those who research indigenous remains believe the work is for the public benefit;[347] and (7) the scientific community in the United Kingdom is still relatively isolated from indigenous communities.[348]

2. Scotland

The Human Tissues Act (2004) of England, Wales, and Northern Ireland, does not apply to Scotland. Scotland enacted its own Human Tissues Act in 2006, which contains several distinctions from the Human Tissues Act (2004), the most notable of which exists in the differences in the Guidelines published after the acts were enacted. The Guidelines for the Care of Human Remains in Scottish Museum Collections lay out administrative, museum, and legal approaches that indigenous communities may use to argue for repatriation in Scots law.[349] In its introduction, the Guidelines for the Care of Human Remains in Scottish Museum Collections acknowledge that museums have in their collections "human remains, grave goods and sacred items."[350] It further reads that:

> Museums recogni[z]e that the groups from which human remains were collected, and the relatives and descendants of people whose remains are in collections, have an interest in their treatment. Descendants and relatives may also have moral and legal questions about how they were acquired.[351]

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342. *Id.* at 31-32.
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*
348. *Id.*
349. *See* MUSEUMS GALLERIES SCOT., GUIDELINES FOR THE CARE OF HUMAN REMAINS IN SCOTTISH MUSEUM COLLECTIONS (2011) [hereinafter MUSUEMS GALLERIES SCOTLAND GUIDELINES], *available at* http://www.museumsgalleriesscotland.org.uk/publications/publication/378/guidelines-for-the-care-of-human-remains-in-scottish-museum-collections.
350. *Id.* at 4.
351. *Id.*

The scope of the Human Tissues Act 2006 of Scotland goes beyond the scope of the Human Tissues Act 2004 of England, by considering grave goods and sacred items in addition to human remains.

The Guidelines go through a number of legal arguments concerning human remains, ownership, and the right to possession in Scots law.[352] It states that the "National Museums of Scotland is subject to a statutory bar on de-accessioning objects," but also that an argument may be made against defining human remains as objects.[353] The Guidelines lay out the exact way in which de-accessioning of an object may be sought from the National Museums of Scotland and provides useful arguments for indigenous communities to make within a repatriation claim. For instance, the Guidelines state that the National Museums of Scotland cannot include the transfer of the collections to another museum. Permission may instead be secured by "the approval of the Scottish Ministers under section 8(3)(d) of the National Heritage (Scotland) Act 1985"[354] to repatriate. Additional restrictions on de-accessioning objects (or repatriation) have been discussed by the Guidelines and include constitutional documents of a museum and limitations made in gifts or bequests.[355]

In addition to laying out the means by which repatriation may be sought in administrative and governmental entities, the Guidelines go on to lay out challenges that could be brought under Scots law. These include the Human Rights Act 1998 and Articles of the Convention for the Protection of Human Rights and Fundamental Freedoms.[356]

The Guidelines also discuss records associated with human remains and contend that they may fall under the Freedom of Information (Scotland) Act 2002.[357] The Guidelines insist that rigor, honesty and integrity, sensitivity, respect, openness and transparency, and fairness are all part of the ethical principles of the Guidelines for the Care of Human Remains in Scottish Museum Collections.[358]

Specific case studies highlight examples of the ethical treatment and storage of human remains and culturally sensitive materials that Scots museums are attempting to make. The University of Aberdeen and the Glasgow Museums Research Center, which have created a separate storeroom for such human remains and cultural objects, are mentioned

352. *See generally id.*
353. *Id.* at 34.
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.* at 37.
358. *Id.* at 9–10.

within the Guidelines.[359] The Guidelines advise restricted access to human remains and have suggested that all museums "compile, and make public, an inventory of their holdings" of human remains.[360] Worth noting are the parameters that the Guidelines set forth for museums in Scotland to determine whether repatriation should occur through a series of questions:

Topic	Questions
Identity of Remains	What is the evidence that the human remains concerned are those requested by the claimant?
History of Possession	What is known about the provenance of the remains before their acquisition by your museum and how this relates to your rights of possession? Is there documentation relating to the use and treatment of the remains since their acquisition?
Connection Between the Remains and the Claimant	What evidence connects the claimant and the human remains? Is the claimant a genealogical descendant? Claims based on cultural affiliation should be considered. This may include evidence of group identity or any continuity of cultural practices between the original possessors and those making the request. . . .
Representatives of Claimants	If the claimant is acting on behalf of others, what is their right to be a representative?
Significance of the Remains	What is the significance of the remains to both the claimant and your museum? This may include issues such as the religious, cultural, historical, or scientific importance of the human remains to either.
Consequences of Return to the Claimant	Repatriation of ancestral remains may take place under a variety of conditions, one of which is that the community to whom the remains are repatriated is entitled to decide their future treatment. However, the museum considering the repatriation is entitled to ask what the likely future treatment will be.
Future Partnerships	Future partnerships resulting in additions to your collections, publicity for the museum, increased contextual knowledge of your collections and research opportunities should all be considered.
Consequences of Retention	What is the likely future treatment and use of the human remains if you retain them? This may include display, research, destruction, alteration, or restrictions of access.
Broader Implications of Not Returning the Remains	Issues you may wish to consider include any publicity the decision would attract, the implications for access and research, and the effect on other partnership opportunities with the claimant, other institutions, and donors.[361]

Table 2.

Several museums in Scotland are willing to open up lines of communication with tribes about repatriation, diplomacy, and ongoing dialogues.[362] Neil Curtis of the University of Aberdeen's Marischal Museum

359. *Id.* at 15–16.
360. *Id.* at 22.
361. *Id.* at 26–27.
362. *See generally* Curtis, *supra* note 269.

is especially enthusiastic about making these connections.[363] In the summer of 2010, members of the Cherokee Nation, including the Principal Chief and several Council members, traveled to Scotland to visit the ancestral homeland of a Scottish Jacobite who married into the tribe in the eighteenth century when he was sent to the southeastern United States as an indentured servant.[364] Clan Grant, the clan of Ludovic Grant, the Jabobite who married into the Cherokee Nation, welcomed Cherokees to their Highland games.[365] Neil Curtis at the Marischal Museum also greeted the tribe to continue an ongoing collaboration between the Marischal Museum in Aberdeen and the Cherokee Heritage Center in Tahlequah, Oklahoma.[366] Clan Grant representatives then traveled to Cherokee Nation for the 2011 Cherokee National Holiday in September.[367]

Glasgow Museums have also made great strides in communications with indigenous communities and international repatriation efforts under the direction of Patricia Allan. It has created a limited access storage area for human remains and culturally sensitive materials and has endeavored to contact tribes when they have affiliated human remains.[368] Although the collection is generally divided according to region and not specific tribes, the museums strive to engage in cultural revitalization studies that will hopefully, mutually benefit tribes and the Museums Glasgow public.[369] In 1999, the Kelvingrove Museum (of Glasgow Museums) repatriated a Ghost Dance Shirt to the Wounded Knee Survivors Association.[370] Recognizing that their criteria for the international repatriation was too strict and hoping to encourage repatriation, as of 2010, Glasgow Museums was broadening its repatriation policy.[371] The policy is anticipated to reflect the requirement of an indigenous representative from the repatriating community on the Repatriation Board of Advisors and an appeals process for a repatriation

363. *Id.*

364. *See* James Grant, *A Welcome from the Chief of Clan Grant: Ceud Mìle Fàilte!*, CLAN GRANT SOC'Y, http://www.clangrant.org/index.php (last visited Apr. 2, 2012).

365. *Id.*

366. *Background to Ludovick Grant and the Cherokees*, CLAN GRANT SOC'Y, http://www.clangrant.org/history/cherokee.htm (last visited Apr. 2, 2012); Paula Jean West, *Ludovick Grant: An Aberdeen, Scotland Laird's Son Possibly Ancestor of Large Part of Cherokee Nation*, EXAMINER (Jan 12, 2010), http://www.examiner.com/pagan-travel-in-national/ludovick-grant-an-aberdeen-scotland-laird-s-son-possibly-ancestor-of-large-part-of-cherokee-nation.

367. *See* Grant, *supra* note 364.

368. *See* MUSUEMS GALLERIES SCOTLAND GUIDELINES, *supra* note 349, at 15–16.

369. *See id.*

370. *The Ghost Dance Shirt*, GLASGOW MUSEUMS, http://www.glasgowlife.org.uk/museums/our-museums/kelvingrove/visiting/Displays/First%20Floor/Study%20Centre/Pages/More-about-the-Ghost-Dance-Shirt.aspx (last visited Mar. 26, 2012).

371. *See generally* Curtis, *supra* note 269.

that has been denied, as well as reconsideration if new evidence is discovered.[372]

3. Conclusion

The Repatriation Movement began within indigenous communities as a self-determinative effort in domestic forums. While the NAGPRA was originally only meant to address human remains and cultural items in the United States, it has become globally influential in repatriation efforts. Although the NAGPRA is limited to federally funded institutions, it was an essential first step in addressing repatriation. The reparative justice the Repatriation Movement seeks, however, is much broader than the scope of NAGPRA, and includes repatriation from private and international collections.

While initial responses to repatriation among the international museum community have been similar to the responses of museums in the United States prior to the NAGPRA legislation, it is now evident that the international community has adopted an international norm in indigenous repatriation upon the signing of the UNDRIP. Now, domestic legislation in a second-response wave is emerging and stronger repatriation legislation among nation-states is anticipated to follow the international lead.

