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THE CULTURAL PROPERTY CONUNDRUM: THE CASE FOR A NATIONALISTIC APPROACH AND REPATRIATION OF THE MOAI TO THE RAPA NUI

*Annie Rischarad Davis**

*There is a temple in ruin stands,
Fashion'd by long forgotten hands;
Two or three columns, and many a stone,
Marble and granite, with grass o'ergrown!
Out upon Time! It will leave no more
Of things to come than the things before!
Out upon Time! Who for ever will leave
But enough of the past and the future to grieve
O'er that which hath been, and o'er that which must be:
What we have seen, our sons shall see;
Remnants of things that have pass'd away,
Fragments of stone, rear'd by creatures of clay!*¹

I. Introduction

A. Thesis and Context

Colonial discovery, plundering, and exploitation of native people's cultural artifacts are some of the most notable injustices indigenous peoples have suffered from the current era. And the aftermath of these pervasive practices has resulted in legal challenges for native peoples to reclaim their rightful property. Although certain countries' legislative and executive efforts, as well as international standards and guidelines, have attempted to address these issues over the last twenty years, wrongfully obtained native cultural artifacts remain in museums and public collections. Recent contentions between the Rapa Nui² and the British Museum over possession

* Third-year student, University of Oklahoma College of Law. Many thanks to the spectacular staff and editors of AILR, as well as Professor Drew Kershen, Ashlee Barker, and Sam Davis, whose feedback and encouragement made this Comment possible.

1. LORD BYRON, *The Siege of Corinth*, in *THE COMPLETE POETICAL WORKS OF LORD BYRON* 384, 389 (Paul Elmer More ed., Student's Cambridge ed. 1905), <https://archive.org/details/completopoetical00byrouoft/page/n7/mode/2up>.

2. The Rapa Nui people are the indigenous population of the island of Rapa Nui, colloquially referred to as Easter Island or Isla de Pascua.

of the moai³ Hoa Hakananai'a highlight many of these legal issues and provide an opportunity for international law to allow recourse for affected native groups.

Repatriation is defined as “the return of cultural objects to nations of origin (or to the nations whose people include the cultural descendants of those who made the objects; or to the nations whose territory includes their original sites or the sites from which they were last removed).”⁴ Two countervailing points of view typically characterize the discourse surrounding repatriation: the nationalist approach and the internationalist approach.⁵ The nationalist approach is usually invoked by the claiming state, wherein “the claimed objects tend to become symbols of a lost past, which is extremely important to the formation of the modern nation’s identity Therefore, the removal of such objects disrupts social justice: [t]he displacement of the visual image of a cultural object disrupts the collective memory of identity.”⁶ Notwithstanding, advocates for the internationalist approach argue the placement of the contested objects in museums allows for a wider appreciation and such institutions are equipped to protect the structural integrity of the artifact.⁷ Those who subscribe to the internationalist narrative promote the idea that cultural property is not the absolute property of any nation, “but, rather, the common heritage of humanity.”⁸

The goal of this Comment is to advocate for the repatriation of cultural property based on the nationalist approach. The internationalist approach adopted by museums and other institutions is self-serving and completely blind to the inherent rights of indigenous groups, especially groups such as the Rapa Nui who have been subjected to near-biological and cultural extinction at the hands of outside powers. The repatriation of the moai back to the Rapa Nui is a vital step in the long-overdue redress owed to the modern Rapa Nui people. The result is two-fold: first, it would reunite the statues with the descendants of their makers, who deeply believe the statues

3. “Moai” simply means “statue” in Rapa Nui. However, typically the term “moai” refers to the anthropomorphic monolithic statues constructed by the Rapa Nui people in the pre-historic era.

4. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT’L L. 831, 845 (1986).

5. Maria Shehade & Kalliopi Fouseki, *The Politics of Culture and the Culture of Politics: Examining the Role of Politics and Diplomacy in Cultural Property Disputes*, 23 INT’L J. CULTURAL PROP. 357, 360 (2016).

6. *Id.* (internal quotation mark omitted) (citation omitted).