D. International Support for Repatriation in International Law & the U.N.

1. Introduction

While domestic laws and policies pertaining to repatriation continue to be created, international repatriation is a global human rights issue. It transcends boundaries and, accordingly, must be addressed in an international law context. It was not until the late 1980s and 1990s that the international arena began to recognize the gross violations of indigenous peoples' rights that have occurred largely from being excluded from decision-making on issues directly affecting them in the nation-state context.[373] Falling in line with the global human rights movement, collective

372. *See generally id.*

373. *See generally* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2004).

and individual indigenous rights are once again being acknowledged by the international community and adopted as the international norm.[374]

This Section will discuss the development of international terminology pertaining to indigenous peoples, the debates historically and presently surrounding international legislation recognizing indigenous rights, and finally, international legislation that affects the Indigenous International Repatriation Movement.

2. Indigenous Peoples in International Law & the Human Rights Movement

The Human Rights Movement has its basis in natural law, which emerged approximately seven hundred years ago.[375] Initially, the concept of natural law encompassed the idea of "a universal moral code for humankind," but later split the notion into two separate sets of natural rights: those of the individual and those of the state.[376] During this era, indigenous rights, though still thought of as "the other" and referred to in highly racial terms by European thinkers, were acknowledged in natural law, and international law recognized indigenous consent and self-determinative rights in the form of treaties.[377]

Later, the focus of international law transformed entirely, eliminating individual rights and, instead, focusing on those of the European nation-state, who in turn had the duty to recognize individual rights.[378] Anaya refers to this period in international law as the "law of nations" in a post-Westphalian world.[379] As Anaya phrases it, "[t]he concept of the nation-state in the post-Westphalian sense is based upon European models of political and social organization,"[380] models which do not fit the models of indigenous communities.[381] During this time, many European nation-states created treaties with indigenous peoples, acknowledging them as something equivalent to a nation-state.[382] However, individual rights were arguably dismissed because European nation-states refused to acknowledge indigenous peoples as "individuals," instead referring to them as

374. *See generally id.*
375. *Id.* at 15, 20.
376. *Id.* at 20.
377. *Id.* at 15–19.
378. *Id.* at 20.
379. *Id.*
380. *Id.* at 22.
381. *Id.*
382. *Id.* at 19–30.

"savages."[383] The "nation-state" terminology continued through World War I, eventually giving way to the creation of the United Nations and the re-emergence of natural law, conceptualized around the idea of a universal moral code in the following decades.[384] In World War II and subsequent decades, international law began acknowledging minorities and their rights.[385] However, indigenous peoples assert that they are not minorities, but peoples, in international law, primarily because they retain a separate sense of identity, still live on their indigenous lands, and maintain their sovereignty.[386]

This new movement manifested itself in the acknowledgement of human rights, both incorporating certain individual rights that were common to all mankind and later acknowledging community collective rights, particularly within indigenous communities.[387]

a. Indigenous Peoples

Specific terminology has been crafted to address indigenous rights in the last few decades of the Human Rights Movement era. Several of these concepts have re-emerged into internationally accepted customary norms, which form the basis for all international law.[388] Indigenous peoples themselves have come to be accepted as international political entities.[389] However, they still do not have the voting power or political status of nation-states in the international nation-state legal structure.[390]

First, we will look at the definition of "indigenous peoples" as it is accepted in international law and policy. Indigenous peoples have been defined by Anaya as "the living descendants of preinvasion inhabitants of lands now dominated by others . . . [who are] culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest."[391] The Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities within the United Nations adds on to Anaya's definition by stating that indigenous peoples "are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued

383. *Id.* at 22–26.
384. *Id.* at 31–34, 51–53.
385. *Id.* at 49–56.
386. *Id.* at 56–60.
387. *Id.* at 49–60.
388. *Id.* at 97.
389. *Id.* at 3–9.
390. *Id.*
391. *Id.* at 3.

existence as peoples, in accordance with their own cultural patterns, social institutions and legal system."[392]

All of these definitions have in common distinctions from the operation of western nation-states, but the clearest distinction between the operation of indigenous peoples and that of nation-based Western society may be found by comparing the Western legal systems from indigenous legal systems. Glenn's book, *Legal Traditions of the World: Sustainable Diversity in Law*, investigates what he defines as the seven legal traditions of the world.[393] The Western World encompasses two legal traditions, the common law system and the civil code system, which Glenn calls "controllable and may be given a national direction."[394] Glenn states that common law "can float around the world, but in so doing it provides little reinforcement for national identities."[395] He also states that civil law is characterized by "codes of law, large resident judiciaries, procedure which is controlled by the judge . . . , denial of judicial law-making, [and] historical prestige of law professors . . . ."[396] These two legal systems, the common law system and the civil codes system, and their structures laid the basis for modern international law and were extraordinarily influential when the United Nations came into existence.[397] At the inception of the U.N., the focus was on the nation-state. However, today, with the Human Rights Movement, there has been a gradual inclusion of other legal systems into international law, most particularly pertinent to this paper, the Chthonic Legal tradition (indigenous legal systems). Glenn defines the Chthonic Legal tradition as law that is characteristically oral, operating on the community level, and seeped in theocratic-based governments.[398]

b. Western Reinterpretations of Indigenous Cultural Objects

Most international repositories have never had contact with the Native American communities from which indigenous ancestral remains and cultural objects originated.[399] This creates a significant communication gap

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392. Workshop for Data Collection and Disaggregation for Indigenous Peoples, Jan. 19–21, 2004, *The Concept of Indigenous Peoples*, ¶ 2, U.N. Doc. PFII/2004/WS.1/3, *available at* http://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc.

393. *See* GLENN, *supra* note 32.

394. *Id.* at 229.

395. *Id.*

396. *Id.* at 125–26.

397. *Id.* at 147–49.

398. *See id.* at 58–64.

399. Jack Trope and Honor Keeler, Preliminary Findings of the International Repatriation Project Association on American Indian Affairs (Mar. 2012) (unpublished manuscript) (on file with author); Honor Keeler, *International Repatriation: An Educational Process*, INT'L

that has led to the misidentification and Western reinterpretation of indigenous cultural objects.[400] For example, a Native American ceremonial object may have special significance to the ceremonial activity and survival of a tribe. Only one specific person within the community may be permitted to use this sacred object and this person is the only one within the community who holds the knowledge of its purpose, use, and how it must be cared for over time. However, a Western museum may have the ceremonial object within its collection, identify it as simply a hat, put it in a box available for public research or on public display, and comment on it based upon its design and artistic value. The primary missing link for the international repository is communication with the indigenous community. Not only is the object being improperly handled and cared for, but its improper treatment may be comparative in a Western context to throwing stones at church statues or a tabernacle. By not contacting the originating indigenous community, western repositories are constantly misinterpreting and reimagining cultural objects into western contexts and becoming contributors to the miseducation of the public.

As Linda Tuhiwai Smith writes in *Decolonizing Methodologies*, "[u]nder colonialism indigenous peoples have struggled against a Western view of history . . . . We have often allowed our 'histories' to be told and have then become outsiders as we heard them being retold."[401] This phenomenon occurs often within the context of Native American collections in international repositories, by which the Western world reinterprets Native American funerary objects, sacred objects, and objects of cultural patrimony as art, instead of seeking to contact the origin indigenous community to understand the importance of these cultural objects within their true contexts.

The Western reinterpretation of Native American collections as art also creates barriers to international repatriations. Art has been legally defined in such a way by Western states that numerous laws have developed to protect national collections, into which indigenous human remains and cultural objects have become integrated.[402] Museum professionals argue that they have an obligation to educate the public about their country's history, as

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REPATRIATION BLOG (Aug. 29, 2010), http://internationalrepatriation.wordpress.com/2010/08/29/international-repatriation-an-educational-process/.

400. Trope & Keeler, *supra* note 399.

401. LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES 33 (1999).

402. *See* EUROPEAN GRP. ON MUSEUM STATISTICS, A GUIDE TO EUROPEAN MUSEUM STATISTICS (Dec. 2004), *available at* http://www.mdc.hr/UserFiles/File/Guide-to-European-Museum.pdf.

well as a professional obligation to preserve world cultures.[403] However, the reimagining of indigenous history and culture, absent of truthful depiction, consent from the indigenous community, and an indigenous voice, is not a responsible educative exercise. In addition, it is not necessary to have ancestral remains and cultural objects to tell this story.

c. Human Remains

Something integral to indigenous identity is disturbed when ancestral bodies are exhumed after being carefully laid in the ground with proper ceremonies to protect them in their journeys.[404] The desecration of graves as impermissible is something that is translatable into Western concepts of self, but somehow, when the identity of the individuals are revealed as indigenous, exceptions for scientific advancement override the impermissible nature of such desecrations and the issue is reformulated in terms of the benefit for the greater good of humanity. The Working Group on Human Remains in the U.K. asserts this as an ethical principle stating:

> Respect for the value of science—*respect for the scientific value of human remains and for the benefits that scientific inquiry may produce for humanity*. This principle holds that individuals and communities (past, present and future) benefit both personally and indirectly, through the benefit to their loved ones, descendants and communities, from the fruits of science.[405]

While the Working Group on Human Remains asserts that it places indigenous requests on par with the scientific community (which had not previously been the case), the burden for repatriation claims remains with the indigenous community to provide information for repatriation claims. In the meantime, the scientific community is still permitted to perform studies through sampling on Native American ancestral remains.[406] As Rebecca Tsosie asserts when speaking about repatriation in the context of NAGPRA in the American legal system, "Native American claimants are disadvantaged by being forced to articulate their claims according to the standards of another culture, and they are doubly disadvantaged when the law assigns the burden of proof to the Native American group."[407]

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403. Trope & Keeler, *supra* note 399.

404. *Id.*

405. DEP'T FOR CULTURE, MEDIA AND SPORT, U.K. GOV'T, GUIDANCE FOR THE CARE OF HUMAN REMAINS IN MUSEUMS 14 (2005), *available at* http://www.culture.gov.uk/images/publications/GuidanceHumanRemains11Oct.pdf.

406. *Id.* at 21.

407. Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L.J. 583, 673 (1999).

In the process of negotiations, although indigenous peoples do not want their ancestors desecrated, they oftentimes have to compromise repatriation in favor of science in order for ancestral remains to be returned at all. Such a conditional repatriation reproduces colonialism by disregarding indigenous consent.

d. Cultural Objects

While initial responses by international communities suggested that international repatriation would be limited to indigenous ancestral remains, more recent government responses have indicated that international repatriation includes the repatriation of indigenous funerary objects, sacred objects, and objects of cultural patrimony, as well as ancestral remains. The Working Group on Human Remains acknowledged in 2007 that:

> Where an art[i]fact is of significant importance to the culture or the religious beliefs of an indigenous people then arguably the continued retention of such an art[i]fact by a museum could amount to a denial of such peoples' right to maintain their culture or to manifest their religion, thus engaging Articles 8 and 9 of the Convention [the European Convention on Human Rights].[408]

Article 12 of the U.N. Declaration on the Rights of Indigenous Peoples (2007) signifies the adoption of an international norm that acknowledges international repatriation of ancestral remains and ceremonial objects.[409] The international repatriation of sacred ceremonial objects has already begun in Scotland. In 1999, a Lakota Ghost Dance Shirt was repatriated to the Wounded Knee Survivors Association, having been taken from a Lakota ancestor of the Wounded Knee Massacre.[410] After a tribal member of the Eastern Band of Cherokee saw the object in the Kelvingrove Museum in Glasgow, Scotland, he contacted members of the Cheyenne River Sioux community to alert them.[411] Marcella LeBeau, a tribal member of the Cheyenne River Sioux tribe, attorney Mario Gonzalez (Oglala Lakota), and other tribal members undertook a long series of appeals to the museum for repatriation.[412] Scottish citizens supported the repatriation, particularly those on the Isle of Lewis who raised money to bring Lakota representatives to

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408. REPORT OF THE U.K. WORKING GROUP ON HUMAN REMAINS, *supra* note 239.

409. Declaration on the Rights of Indigenous Peoples, *supra* note 10, at 6.

410. Jim Kent, *Anniversary of Return of Ghost Dance Shirt*, DAKOTA DIG. (Aug. 6, 2009), http://sdpb.org/tv/shows.aspx?MediaID=39544&Parmtype=RADIO&ParmAccessLevel=sdpb-all.

411. *Id.*

412. *Id.*

Scotland.[413] The citizens of Glasgow also supported the repatriation, a factor that played heavily into the ultimate decision by the museum to repatriate because the museum is owned by the citizens of the City of Glasgow.[414] Among the first such international repatriations of sacred objects, the repatriation of the Ghost Dance Shirt was a conditional repatriation that required the continued preservation of the sacred object.[415] In the context of this repatriation, this meant that the Ghost Dance Shirt was legally required under an agreement to be preserved in museum conditions and displayed to the community.[416] Today, several other sacred objects are under review by Museums Glasgow for international repatriation. While some of these sacred objects were initially denied under a strict international repatriation policy, Museums Glasgow is currently rewriting their repatriation policies to make it a broader policy.[417]

Patricia Allan, Curator of the Native American Collections at Museums Glasgow, reflected on the state of international repatriation at the tenth anniversary of the repatriation of the Ghost Dance shirt. She said, "if nothing else has been learned over the past 10 years, it's that Western European museums need to change the mentality that they actually own everything they happen to have on display."[418]

3. United Nations

The United Nations has initiated several statements and resolutions regarding indigenous rights and indigenous intellectual property rights. These rights include the right to the protection of cultural heritage sites, the right of communities and individuals to provide free, prior, and informed consent before research is done among them, the right to the repatriation of ancestral remains and cultural objects, and the right to protect indigenous knowledge.

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413. Honor Keeler, *Museums Glasgow: The Resource Center and Administrative Structure*, INT'L REPATRIATION BLOG (Mar. 9, 2010), http://internationalrepatriation.wordpress.com/2010/03/09/museums-glasgow-the-resource-center-and-administrative-structure/.

414. *Id.*

415. *Id.*

416. *Id.*

417. *See* GLASGOW MUSEUMS, DRAFT GUIDELINES ON THE REPATRIATION OF HUMAN REMAINS, CONSULTATION DOCUMENT (2010).

418. Kent, *supra* note 410.

The United Nations estimates that there are approximately 370 million indigenous people in greater than 70 countries throughout the world[419] and have defined indigenous peoples as peoples who "have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live."[420] With regard to repatriation, a number of documents issued by the U.N. provide support for indigenous communities seeking repatriation, the most recent of which has been the UNDRIP. It is through these and other international documents that indigenous communities seeking repatriation claims may find support, and the human rights violations that have led to the necessity for international repatriation are exposed within the modern day international law framework. At least two human rights violations presently surround international repatriation: (1) the continued possession of indigenous ancestral remains in international repositories without the consent of indigenous communities; and (2) the display, profit, and study done on indigenous ancestral remains and cultural objects in international repositories that occur without the consent of indigenous communities.

a. U.N. Charter

The U.N. Charter, when applied within the present-day context of the human rights framework, may provide some additional support to indigenous communities seeking repatriation claims. The international, cultural, and social character of repatriation as a human rights issue helps to frame repatriation as an issue bolstered by the purposes of the U.N. Charter. Chapter 1, Article 1(3) of the United Nations Charter asserts that one purpose of the Charter is "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[421] Respect factored heavily into the U.N. Charter's purpose and this aspect of the U.N. Charter may be cited by indigenous communities seeking to garner support from the U.N. They may argue that, whereas the continued retention of ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony without the consent of indigenous communities by international repositories clearly creates a violation of human rights, the U.N. Charter within its fundamental purposes

419. *History of Indigenous People and the International System*, UNITED NATIONS PERMANENT F. ON INDIGENOUS ISSUES, http://social.un.org/index/IndigenousPeoples/AboutUsMembers/History.aspx (last visited Mar. 18, 2012).

420. *Id.*

421. U.N. Charter art. 1, para. 3, *available at* http://www.un.org/en/documents/charter.

calls upon nation-states today to cooperatively support international repatriation claims made by indigenous communities out of respect.

Further support for international repatriation may be found in Chapter XI, Article 73 of the United Nations Charter, which frames respect in the context of culture, stating that:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: (a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses.[422]

International repatriation, even within the international framework of the 1940s, could have found support in the U.N. Charter at that time. In today's context, the arguments would be characterized differently, but the baseline understanding of respect holds. The disrespectful, unethical, and immoral nature of retaining ancestral remains and cultural objects in international repositories without the consent of indigenous communities, as well as the continued display, profit and general mischaracterization of indigenous communities by international repositories is an abuse against their humanity, peoples, and culture. It actively seeks to create an inequality among peoples. Under the U.N. Charter, therefore, the U.N. and its member states must guard against these abuses.[423]

b. U.N. Declaration of the Rights of Indigenous Peoples

On September 13, 2007, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the United Nations[424] with 144 votes for, 4 votes against, and 11 abstentions.[425] Initially, Canada, Australia, New Zealand, and the United States, which collectively came to be known as the CAN-ZUS group were the only countries to vote against

422. *Id.* art. 73, paras. 1-2.
423. *Id.*
424. THE INDIGENOUS WORLD 2008, at 526 (Kathrin Wessendorf ed., 2008).
425. *Id.* at 534.

the UNDRIP.[426] However, since that time, all countries originally voting against the UNDRIP have signed on, including the United States.[427]

The Declaration of the Rights of Indigenous Peoples acknowledges the rights of indigenous peoples both inside and outside of a state's boundaries.[428] The following is a brief summary of the rights that are especially pertinent to recognizing the human rights violations that have resulted in the need for indigenous international repatriation.

Discussed earlier, Article 12 is the most important article within the UNDRIP for supporting international repatriation claims through international law. It explicitly discusses the right indigenous peoples have to repatriate:

> Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.[429]

Due to the overwhelming support for the UNDRIP with all countries signing the document, although it is a non-binding document, the UNDRIP overwhelmingly established the adoption of international customary norms in indigenous rights, and international repatriation is counted among them. However, Article 12 is not the only Article within the UNDRIP that supports international repatriation, Articles 8, 11, 15, and 31 also help to bolster international repatriation claims.

For instance, Article 8 lends support to indigenous arguments against the continued display, retention, and study of ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony within international repositories. Article 8, Section 1, provides that "[i]ndigenous peoples and individuals have the right not to be subjected to forced assimilation or the destruction of their culture."[430] It goes on to state that each state "shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic

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426. THE INTERNATIONAL FORUM ON GLOBALIZATION & TEBTEBBA FOUND., IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 4 (2008), *available at* http://www.ifg.org/pdf/UNDRIP%20Report-English.pdf.

427. Declaration on the Rights of Indigenous Peoples, *supra* note 10.

428. *Id.* at 5.

429. *Id.*

430. *Id.* at 4.

identities"[431] and "(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them."[432]

Arguably, the continued retention of indigenous ancestral remains and cultural objects without the consent of indigenous peoples, and the continued reinterpretation of indigenous peoples' cultures without providing an "indigenous voice" is leading to the destruction of indigenous ways of life and culture, as well as affecting the integrity and cultural identity of indigenous peoples. The rationale that ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony should be retained in international repositories as part of non-indigenous "cultural heritage" is a weak argument. It reflects McGuire's observation that, "having been born from colonialism," colonialism is reproduced at every turn.[433] This phenomenon of colonialism is precisely what the UNDRIP seeks to address and, essentially, the UNDRIP's job is to restore the indigenous voice (consent and self-determination) to the international dialogue on international issues that directly affect their communities.