7. *Id.*

8. *Id.*

are the “living embodiment of ancestors whose role it is to protect [the Rapa Nui].”⁹ Second, the repatriation of the moai would further solidify the sovereignty of the Rapa Nui people, who have been struggling to exert their autonomy for almost 300 years.¹⁰

B. Roadmap for Comment

Part II of this Comment will provide the pertinent historical and social context of the Rapa Nui people from their first arrival on the island to present day. As with any legal issue indigenous people face, in contrast to western entities, the often-continuous structural violence¹¹ exerted against indigenous populations plays a vital role in indigenous people’s ability to adequately address their cognizable legal claims. Exploring the history and culture of the Rapa Nui people, as well as the significance of the moai, is crucial to understanding the context for the current legal battle related to reclaiming their rightful property.

Part III will explore the legal issues that the Rapa Nui people face in reclaiming their cultural artifacts. The Part will also identify other potential legal hurdles associated with commencing repatriation actions. While there are numerous procedural and substantive issues at play in these types of situations, this Part will primarily focus on jurisdiction, venue, and conflicts of laws. Then, this Part will explore substantive issues of property, intellectual property, and related defenses.

Part IV will survey current international standards and guidelines for the repatriation of native peoples’ cultural artifacts, as well as analyze certain countries’ legislative and executive efforts to address this issue domestically. Finally, Part V will offer closing remarks on the nationalist argument in light of the layers of historical, cultural, and legal contexts surrounding contemporary indigenous groups’ efforts for the repatriation of their cultural property.

9. John Bartlet, *‘Moai Are Family’: Easter Island People to Head to London to Request Statue Back*, GUARDIAN (Nov. 16, 2018, 2:00 AM), <https://www.theguardian.com/world/2018/nov/16/maoi-easter-island-statue-british-museum-talks-return>.

10. See *infra* Section II.B.

11. “Structural violence” is a term used to refer to social structures that prohibit individuals from realizing their full potential. It was first coined by Norwegian sociologist Johan Galtung. See Johan Galtung, *Violence, Peace and Peace Research*, 6 J. PEACE RES. 167 (1969).

II. Historical Background

A. Prehistoric Rapa Nui

The island of Rapa Nui is located in the Pacific Ocean and is one of the world's most isolated inhabited islands, with its closest neighbor being Concepcion, Chile, over 2000 miles to the east.¹² The island is 15.3 miles long and 7.6 miles wide at its widest point and has an area of 63.2 square miles.¹³ While exact historical data on the first inhabitants of the island is unknown, scientific data suggests the island was first inhabited as early as 300 CE, but the prevailing view is that inhabitants began arriving between 800 and 1200 CE.¹⁴ Mitochondrial DNA testing on prehistoric skeletons conducted in 2007 indicates the Rapa Nui people are of Polynesian origin.¹⁵

The social and political structure of the Rapa Nui people has traditionally been tribal, with independent tribal bodies called *mata* grouped into two confederations under the leadership of a chief called '*ariki*au *hanau*.'¹⁶ The Rapa Nui language is classified as Eastern Polynesian and is still spoken widely by the Rapa Nui people.¹⁷ Early rock drawings (petroglyphs) of the language are believed to be etched in what are called Rongorongo records, which are still being studied and decoded.¹⁸

The island of Rapa Nui is composed entirely of volcanic rocks, which influenced many facets of life on the island.¹⁹ The construction of more than 800 moai illustrates the importance of the volcanic make-up of the island—and it provides for global recognition of the island itself. These moai are large megalithic stone sculptures depicting heads and torsos of

12. *Easter Island: Geography*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, https://en.wikipedia.org/wiki/Easter_Island (last visited May 18, 2020).

13. *Id.*

14. Valenti Rull et al., *Three Millennia of Climatic, Ecological, and Cultural Change on Easter Island: An Integrative Overview*, 4 FRONTIERS ECOLOGY & EVOLUTION art. 29, 2016, at 1, 1, <https://www.frontiersin.org/articles/10.3389/fevo.2016.00029/pdf>.