Additionally, the importance of free, prior, and informed consent is addressed throughout the UNDRIP. Article 11 explicitly applies to the indigenous right to free, prior, and informed consent, stating that "[s]tates shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."[434] This article is probably the most helpful in identifying the second human rights violation that museums and states commit in refusing to seek the free, prior, and informed consent of indigenous communities to display ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony and use them to reproduce photographs, videos, and other such media in order to make money. The UNDRIP also specifies that remedies need to be found by consulting the communities themselves.[435] Moreover, the UNDRIP acknowledges the importance of the indigenous voice. Article 11, Section 1, declares that indigenous peoples have the "right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies, and visual and performing arts

431. *Id.*
432. *Id.*
433. Maguire, *supra* note 1, at 17.
434. Declaration on the Rights of Indigenous Peoples, *supra* note 10, at 5.
435. *Id.*

and literature."[436] This section of the Declaration specifically indicates that indigenous communities need to have input in anything that has to do with the "past, present and future manifestations of their cultures,"[437] which can be construed as including any exhibitions that museums have on their communities. As the Director of the National Museum of the American Indian, Kevin Gover, reflects, the voice least heard about Native people is the Native voice.[438] It is the "Native voice," the indigenous voice, which is absolutely vital to have in accurate representations of indigenous peoples within museums.

Article 15 of the Declaration also assists in exposing the second human rights violation, which is the continued display of indigenous ancestral remains and cultural objects without proper free, prior, and informed consent from indigenous peoples to display these ancestral remains and cultural objects, or to use them to produce other materials such as photographs, postcards, notes, or others studies. Article 15 states that "[i]ndigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information."[439] Displaying ancestral remains and cultural objects that should be repatriated violates Article 15 because it is not consistent with the dignity of indigenous peoples. Furthermore, Section 2 of Article 15 states that "States shall take effective measures, in consultation and cooperation with indigenous peoples concerned, to combat prejudice and eliminate discrimination . . . ."[440] These obligations of consultation and cooperation with indigenous peoples under the UNDRIP are essential components to reparative justice through repatriation and the healing of indigenous communities.

In general, international repositories do not currently seek the free, prior, and informed consent of indigenous communities to either display information about indigenous communities, or display ancestral remains and cultural objects that should be repatriated. Permission is also generally not sought from indigenous communities to study, film, photograph, or otherwise create media from ancestral remains and cultural objects. Article 31, section 1, goes on to state that "[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional

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436. *Id.*

437. *Id.*

438. Kevin Gover, Assistant Sec'y Indian Affairs, Dep't of the Interior, Remarks at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs (Sept. 8, 2000), *available at* http://www.twofrog.com/gover.html.

439. Declaration on the Rights of Indigenous Peoples, *supra* note 10, at 6.

440. *Id.*

knowledge and traditional cultural expressions"[441] and also states that indigenous peoples also "have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."[442] Section 2 further states that "[i]n conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights."[443] Arguably, the international norm trends toward recognizing the intellectual property rights of indigenous peoples and suggests that nation-states should take effective means to protect these rights with respect to international repatriation and public depictions of indigenous peoples.

The Declaration on the Rights of Indigenous Peoples will continue to have a significant impact on both international and domestic legislation. It plays a pivotal role in international support for international repatriation and will likely be the most referenced document in international repatriation claims. The significance, however, of the UNDRIP is that it signifies the adoption, by all countries, of international customary norms with regard to indigenous communities. International repatriation, therefore, is now an international norm in international rights.[444]

4. 1970 UNESCO Convention

Other often-referenced international documents provide further support for international repatriation. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property was the most significant piece of international legislation passed pertaining to stolen cultural objects.[445] At this time in the Human Rights Movement, international norms recognized both the state and the individual. Indigenous peoples as communities were just beginning to be recognized again as international players. Native American nations seeking to repatriate internationally may reference Article 13, Section 13(b), which states that "[t]he State Parties to this Convention also undertake, consistent with the laws of each State: . . . (b) to ensure that their competent services co-operate in facilitating the earliest possible

441. *Id.* at 9.
442. *Id.*
443. *Id.*
444. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, *available at* http://unesdoc.unesco.org/images/0011/001140/114046e.pdf#page=130.
445. *Id.*

restitution of illicitly exported cultural property to its rightful owner . . . ."[446] While domestic laws continue to respond to increasing repatriation claims and realign interpretations of their laws to fall more in line with the UNDRIP, the 1970 UNESCO Convention may be emphasized as supporting international documentation in international repatriation claims. In addition, the spirit of the 1970 UNESCO convention to provide cooperative services to facilitate the return of cultural property in a timely manner will assist indigenous communities with timely repatriations, inclusive of all information pertaining to the ancestral remains and cultural objects necessary to make repatriation claims.

5. UNIDROIT 1995 Convention on Stolen or Illegally Exported Cultural Objects

Subsequent developments in the area of cultural property culminated in the UNIDROIT 1995 Convention on Stolen or Illegally Exported Cultural Objects (1995 Convention).[447] Here, the International Institute for the Unification of Private Law's (UNIDROIT) purpose was to aid in the restitution and return of cultural objects, but not to replace the 1970 UNESCO Convention.[448] As the Explanatory Report later stated, the 1970 UNESCO Convention "remains a key resource in the fight against illicit traffic in cultural objects."[449]

Most notably, the 1995 Convention explicitly incorporates indigenous communities into its statements, stating that the parties were

> DEEPLY CONCERNED by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information.[450]

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446. *Id.* at art. 13.

447. *See* UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322, *available at* http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf.

448. *Id.*

449. Marina Schneider, UNIDROIT, *Unidroit Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, 6 UNIFORM L. REV. 476, 492 (2001) [hereinafter *UNIDROIT Convention Explanatory Report*], *available at* http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-explanatoryreport-e.pdf.

450. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 447, at 1.

Furthermore, Article 3(1) of the Convention on Stolen or Illegally Exported Cultural Objects specifies that "[t]he possessor of a cultural object which has been stolen shall return it"[451] and Article 4(1) expounds on this by stating that "[t]he possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object."[452] While the UNIDROIT was written to provide protections for the good faith purchaser who bought a stolen cultural object,[453] today, the good faith purchaser through the reasonableness standard would have reasonable knowledge of international norms of repatriation because of the UNDRIP. Therefore, a new possessor or a new museum acquiring indigenous ancestral remains and cultural objects would have to exercise the proper due diligence to determine whether it has been stolen from a community. Otherwise, they would fail the reasonableness standard and be held in violation of the UNIDROIT Convention.

Further solidifying the issue of repatriation as an issue of international character can be found in the Explanatory Report by UNIDROIT on the 1995 Convention, which states that "[w]hen a cultural object is found in a State other than that in which it was stolen, there can be no doubt that the claim for its return has an international character, even if it is brought before the courts of the State in which the theft took place . . . ."[454]

Britain, Germany, and the United States did not sign or ratify the 1995 Convention.[455] The implications of this may represent reluctance on the part of these states to bind them to an obligatory international treaty, particularly one that may subject them to long-term scrutiny of multiple states representing indigenous peoples. Thirty-two states, however, did accede to the Convention.[456]

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451. *Id.* at 2.

452. *Id.* at 3.

453. *Id.*

454. *UNIDROIT Convention Explanatory Report*, *supra* note 449, at 494.

455. *See* UNIDROIT, STATUS OF THE UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS—SIGNATURES, RATIFICATIONS, ACCESSIONS (2012), *available at* http://www.unidroit.org/english/implement/i-95.pdf.

456. *Id.* Afghanistan (ratified 2005), Argentina (ratified 2001), Azerbaijan (ratified 2003), Bolivia (signed 1996, ratified 1999), Brazil (ratified 1999), Burkina Faso (signed 1995), Cambodia (signed 1995, ratified 2002), China (ratified 1997), Cote d'Ivoire (signed 1995), Croatia (signed 1995, ratified 2000), Cyprus (ratified 2004), Denmark (ratified 2011), Ecuador (ratified 1997), El Salvador (ratified 1999), Finland (signed 1995, ratified 1999), France (signed 1995), Gabon (ratified 2004), Georgia (signed 1995), Greece (ratified 2007), Guinea (signed 1995), Guatemala (ratified 2003), Hungary (signed 1995, ratified 1998), Iran (ratified 2005),

6. The World Intellectual Property Organization (WIPO)

Although outside the scope of this paper due to its complex nature, the World Intellectual Property Organization has more recently focused its attention on the protection of indigenous knowledge and genetics.[457] While addressing questions surrounding free, prior, and informed consent within indigenous communities and the protection of cultural expression,[458] WIPO has not yet addressed indigenous intellectual property issues surrounding repatriation. The draft provisions for the "Protection of Traditional Cultural Expressions/Expressions of Folklore" recognize that:

> indigenous peoples and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity.[459]

In the Substantive Provisions, Art. I, Protection against Misappropriation, Section 3, it states that:

> legal means should be provided to prevent: (i) acquisition of traditional knowledge by theft, bribery, coercion, fraud, trespass, breach or inducement of breach of contract, breach or inducement of breach of confidence or confidentiality, breach of fiduciary obligations or other relations of trust, deception, misrepresentation, the provision of misleading information when obtaining prior informed consent for access to traditional knowledge, or other unfair or dishonest means; (ii) acquisition of traditional knowledge or exercising control over it in violation of legal measures that require prior informed consent as a condition of access to the knowledge, and use of traditional knowledge that

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Italy (signed 1995, ratified 1999), Lithuania (signed 1995, ratified 1997), the Netherlands (signed 1996), New Zealand (ratified 2006), Nigeria (ratified 2005), Norway (ratified 2001), Pakistan (signed 1996), Panama (ratified 2009), Paraguay (signed 1996, ratified 1997), Peru (signed 1996, ratified 1998), Portugal (signed 1996, ratified 2002), Romania (signed 1996, ratified 1998), Russian Federation (signed 1996), Senegal (signed 1996), Slovakia (ratified 2003), Slovenia (ratified 2004), Spain (ratified 2002), Sweden (ratified 2011), Switzerland (signed 1996), and Zambia (signed 1995). *Id.*

457. *See* WORLD INTELLECTUAL PROP. ORG., REVISED DRAFT PROVISIONS FOR THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE: POLICY OBJECTIVES AND CORE PRINCIPLES, *available at* http://www.wipo.int/export/sites/www/tk/en/consultations/draft_provisions/pdf/tce-provisions.pdf.

458. *See id.*

459. *Id.* at 3.

> violates terms that were mutually agreed as a condition of prior informed consent concerning access to that knowledge; (iii) false claims or assertions of ownership or control over traditional knowledge, including acquiring, claiming or asserting intellectual property rights over traditional knowledge-related subject matter when those intellectual property rights are not validly held in the light of that traditional knowledge and any conditions relating to its access; (iv) if traditional knowledge has been accessed, commercial or industrial use of traditional knowledge without just and appropriate compensation to the recognized holders of the knowledge, when such use has gainful intent and confers a technological or commercial advantage on its user, and when compensation would be consistent with fairness and equity in relation to the holders of the knowledge in view of the circumstances in which the user acquired the knowledge; and (v) willful offensive use of traditional knowledge of particular moral or spiritual value to its holders by third parties outside the customary context, when such use clearly constitutes a mutilation, distortion or derogatory modification of that knowledge and is contrary to *ordre public* or morality.[460]

This new Draft firmly establishes indigenous intellectual property rights into the intellectual property framework[461]—a framework that has been historically driven by business and development. While WIPO may adequately address the protections of indigenous knowledge going forward, the very nature of repatriation involves considerations of indigenous knowledge and indigenous intellectual property rights of the past. Many Native American communities in the United States, for instance, require confidentiality when working with agencies in repatriation or the protection of sacred places. This requirement of confidentiality does not easily fit into the current framework of WIPO's efforts to protect traditional knowledge from non-indigenous acquirement to make profits in industry by placing the information in the public domain. Instead, the likely goal of protecting indigenous knowledge within the international repatriation context would be to keep the information out of the public context.

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460. World Intellectual Prop. Org. [WIPO], *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, *8th session, Geneva, June 6-10, 2005*, *The Protection of Traditional Knowledge: Revised Objectives and Principles*, at 12, WIPO Doc. WIPO/GRTKF/IC/8/5 (Apr. 8, 2005), *available at* http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_5.pdf.

461. *See id.*

V. MUSEUMS AND INTERNATIONAL REPATRIATION: MODELS, MYTHS, BARRIERS, AND SOLUTIONS

A. Introduction

Despite domestic museum law barriers to international repatriation within Europe, several options exist to assist and advance international repatriations, either by creating new domestic legislation or in bypassing the creation of legislation for repatriation and creating a model repatriation policy among museums. The International Council of Museums (ICOM), for instance, is a highly influential organization that recently helped shape updates to several Europe countries' museum legislation by creating museum law models.[462] Within the past twenty years, most European countries have changed their museum laws to fall in line with ICOM's model suggestions.[463] This movement toward museum law uniformity within Europe[464] has likely also been a part of the unity created by the European Union.

Part V will first look at modern domestic museum law barriers that indigenous peoples face when repatriating ancestral remains and cultural objects and economic trends that have also played a part in shaping domestic European museum legislation. Following that analysis, Part V will also examine ways in which indigenous peoples may influence domestic museum legislation or, instead, bypass the laws altogether where seeking international repatriation claims.

B. Statutory-Based Museum Laws v. Constitutionally-Based Museum Laws

Modern domestic European museum laws fall in two categories: statutory museum laws and constitutionally-based museum laws. Of the two, the most difficult to change are constitutionally-based museum laws because amending any constitution is a much longer process than creating new statutory legislation. When thinking about these two types of museum laws that function in European countries, one must also keep in mind the

462. *Standards & Guidelines*, ICOM, http://icom.museum/what-we-do/professional-standards/standards-guidelines.html (last visited Mar. 18, 2012).

463. *See 2000 Museums*, ICOM, http://icom.museum/ (last visited Mar. 18, 2012).

464. *See History*, ICOM, http://icom.museum/who-we-are/the-organisation/history.html (last visited Mar. 18, 2010).

two different legal systems that are in operation: common law and civil code systems.[465]

Statutory-based museum laws are the most common type of museum laws within European states.[466] In civil code systems, judges usually dominate the courtroom,[467] whereas in common law systems, the attorneys dominate.[468] The civil code systems began to develop in Europe in the seventeenth and eighteenth centuries while these countries were still contemplating natural law, and solidified the establishment of the nation-state.[469] In 1804, the French Napoleonic Code (*Code Civil*) and, in 1900, the German Civil Code (*Bürgerliches Gesetzbuch*) was developed.[470] Eventually, the civil code systems of France, Belgium, Luxembourg, Italy, and Spain developed from the French Napoleonic Code.[471] From the German Civil Code developed the civil legal systems of Germany, Austria, Switzerland, Greece, Portugal, Turkey, and Japan.[472] Polish Civil Code became a combination of the two.[473] A Scandinavian Civil Code also developed and later influenced the development of the civil codes of Denmark, Finland, Iceland, Norway, and Sweden.[474] Russian Civil Codes are partially influenced by Dutch Civil Codes.[475]

In Europe, museum laws that have a statutory basis are Belarus, Belgium, Croatia, Denmark, Finland, Hungary, Latvia, Poland, Romania, Slovak Republic, Slovenia, Spain, Sweden, and England.[476] Countries that

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465. GLENN, *supra* note 32, at 164–70, 237–47. One legal system is the common law system, a system based upon precedent where lower courts are bound to the decisions of higher courts. The other legal system is the civil code system where precedent does not come into play, but courts must interpret cases according to a detailed statutory system. *Id.* at 237–47.

466. *See National Reports*, EGMUS, http://www.egmus.eu/index.php?id=79 (last updated Nov. 24, 2011).

467. GLENN, *supra* note 32, at 145.

468. *Id.* at 243–44.

469. *Id.* at 143–44.

470. *Id.*

471. THOMAS WATKIN, AN HISTORICAL INTRODUCTION TO MODERN CIVIL LAW 146 (1999).

472. JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA, CASES AND MATERIALS 493 (1994).

473. WATKIN, *supra* note 471, at 146; Susan S. Cummings, *Environmental Protection and Privatization: The Allocation of Environmental Responsibility and Liability in Sale Transactions of State-Owned Companies in Poland*, 17 HASTINGS INT'L & COMP. L. REV. 551, 569 (1994).

474. 1 KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 284–86 (Tony Weir trans. 1977).

475. John C. Reitz, *Export of the Rule of Law*, 13 TRANSNAT'L L. & CONTEMP. PROBS., 429, 479 (2003).

476. *See* EUROPEAN GRP. ON MUSEUM STATISTICS, *supra* note 402. These statistics have been taken from the European Group on Museum Statistics ("EGMUS"), of which there are 27 European member countries. *Home*, EGMUS, http://www.egmus.eu/ (last updated Nov. 24,

have both statutory and constitutionally-based museum laws are Austria, Greece, and Italy.[477] France has museum laws created upon executive order, whereas Germany, Luxembourg, Netherlands, and Switzerland (pending) all currently do not have museum laws.[478]

Of these countries, the ones with the largest indigenous human remains and cultural objects are the United Kingdom, France, and Germany.[479] Ironically, these are all countries that have been extremely influential both as colonial powers, as well as countries that have strongly influenced the development of legal systems in European countries and former colonial governments.[480] These are all important considerations when looking at the historic context of international repatriation, and understanding the interrelatedness between the genesis of the international repatriation issue and the establishment of modern international and domestic legal systems.

C. ICOM: Influencing European Domestic Museum Laws

The most influential entity in creating domestic museum legislation has not been international legislation, but rather ICOM, the International Council of Museums—a group that has set forth a Code of Ethics for museums.[481] In the past 20 years, this Code of Ethics has been extremely influential in European countries and several European countries have changed their laws based upon ICOM's suggestions, generally adopting ICOM's definitions of museums.[482] Countries influenced by ICOM's models include Belgium, Croatia, Denmark, Finland, Germany, Italy, Luxembourg, Netherlands, Norway, Slovak Republic, Slovenia, Sweden, and Switzerland.[483] Thus, ICOM may help become a conduit for homogeneity in international repatriation policies.

2011). Austria, Belarus, Belgium, Croatia, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Macedonia, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, the Netherlands, and the United Kingdom are all members of the EGMUS. However, Estonia, Ireland, and Portugal did not submit statistics to the referenced materials. *National Reports*, EGMUS, http://www.egmus.eu/index.php?id=79 (last updated Nov. 24, 2011).

477. *Id.*

478. *Id.*

479. International Repatriation Project Notes, *supra* note 231.

480. *See* GLENN, *supra* note 32.

481. *See* INT'L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS (2006), *available at* http://icom.museum/fileadmin/user_upload/pdf/Codes/code2006_eng.pdf.

482. *Id.* at vi; *Code of Ethics*, ICOM, http://icom.museum/who-we-are/the-vision/code-of-ethics.html (last visited Mar. 18, 2012).

483. *See National Reports*, EGMUS, http://www.egmus.eu/index.php?id=79&no_cache=1 (last updated Nov. 24, 2011).