15. B. A. Lie et al., *Molecular Genetic Studies of Natives on Easter Island: Evidence of an Early European and Amerindian Contribution to the Polynesian Gene Pool*, 69 TISSUE ANTIGENS 10, 11 (2007).

16. STEPHEN ROGER FISHER, ISLAND AT THE END OF THE WORLD: THE TURBULENT HISTORY OF EASTER ISLAND 21 (2005).

17. *Rapa Nui Language*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, https://en.wikipedia.org/wiki/Rapa_Nui_language (last visited June 25, 2020).

18. See, e.g., Sergei V. Rjabchikov, *Rongorongo Glyphs Clarify Easter Island Rock Drawings*, 113 JOURNAL DE LA SOCIÉTÉ DES OCÉANISTES 215, 215 (2001).

19. Anna Gioncada et al., *The Volcanic Rocks of Easter Island (Chile) and Their Use for the Moai Sculptures*, 22 EUR. J. MINERALOGY 855, 856 (2010).

mostly men,²⁰ along with many of the statues wearing *pukao* or hats.²¹ Although exact dates of construction are unknown, scientists estimate the majority of the moai were built between the twelfth or thirteenth century and the seventeenth century.²² The moai range in size from three to thirty feet in height²³ and weigh up to seventy-four metric tons.²⁴ The majority were carved using two types of pyroclastic (volcanic) rocks: one type for the bodies and another for the hats.²⁵

Global enthrallment with the statues lies not only in their massive size and distinct artistic portrayal but also with their unique placement throughout the island, as if they were “endowed with power to walk about in the darkness.”²⁶ Multiple theories and experiments over the last century have grappled with the method by which the large structures came to be situated.²⁷ The volcanic material used to construct the statues comes from the Rano Raraku crater in the southeast corner of the island.²⁸ Although most of the completed moai on the island are located along the coast, over 300 are scattered throughout the island in various stages of completion,²⁹ with sixty-two statues located on and parallel to prehistoric roads,³⁰ suggesting purposeful relocation efforts by the ancestral Rapa Nui people.³¹

20. *Id.* at 855.

21. Sean W. Hixon et al., *The Colossal Hats (Pukao) of Monumental Statues on Rapa Nui (Easter Island, Chile): Analyses of Pukao Variability, Transport and Emplacement*, 100 *J. ARCHAEOLOGICAL SCI.* 148, 150 (2018).

22. Gioncada et al., *supra* note 19, at 855–56.

23. *Id.* at 855.

24. Hixon et al., *supra* note 21, at 148.

25. Gioncada et al., *supra* note 19, at 860.

26. WILLIAM J. THOMSON, *TE PITO TE HENUA, OR EASTER ISLAND* 497 (Washington, D.C., Gov’t Printing Office 1891), <https://archive.org/details/cu31924105726222/page/n89/mode/2up>.

27. Carl P. Lipo et al., *The ‘Walking’ Megalithic Statues (moai) of Easter Island*, 40 *J. ARCHAEOLOGICAL SCI.* 2859, 2859–60 (2013).

28. Valenti Rull, *Natural Anthropogenic Drivers of Cultural Change on Easter Island: Review and New Insights*, 150 *QUATERNARY SCI. REVS.* 31, 32 (2016).

29. Abby L. Barfelz, Note, *The Little Island That Could: How Reforming Cultural Preservation Policies Can Save Easter Island and the World’s Heritage*, 20 *MICH. ST. INT’L L. REV.* 149, 151 (2011).

30. Lipo et al., *supra* note 27, at 2860.

31. Some suggested theories for the purpose of the moai placement throughout the island are to asset land right ownership, to “visually” control limited resources, or to accentuate different groups’ access points to fresh water sources. Robert J. DiNapoli et al., *Rapa Nui (Easter Island) Monument (ahu) Locations Explained by Freshwater Sources*, *PLOS ONE*, Jan. 10, 2019, at 1, 4, <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0210409&type=printable>.