Significant support for indigenous consent and international repatriation is provided throughout the ICOM Code of Ethics for Museums (2006). In Article 6, museums are required to "reflect the cultural and natural heritage of the communities from which they have been derived."[484] Article 6, Section 2 specifically addresses the return of cultural property and states that "[m]useums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin."[485] ICOM acknowledges indigenous peoples by stating that the return of cultural property should go to either the "country or people of origin."[486] Further sections in Article 6 call for taking "prompt and responsible steps to co-operate" in the return of cultural property.[487]

ICOM's Code of Ethics also sets forth that "acquisitions should only be made based on informed and mutual consent without exploitation of the owner or informants."[488] Later, the Code of Ethics requires that "[m]useum usage of collections from contemporary communities requires respect for human dignity and the traditions and cultures that use such material"[489] and "should be used to promote human well-being, social development, tolerance, and respect by advocating multisocial, multicultural and multilingual expression."[490]

ICOM has clearly promoted the return of cultural property to indigenous peoples and acknowledged the need for free, prior, and informed consent of contemporary indigenous communities. ICOM may provide an especially influential avenue for the development of more widespread dialogue about international repatriation among indigenous communities and international museum professionals. In addition, this may be a non-legislative means to develop a model policy for international repatriation that would help ease the burden on indigenous communities who, at present, are forced to respond to a number of different legal systems, administrative policies, and barriers to each repatriation they engage in undertaking.

D. The Cultural Heritage Debate

International museums with indigenous collections have cited cultural heritage laws as legal provisions that prevent the repatriation of ancestral

484. INT'L COUNCIL OF MUSEUMS, *supra* note 481, at 9.
485. *Id.*
486. *Id.*
487. *Id.* at 10.
488. *Id.*
489. *Id.*
490. *Id.*

remains or cultural objects. Some European museum laws provide that the State owns all collections pertaining to "cultural heritage" within the country's museums.[491] Museums will define "cultural heritage" as inclusive of indigenous ancestral remains and cultural objects because, they argue, either: (1) indigenous ancestral remains or cultural objects tell the story of the cultural heritage of a country's empire and peoples, or (2) indigenous ancestral remains or cultural objects, because they are within a state's collection, are automatically defined as "cultural heritage." In this context, the debate that becomes especially important among European museum professionals is whether indigenous ancestral remains or cultural objects are part of the cultural heritage of the country itself.[492]

"Cultural heritage," therefore, is often ill-defined and can be applied very broadly to encompass everything within a national collection. This is especially problematic for indigenous communities requesting repatriation because it places a legal barrier to the negotiation process.[493] However, museums themselves have the opportunity to argue that cultural heritage collections do not include those collections from indigenous communities.

E. Memorandum of Understanding

Another non-legislative means to undertake international repatriations involves the signing of Memorandums of Understanding (MOUs) between the indigenous community and the museum. An MOU is an agreement of two or more parties and, in this context, it would likely stipulate agreements among the parties over consultations and the repatriation process. The government status of Native American nations makes MOUs an especially important exercise in sovereignty, most especially because of the diplomatic nature of this type of MOU and its international character. MOUs have been signed in a number of international repatriations and are increasingly becoming the standard within international repatriations.[494]

F. Models, Myths, and Challenges of Repatriation

To date, only a handful of international repatriation cases have occurred to Native American nations within the United States. However, several

491. Trope & Keeler, *supra* note 399.
492. *Id.*
493. *Id.*
494. *Id.*

international repatriations have occurred in both New Zealand and Australia due to increased government funding and support.[495]

In addition to the legal barriers international museums face within their own countries, internal resistance also plays a large role in withholding information and denying requests for repatriation. An unsubstantiated fear of the complete depletion of indigenous collections resounds among international museum professionals and effectively shuts down communication lines with indigenous peoples.[496] Because these communication lines are closed, indigenous peoples do not know the full extent of the collections of international museums and the ancestral remains and cultural objects that might be eligible for repatriation.[497] Estimates in the millions have been made to the number of indigenous ancestral remains in European collections.[498] However, museums are extraordinarily careful about what the outside world knows both about the value of the collections they hold and the full extent of the collections themselves.[499] The following will first discuss three models of international repatriation that have emerged. Then, it will discuss some common myths among international repositories, most especially those that have not yet engaged in a dialogue with indigenous communities about repatriation. Finally, this section will analyze additional potential barriers for international repatriation and suggest possible solutions.

1. Three Models of International Repatriation

International repatriations may be viewed in three very distinct models. The first model involves international repatriations occurring through government support. The second model involves international repatriations initiated and supported by indigenous communities. And the third model is international repatriations initiated by museums. Obstacles face all three models, but they have all been met with varying degrees of success.

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495. AUSTRALIAN GOVERNMENT POLICY ON INDIGENOUS REPATRIATION, *supra* note 283. *See also* E-mail from Te Herekiekie Herewini, *supra* note 288.

496. Trope & Keeler, *supra* note 399.

497. *Id.*

498. *See* Nancy J. Fuller, *Native American Collections in European Museums and Archives: A Listing*, MUSEUM ANTHROPOLOGY, May 1990, at 21, 21–24*; Ancestral Remains to 'Go Home'*, MANCHESTER EVENING NEWS, July 29, 2004, at 22, *available at* http://menmedia.co.uk/manchestereveningnews/news/s/125/125310_ancestral_remains_to_go_home.html.

499. Honor Keeler, International Repatriation Presentation at NAGPRA (Jan. 29, 2010).

a. Community Initiated Repatriations

Community initiated and supported repatriations were the first type of international repatriations in the world.[500] Indigenous communities in the United States, Australia, New Zealand, and Canada have all partaken in such repatriations.[501]

The model for community initiated international repatriations generally consists of several phases: (1) Discovery of object in foreign collection, (2) Contact, (3) Negotiation, and (4) Repatriation. Successful models of community initiated repatriations may be seen in the international repatriation efforts made by the Zuni tribe and the Native Hawaiians through Hui Mālama I Nā Kūpuna O Hawai'i Nei (Hui Mālama), both of which have been successful.[502]

Hui Mālama, under the direction of Director Edward Halealoha Ayau, has been involved in international repatriation efforts for over twenty years. They have successfully repatriated hundreds of ancestral remains. Each repatriation must be undertaken on a case-by-case basis, and community-initiated repatriations in particular, allow for specific community traditional approaches to repatriation so that the community is properly prepared to bring their ancestors home. Edward Halealoha Ayau asserts that having a strong grounding in one's cultural beliefs and identity, as well as the intent to remain focused on the important, collective work of returning ancestors to their homes, is paramount.[503]

The Zuni also have incorporated traditional beliefs into the repatriation approach.[504] As Ferguson, Anyon, and Ladd stated in *Repatriation at the Pueblo of Zuni*, "In Zuni culture a reasonable person with a grievance goes to an adversary four times to attempt a peaceable resolution of the problem. Only after this good-faith attempt at resolution is made should stronger action be taken."[505] Thus, the first attempts at communicating with museums or private collectors are "humanistic rather than legal."[506] This approach, which stresses "gentle yet persuasive dialogue rather than confrontation,"[507]

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500. *Id.*

501. *Id.*

502. Honor Keeler, *Keep It Moving Forward*, INT'L REPATRIATION (Sept. 27, 2011), http://internationalrepatriation.wordpress.com/2011/09/27/keep-it-moving-forward/.

503. *See* Edward Halealoha Ayau & Ty Kāwika Tengan, *Ka Huaka'i O Nā 'Ōiwi: The Journey Home*, *in* THE DEAD AND THEIR POSSESSIONS: REPATRIATION IN PRINCIPLE, POLICY, AND PRACTICE 171, 171 (Cressida Fforde et al. eds., 2004).

504. T.J. Ferguson et al., *Repatriation at the Pueblo of Zuni: Diverse Solutions to Complex Problems*, 20 AM. INDIAN Q. 251, 251 (1996).

505. *Id.* at 255.

506. *Id.*

507. *Id.* at 257.

has helped to solidify Zuni's reputation "as a tribe committed to resolving issues in a manner mutually satisfying to all parties."[508]

Several benefits exist by choosing to initiate international repatriations through one's indigenous community. For instance, each repatriation may be viewed on a case-by-case basis, rather than generalized strict rules of governance with black and white protocols meant to reach across many indigenous nations that may or may not take into account the unique and personal nature of repatriation for each indigenous community. Secondly, the indigenous community remains in control of the entire repatriation process. Furthermore, indigenous communities may target specific international museums, as well as private collectors, allowing for repatriation on a wider scale. Finally, indigenous community-initiated international repatriations have been the most successful in repatriating cultural objects without limiting repatriations to human remains. Indigenous peoples are also free to request that replication of human remains and cultural objects in the form of molds, photos, and other media may not be made.