The enigma of the moai's impressive construction and the engineering feats required to move them throughout the island is compounded by the cultural significance of the structures themselves and the effect of the statues on the social development of the ancestral Rapa Nui. During the era of their construction and placement, the ancient statues represented "deified ancestors, [and] were standard worship subjects to ensure land and sea fertility and, hence, social prosperity."³² The centuries of moai construction and transportation coincided with a climate favorable to agriculture, which resulted in a population increase for the island.³³ Although the exact population numbers are unknown, some researchers estimate the population on the island reached as high as ten thousand people by the middle of the seventeenth century.³⁴

A point of fascination and contention among academics who study the Rapa Nui people is the apparent dwindling of the island population and resources prior to European contact. Scholars debate about the rate and reason for the decline in population on the island,³⁵ but first accounts estimated the population of the island to be about two to three thousand in the mid-eighteenth century.³⁶ The island experienced ecological issues between the seventeenth and eighteenth centuries, such as drought and deforestation.³⁷ Some archaeological, geological, and ecological surveys conducted on the island indicate major societal collapse around 1650, but researchers remain split on the cause.³⁸

One of the most popular theories for the decline in population is ecocide due to overconsumption.³⁹ This theory suggests the Rapa Nui people's fixation on building and situating the moai throughout the island resulted in overconsumption of the island's natural resources, eventually leading to

32. Rull, *supra* note 28, at 32.

33. Rull et al., *supra* note 14, at 2.

34. Daniel Mann et al., *Drought, Vegetation Change, and Human History on Rapa Nui (Isla de Pascua, Easter Island)*, 69 QUATERNARY RES. 16, 16 (2008).

35. See Mara A. Mulrooney et al., *Empirical Assessment of a Pre-European Societal Collapse on Rapa Nui (Easter Island)*, in THE GOTLAND PAPERS: SELECTED PAPERS FROM THE VII INTERNATIONAL CONFERENCE ON EASTER ISLAND AND THE PACIFIC: MIGRATION, IDENTITY, AND CULTURAL HERITAGE, AUGUST 20-25, 2007, at 141 (Paul Wallin & Hene Martinsson-Wallin eds., 2010).

36. Mann et al., *supra* note 34, at 16–17.

37. Tony Dunnell, *Jacob Roggeveen and the First European Contact with Easter Island*, S. AM. VACATIONS (Sept. 8, 2018), <https://www.savacations.com/jacob-roggeveen-first-european-contact-easter-island>.

38. Mann et al., *supra* note 34, at 16–17.

39. Rull et al., *supra* note 14, at 1.

scarcity, warfare, and cannibalism.⁴⁰ These theories center around the date of depopulation and include either ecocide attributed to human selfishness or genocide attributed to European arrival.⁴¹ Another theory for the population decline is that ecological factors beyond human control were responsible for the stark social collapse.⁴² Hypothetically projected climate research suggests widespread droughts also occurred on the island during the time of societal deterioration.⁴³ Other researchers have posited the population decline is attributable entirely to European contact, and diseased vermin caused the striking deforestation that the first European explorers witnessed.⁴⁴

B. Outside Contact and Consequences

In the context of Rapa Nui's history, the mysterious rise and fall of the original inhabitants is clarified by the point when European explorers encountered the lonely island. Dutch explorer Jacob Roggeveen came upon the island of Rapa Nui on Easter Sunday 1722.⁴⁵ Accounts from this week-long visit present information about the population (between two and three thousand), the food the islanders offered, the clothing they wore, and notes about the moai.⁴⁶ Fifty years later, Felipe Gonzalez de Ahedo arrived, claiming the island for Spain in 1770, but the Spanish government did not exert any further power over the island.⁴⁷ In 1774, English explorer James Cook reached Rapa Nui's shores and produced detailed notes about the people, food, customs, culture, and—of course—the statues.⁴⁸ During his visit, Cook estimated the island population to be about 600 to 700 inhabitants.⁴⁹

If Cook's estimation was correct, the Rapa Nui population would have been decimated within the next century. Peruvian slave traders began to raid the island in the 1860s, and many islanders were captured and taken to

40. *Id.*

41. Carl P. Lipo et al., *Weapons of War? Rapa Nui mata'a Morphometric Analysis*, 90 *ANTIQUITY* 172 (2016).

42. Rull et al., *supra* note 14, at 1.

43. *Id.* at 2.