However, there are also several difficulties involved in community-initiated international repatriations. First, it may take a long time to repatriate and could be very expensive for the community. The navigation of international laws and domestic museum laws are also especially cumbersome, particularly when a community may not have full-time staff dedicated to researching and navigating them. It is also difficult for indigenous communities to know what is contained within international repositories because of the distance between the museum and the community and because there is a general lack of a centralized place to collect the information that is sensitive to the beliefs of each indigenous community.[509] Such knowledge comes either from word-of-mouth, a discovery when a tribal member is abroad, or someone who happens to see the ancestral remains or cultural objects in a museum catalogue.

b. Government Initiated Repatriations

Government initiated and supported international repatriations have occurred primarily in Australia and New Zealand. Due to the support of the government, which provides nation-to-nation capabilities in negotiations,

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508. *Id.*

509. The Association on American Indian Affairs has recently initiated an International Repatriation Project, which is collecting information on Native American collections within international repositories. *International Repatriation*, ASS'N ON AM. INDIAN AFF., http://www.indian-affairs.org/programs/aaia_repatriation_we_help.htm (last visited Mar. 17, 2012). The database is password protected and will remain culturally sensitive. *Id.*

there has been an explosion in the number of successful international repatriations.[510] In addition to providing funding, national museums assist in the repatriations themselves.[511]

There are many benefits to this negotiation process, the first of which is the power of the nation-state that is put behind indigenous peoples. The State is a long-established party negotiator in international law, as opposed to indigenous peoples who are only just being recognized as participants once more. Nation-states can vote in international forums and can apply pressures on other nation-states that indigenous peoples are not permitted to do in the current nation-state framework. Furthermore, nation-states work with larger amounts of money and can allocate funds to indigenous international repatriations. This results in an increase in the number of repatriations to indigenous communities.[512] Since 2000, Australia has repatriated over 1000 human remains to indigenous communities.[513]

Of the most significant accomplishments made in state-to-state agreements about repatriations, is the Prime Ministerial Joint Statement on Aboriginal Remains, signed on July 4, 2000.[514] This agreement was made between the prime ministers of Australia and the United Kingdom "to increase efforts to repatriate human remains to Australian indigenous communities."[515] Since this agreement, Australia has created its International Repatriation Program for indigenous peoples, which has actively sought the repatriation of aboriginal human remains.[516]

Yet, there are also some drawbacks to these government-influenced international repatriation programs. It appears that these international repatriations only pertain to the ancestral remains of indigenous peoples from Australia and New Zealand. Funerary objects, sacred ceremonial objects, and objects of cultural patrimony have not been supported by these programs historically. This limitation is likely a reflection of international law concepts of repatriation prior to the UNDRIP. Western societies understand the need to bury the dead, something that is translatable beyond cultural boundaries. However, funerary objects, sacred ceremonial objects,

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510. AUSTRALIAN GOVERNMENT POLICY ON INDIGENOUS REPATRIATION, *supra* note 283, at 5. *See also* E-mail from Te Herekiekie Herewini, *supra* note 288.

511. AUSTRALIAN GOVERNMENT POLICY ON INDIGENOUS REPATRIATION, *supra* note 283, at 8. *See also* E-mail from Te Herekiekie Herewini, *supra* note 288.

512. *See* AUSTRALIAN GOVERNMENT POLICY ON INDIGENOUS REPATRIATION, *supra* note 283, at 8–9. *See also* E-mail from Te Herekiekie Herewini, *supra* note 288.

513. *Repatriation*, NAT'L MUSEUM AUSTL., http://www.nma.gov.au/collections/repatriation (last visited Mar. 17, 2012). *See also* E-mail from Te Herekiekie Herewini, *supra* note 288.

514. Howard & Blair, *supra* note 281.

515. *Id.*

516. AUSTRALIAN GOVERNMENT POLICY ON INDIGENOUS REPATRIATION, *supra* note 283.

and objects of cultural patrimony are seen as art, as opposed to being recognized for their true and important function in indigenous culture. Despite these perceptions, the fact that these objects were stolen and robbed from graves is often ignored by the international communities in open discussions. Nevertheless, there is an indication that international repatriation of secret sacred objects will be supported by the Australian government, particularly after the Minister of the Arts, Simon Crean, supported this in a public statement in August of 2011.

These government-initiated repatriations are very important to their indigenous communities, for they are accomplishing large numbers of international repatriations of indigenous human remains. They also assist in creating international norms for international repatriation of indigenous human remains, so that they will become even more widely accepted in the international museum community. These government initiated international repatriations may set forth important models that other states may use to establish similar government-funded programs.

c. Museum Initiated Repatriations

One of the only museums to initiate international repatriations is the Smithsonian National Museum of the American Indian. In the spirit of the NMAI Act and NAGPRA, the NMAI took active steps under former Director Richard W. West, Jr. to look abroad and facilitate the international repatriation of indigenous human remains and cultural objects.[517] These repatriations were made to indigenous communities in Canada, Chile, Cuba, Peru, and Ecuador.[518]

Within their protocols, the NMAI specifies that repatriations will only occur to indigenous communities or their place of origin.[519] This often became complicated in international repatriations, particularly when it involved Latin American countries.[520] Many countries in Latin America have laws in place that state that the government not only owns everything

517. Abby Mogollón, *Conference Provides Counter-Narratives on Repatriation*, FIRST PEOPLES (Feb. 3, 2010), http://www.firstpeoplesnewdirections.org/blog/?p=260; *Repatriation*, NAT'L MUSEUM AM. INDIAN, http://nmai.si.edu/explore/collections/repatriation/ (last visited Mar. 21, 2012).

518. Email from Nancy Kenet Vickery, Int'l Research Specialist, Smithsonian Institute, to Honor Keeler (Jan. 10, 2012) (on file with author).

519. *Repatriation*, *supra* note 517; *Protocols for Native American Archival Materials*, N. ARIZ. U. (Apr. 9, 2007), http://www2.nau.edu/libnap-p/protocols.html.

520. Tracy Gross, *Who Owns History? Global Repatriation Treaties Prompt Slow but Steady Return of Historical Treasures*, ETHICAL TRAVELER (Mar. 2, 2011), http://www.ethicaltraveler.org/2011/03/who-owns-history-global-repatriation-treaties-prompt-slow-but-steady-return-of-historical-treasures/.

below the ground, but anything else that may be classified as "cultural heritage." Cultural heritage within the context provided by these countries would then include associated and unassociated funerary objects, sacred ceremonial objects, and objects of cultural patrimony in these countries. Furthermore, many Latin American countries do not recognize indigenous peoples as separate cultural and sovereign entities. Instead, they view the country's heritage as one single heritage without distinction among the people. The NMAI has negotiated these complex policies so that indigenous communities themselves became stewards of their ancestral remains, and the museum was able to repatriate ancestral remains back to the indigenous community, as opposed to the state.

This pro-active stance of the NMAI, which has a large staff of indigenous peoples, is a model that international repositories may wish to look toward in establishing their own repatriation policies. Instead of waiting to hear from an indigenous community itself, the NMAI and its staff actively identify human remains and cultural objects that should be repatriated and contact the communities directly.

d. Conclusion

While each model has its pros and cons, these models are only the very beginning of what will be seen in the global indigenous Repatriation Movement. As time progresses, they will likely change character and some may merge to more adequately address indigenous community concerns.

2. Common Myths in the Museum World

The international museum community has expressed several fears associated with conducting international repatriations. I believe international repatriation is not something to fear among museums; it is something that will build community relationships with indigenous peoples, facilitate active learning by museum professionals, and assist museums in providing their public with accurate and informed information. This information was gathered throughout an International Repatriation Study conducted in 2010.[521] The following will discuss six unfounded fears and assumptions that international museum professionals have expressed about international repatriation.

521. International Repatriation Study is ongoing at the Association on American Indian Affairs through the International Repatriation Project. It stemmed from a study by Honor Keeler conducted in Europe in the beginning of 2010.

a. Indigenous collections will be completely depleted if our museum engages in repatriations.

A common myth that international museums express is the fear that their indigenous collections will be completely depleted if the museum adopts a repatriation policy. This simply is not true. Museums in the United States, prior to the passage of NAGPRA, were originally extremely fearful that any legislation requiring repatriation from museums to tribes within the United States would completely deplete their collections.[522] However, less than 1% of any collection has ever been repatriated.[523] This is for a number of reasons, including: the fact that many items have been collected legitimately, not all communities have wanted to repatriate, and many Native American communities lack the resources to repatriate.

b. Cultural objects are only art.

International museums often interpret cultural objects with no connection to the originating indigenous community knowledgeable about its history, its use, its spiritual characteristics, or its identity within the community. Cultural objects have different meanings in indigenous communities and often encompass much more than a simplistic aesthetically-oriented reinterpretation of the cultural object as art. These explanations sometimes are hard to make beyond cultural barriers, most particularly when the international repository makes no contact with the indigenous community. It should be acknowledged as a right of indigenous communities to self-determine the fate of these cultural objects, particularly when they have been stolen from the community or exhumed from gravesites.

c. "For the good of science (or humanity)" is a greater cause than the wishes of an indigenous community with regard to ancestral remains.

"For the good of science (or humanity)" is likely the most commonly asserted argument against international repatriation. In essence, the scientific community argues that retaining indigenous human remains within international repositories must be done so that they may be studied at some future date in scientific or genetic studies that have the potential to

522. Richard West, *Beyond Repatriation: (Or How the "Other" Became the "We")*, HISTORIC NANTUCKET, Winter 1996, at 101, *available at* http://www.nha.org/history/hn/HN-winter96-repatriation.htm.

523. Catherine Bell et al., *Repatriation and Heritage Protection: Reflections on the Kainai Experience*, *in* FIRST NATIONS CULTURAL HERITAGE AND LAW: CASE STUDIES, VOICES, AND PERSPECTIVES 203, 233–34 (Catherine Bell & Val Napoleon eds., 2008).

benefit "all of humanity." The argument for the betterment of humanity, however, robs indigenous communities of their self-determinative rights and is a reflection of paternalism and colonialism still present in Western society. More to the point, this argument is only used against indigenous communities in order to retain indigenous ancestral remains. The point here is that the free, prior, and informed consent of indigenous communities was never obtained from either an individual or the community in either obtaining the ancestral remains or retaining them within an international repository. By using "for the betterment of humanity" or "for the good of science" as justification to deny a repatriation claim, repositories effectively deny the rights of self-determination to indigenous peoples.

When NAGPRA was in the process of being considered by the U.S. Congress, Dr. Emery Johnson, head of Indian Health Services, testified in Congress that to date, no studies done on any human remains had enhanced any aspect of Native American health.[524] In addition, it makes little sense why researchers cannot contact indigenous communities, provide their reasoning for studies, and request approval from indigenous communities on studies they would like to perform on indigenous ancestral remains and cultural objects.

In addition, present-day laws now ask individuals and families whether they want to be organ donors or donate their bodies to science upon death. A document must be signed and laws prohibit organ donation or the donation of bodies to science if consent has not been obtained. The same measures should be taken for indigenous peoples and their ancestral remains.

d. Repatriation is prohibitively expensive for one museum to undertake.