44. Terry L. Hunt, *Rethinking Easter Island's Ecological Catastrophe*, 34 *J. ARCHAEOLOGY SCI.* 485, 498 (2007).

45. Dunnell, *supra* note 37.

46. *Id.*

47. *Id.*

48. *Id.*

49. See THOMSON, *supra* note 26, at 460.

mainland South America.⁵⁰ Continued contact with slavers, whalers, and missionaries resulted in outbreaks of smallpox and tuberculosis, causing the Rapa Nui population to decline even further.⁵¹ By 1868, these contacts and diseases had claimed more than a quarter of the Rapa Nui still on the island, including the last East Polynesia royal first-born son, Manu Rangi, who died of tuberculosis in 1867.⁵² By the mid-1870s, the native population on the island had diminished to 110 people.⁵³

The plight of the Rapa Nui was further worsened by the erasure of their indigenous cultural practices and eventual loss of self-governance. In the late nineteenth century, French missionaries from Tahiti and Mangareva established Roman Catholic missions throughout Rapa Nui, reconfiguring the social and political systems on the island.⁵⁴ Despite the pervasive French influence and presence, France elected not to colonize the island itself, leaving open the possibility that Rapa Nui's closest neighbor, Chile, would step in.⁵⁵

By the late 1880s, Chile acquired the majority of the island's European property interests, and eventually annexed the island in 1888.⁵⁶ The bilingual proclamation documenting the annexation is wrought with controversy, with the Spanish version indicating "cession 'forever and without reserve' of the 'full and entire sovereignty' and guarantee [of] the chiefs' titles."⁵⁷ Whereas "the Rapa Nui version was much more ambiguous and merely concedes to the Chilean government the privilege of being a 'friend of the land.'"⁵⁸ Accounts from the annexation ceremony document the Rapa Nui chief giving the Chilean naval officer "a bunch of grass while he put a handful of soil in his pocket, underlining his understanding of giving to Chile only the right to use the land."⁵⁹ The ceremony also suggested the Rapa Nui would remain sovereign, as the Rapa Nui flag was hoisted above the Chilean flag.⁶⁰ However, any sovereignty the Rapa Nui retained following annexation was purely symbolic.

50. FISHER, *supra* note 16, at 86–91.

51. *Id.* at 90–91.

52. *Id.* at 86–91.

53. Barfelz, *supra* note 29, at 152.

54. Lorenz Gonschor, *Facing Land Challenges in Rapa Nui (Easter Island)*, 34 PAC. STUD. 175, 176 (2011).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 176–77.

59. *Id.* at 177.

60. *Id.*

In 1895, a Chilean company—with the permission of the Chilean government—claimed the island as a sheep ranch, and, for the next sixty years, the entire island was run as a “company state.”⁶¹ During this time, the remaining native Rapa Nui people were forcibly enclosed to the capital village of Hanga Roa.⁶² The Rapa Nui were stripped of their civil and political rights, were confined by a wall around Hanga Roa, and were forced to live in conditions comparable to slavery and concentration camps.⁶³ The Chilean Navy took control of the island in 1953, and involuntary imprisonment continued until the 1960s, when a massive revolt by the confined Rapa Nui forced the Chilean government to abandon its military rule.⁶⁴ In 1966, the Chilean government enacted legislation entitled *Ley Pascua* (Easter Island Law), granting Chilean citizenship to the Rapa Nui and incorporating the island into its closest mainland region.⁶⁵ The legislation also created a local municipal government on the island, as well as a Chilean-appointed judiciary and executive branch.⁶⁶ The law preserved certain protections for the native Rapa Nui including “exemption from taxes [and] the prohibition of land alienation to non-Rapanui.”⁶⁷ The enclosure around Hanga Roa was torn down, and the Rapa Nui finally regained their freedom.⁶⁸