While repatriation may have its expenses, the costs have generally been borne on the indigenous communities seeking to repatriate and the investment of museums has been minimal—in terms of both staffing and time. In fact, the better argument is that international repatriations are often *prohibitively expensive for Native American Nations*. In negotiating with indigenous communities, options for repatriation should be made available, such as the option of a virtual consultation and several options for transportation overseas, so that costs may be reduced for indigenous communities. Nevertheless, the costs when compared with the moral

524. Katreina Eden, *Where Do the Dead Go? A Discussion of the Need to Enact More Specific Legislation in North American to Better Serve Native Americans' Rights to Indigenous Skeletal Remains*, 12 SOUTHWESTERN J.L. & TRADE AM. 119, 135 n.12 (2005).

argument against the acquirement and continued retention of Native American ancestral remains and cultural objects far outweighs the seemingly minimal costs of repatriation.

e. The only people who stand to gain from repatriation are indigenous communities. We get nothing. In fact, we get less because this will devalue our overall collections.

This simply is not true. There is much to gain from international repatriations, including an increase in the value of a museum's legitimate indigenous holdings through the educative process and dialogue with indigenous communities.

Negotiations for international repatriation will open up communication lines and resources to international museums. Instead of relying on books with potentially (and likely) inaccurate information on indigenous communities, international museums will have access to primary sources—the indigenous peoples themselves. Usually, the relationships that develop during and after international repatriations are ongoing. Museum officials will learn tremendous things from indigenous communities, which will in turn help them to fulfill their duty to the public to provide accurate information. In addition, many objects within museums will be more accurately identified and, instead of viewing things simply as art, these objects may be understood in the full context that their maker and community intended.

3. Identified Challenges for Museums and Native American Communities

International repatriation requires the cooperation of both government and museums due to the international nature of the issue. This means that time and resources must be invested by not only the Native American community seeking international repatriation, but the museums and governments themselves. The challenges involved in international repatriations include accurate identification of the Native American community or region where human remains and cultural items originated, researching provenances, storing such ancestral remains and cultural items with respect, and establishing policies and procedures for international repatriation.

Of these, the most challenging is the accurate identification of ancestral remains and cultural objects that should be eligible for repatriation. Most museums throughout Europe have regionalized their identification of objects and, unfortunately, some have misidentified their collections

entirely.[525] This has become a particularly prevalent problem throughout Europe where many collections have been obtained through bequests or donations from curio collections made during the nineteenth and early twentieth centuries.[526] Unfortunately, resources often have not been put into identifying the collections, which may be due to either traditional neglect of Native American and indigenous collections or general lack of funding.[527] Nevertheless, moving forward, this should not act as a barrier to repatriation. It can be a collaborative effort on the part of museums and Native American communities to accurately identify ancestral remains and cultural objects eligible for repatriation. Museums also stand to benefit from the development of such a relationship because collections that they legitimately hold may be accurately identified. This may, in turn, increase the value of the collection.

4. Virtual Repatriation

European museums are currently debating the idea of "virtual repatriation." Virtual repatriation has several potential definitions in Europe.[528] However, "virtual repatriation" is not truly repatriation at all and should instead be more accurately referred to as "cultural revitalization studies."[529]

These studies involve two very different concepts. The first concept is to photograph all or part of a collection for indigenous peoples to view the collection in a virtual environment, such as through a public database or in a private setting.[530] Cambridge University is currently involved in such a study with the Pueblo of Zuni.[531] Zuni collections at Cambridge have been digitally photographed and uploaded onto a secure server at Zuni so that tribal members may view the collection without the intrusion of the rest of the internet.[532] However, this is not repatriation; it is a study.[533] Repatriation

525. Trope & Keeler, *supra* note 399.

526. *Id.*

527. *Id.*

528. *Id.*

529. Katherine Carlton, Native American Material Heritage and the Digital Age: "Virtual Repatriation" and Its Implication for Community Knowledge Sharing (Apr. 4, 2010) (unpublished Honors Thesis in the Department of Anthropology and Museum of Anthropology, University of Michigan).

530. Trope & Keeler, *supra* note 399.

531. *Kechíba:wa Digital Collection*, A:SHÍWÍ A:WAN MUSEUM & HERITAGE CENTER, http://www.ashiwi-museum.org/kechibawa.html (last visited Mar. 22, 2012).

532. *Id.*

533. Trope & Keeler, *supra* note 399.

occurs when the ancestral remains and/or cultural objects are returned to the indigenous community.

The other concept of "virtual repatriation" involves something very different. Some European Museums contest that a photograph of human remains or a cultural object that should be repatriated is as good as the actual human remains or cultural objects.[534] In other words, instead of repatriating actual human remains or cultural objects, museums would "repatriate" duplicate photographs of them.[535] This also is not repatriation. Ultimately, it is a way for a museum to appear conciliatory to the idea of repatriation and still not repatriate.[536]

G. Potential Solutions

Solutions to the issue of international repatriation do exist and it is important to focus upon the ethical and policy goals rather than become mired down in technical concerns. Ethical arguments for international repatriation exist for both historic injustices and the continued display of ancestral remains and cultural objects eligible for repatriation where consent has not been obtained by either family members or indigenous communities.

Indigenous community approaches to international repatriation will vary. Approximately 566 different federally recognized tribes exist in the United States. One community's approach to repatriation may not necessarily be the same as another community's approach.

While talking to museum professionals in Europe, a certain sense of expectation existed regarding repatriations.[537] For instance, one museum was engaged in two indigenous-initiated repatriations and one government-initiated repatriation.[538] When asked about their experiences with each, the museum stated that they preferred the indigenous-initiated repatriation that involved several gifts to the museum, special invitations to ceremonies that were usually off-limits to the public, and continued updates on what happened to the ancestral remains or cultural items repatriated.[539] The museum curator stated that the least favorable repatriation was the government-initiated repatriation because nothing was received in return and there was no update on what happened to the human remains or cultural

534. *Id.*
535. *Id.*
536. *Id.*
537. *Id.*
538. *Id.*
539. *Id.*

objects after the repatriation occurred.[540] This particular interview brought to light not only the differences among international repatriations, but also the unrealistic expectations of museums.[541] It also suggested that museums that repatriate are expecting to have a continued "right to know what happened." Such information, however, is up to the indigenous community to share or not share with the museum.

Another factor that international museums should consider is creating cultural sensitivity training programs in international repatriation for all current and future staff. Such a program would go over repatriation policies of the museum, involve cultural sensitivity training, and reinforce policies and procedures surrounding any culturally sensitive areas that have been made for indigenous community members.

Yet another potential factor that may assist Native American communities in the United States to repatriate internationally is the establishment of a culturally sensitive database that can notify tribes of human remains and cultural items in international museums. One of the largest problems surrounding the issue of international repatriation is that tribes simply do not know where ancestral remains of their tribal members and other cultural objects potentially eligible for repatriation are located. Furthermore, many international museums do not know the full extent of their holdings. In 2011, The Association on American Indian Affairs initiated an International Repatriation Project, which seeks to assist Native American communities, when requested, with research and the international repatriation process.[542] The Project is creating a culturally sensitive database, with the goals of provided a centralized location for Native American communities to research international repository collections. The database will be accessible to Native American communities and will have access restrictions to the general public.

The United States may also consider creating a government-funded international repatriation program, similar to those available in New Zealand and Australia that have been so successful for their own indigenous peoples. Such a program would promote partnership with Native American nations and involve funding for research of international collections, consultations, and repatriations. Such a program may fund tribal databases, notification systems for tribes of the discovery of ancestral remains and cultural objects located in international repositories, and training programs for Native American communities at their request.

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540. *Id.*
541. *Id.*
542. *International Repatriation*, *supra* note 509.

H. Conclusion

While international repatriation continues to be discussed in international and domestic forums, there are three key takeaways to keep in mind. First, repatriation is an international human rights issue that must continue to be addressed on the domestic and international levels. Second, international repatriation is about opening the doors to dialogue with indigenous communities and restoring the indigenous voice that, historically, has been silenced in both museums and legal structures. Finally, international repatriation cannot be limited to ancestral remains, but also involves the repatriation of funerary objects, sacred objects, objects of cultural patrimony, and anything else that has been produced from these ancestral remains and cultural objects. The necessity for international repatriation today cannot be ignored, but must be acknowledged as an integral component of the development of international law, domestic laws, and museums toward acknowledging and respecting the self-determination of indigenous peoples. In moving forward through this healing process with indigenous communities, this awareness will help the international community continue to extract deep-set fictions that have had inhumane consequences for the world's indigenous peoples.

VI. CONCLUDING REMARKS

The Repatriation Movement, having begun among indigenous communities, has compelled the international community to adopt repatriation as an international norm. As these tenets of the UNDRIP are integrated into domestic laws and among international repositories, robust models of international repatriation must be adopted to address these egregious human rights violations.

As was demonstrated throughout this Article by the five-hundred year recitation of history, the mindset of justification for the theft of ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony has become so integrated into legal structures, academic approaches, and museum practices internationally that a systemic approach must be undertaken to address this issue. Such an approach involves communication, dialogue, and partnership with indigenous peoples. It must acknowledge that the fundamental basis of the international human rights violations surrounding international repatriation involves the absence of the free, prior, and informed consent of indigenous peoples, which never was obtained to take ancestral remains and cultural objects from communities. In addition, the free, prior, and informed consent of indigenous

communities never has been obtained to retain ancestral remains and cultural objects within international repositories, to study them, or to make profit from them. Moving forward, the removal of barriers to repatriation of ancestral remains, funerary objects, sacred objects, and objects of cultural patrimony, both legal and administrative, will better assist indigenous communities with repatriation efforts.