C. Current Status of the Rapa Nui

Although *Ley Pascua*'s passage addressed the most abysmal physical, legal, and cultural grievances suffered by the Rapa Nui people, it did not come close to restoring the autonomy they once enjoyed. Rapa Nui efforts to resist heavy-handed Chilean rule, however, have yielded many political and social victories for the native islanders. Concerted organization and lobbying by the Rapa Nui Council of Elders in the 1980s and 1990s resulted in the Chilean Congress enacting *Ley Indigena* (Indigenous Law) in 1993.⁶⁹ This law officially recognized the Rapa Nui as an indigenous group and provided more land alienation protections, as well as creating a special commission comprised of Chilean and Rapa Nui members to

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 178.

promote cultural and economic development of the indigenous population and redistribute the land on the island back to its indigenous inhabitants.⁷⁰ However, after the first stage of the land repatriation in 2011, only thirteen percent of the island was under Rapa Nui control.⁷¹ According to one of the most recent census surveys conducted in Chile in 2002, the population of the island was 5761, with sixty percent of that number (3457)⁷² identified as indigenous Rapa Nui.⁷³

Despite centuries of oppressive rule and harsh treatment, the Rapa Nui people continue to make strides in establishing their autonomy. In 2007, an amendment to the Chilean constitution designated the island as a special territory outside mainland administration,⁷⁴ but the Rapa Nui people continue to push for Chile to do more to recognize their self-determination in line with modern international law.⁷⁵ These efforts erupted in 2010, as indigenous rights activists peacefully occupying publicly and privately owned buildings in the Capital of Hanga Roa seeking to reclaim the ancestral title to their land were met by violent retaliation by the Chilean Special Police Forces.⁷⁶ Tensions between the Hito Rangī, a Rapa Nui clan living on the island, and Chile over land rights culminated in a 2012 Chilean Supreme Court decision.⁷⁷

In a civil action against the purported owner of Hotel Hanga Roa, Rapa Nui native Eliana Hito Hito sought intervention of the Chilean judiciary to restore the property interest in the hotel to the Hito family. The Hitos claimed they were heirs to the territory under the inheritance title of the

70. *Id.*

71. IWGIA, REPORT 15, THE HUMAN RIGHTS OF THE RAPA NUI PEOPLE ON EASTER ISLAND: REPORT OF THE INTERNATIONAL OBSERVERS' MISSION TO RAPA NUI 2011, at 5 (Observatorio Ciudadano ed., 2012), https://www.iwgia.org/images/publications/0597_Informe_RAPA_NUI_IGIA-Observatorio_English_FINAL.pdf [hereinafter IWGIA REPORT 15].

72. This number is significant because it shows there are now more indigenous Rapa Nui living on the island than at any time since the early part of the eighteenth century.

73. *Indigenous World 2019: Rapa Nui (Easter Islands)*, IWGIA (Apr. 24, 2019), <https://www.iwgia.org/en/chile/3407-iw2019-rapa-nui>.

74. Gonschor, *supra* note 54, at 178.

75. IWGIA REPORT 15, *supra* note 71, at 11.

76. Chloë Baartmans, Rapa Nui: The Struggle for Indigenous Land Rights on Easter Island 16 (2013) (unpublished M.A. thesis, Tilburg Law School), <http://arno.uvt.nl/show.cgi?fid=131148>.

77. Corte Suprema de Justicia [C.S.J.] [Supreme Court], 25 mayo 2012, "Hito, Eliana Hito c. Sociedad Hotelera Interamericana," Rol de la causa: 9431-2011 s. (Chile), *cited in* Baartmans, *supra* note 76, at 57.

domestic *Codigo Civil* (Civil Code).⁷⁸ The defendant, Sociedad Hotelera Interamericana (“SHI”), countered the Hitos’ claim to the land was never properly registered under *Ley Indigena* and was granted dismissal of the case at the trial and appellate levels.⁷⁹ The Supreme Court unanimously affirmed these decisions on May 25, 2012, reasoning that the land in dispute was subject to the original annexation agreement between Chile and Rapa Nui from 1888, the subsequent transfers of the land were legitimate under Chilean law, and the land was never properly registered as indigenous land so as to be subject to *Ley Indigena*.⁸⁰

While this decision does not directly relate to the concerns of cultural property rights of the Rapa Nui at issue in this Comment, it nevertheless demonstrates the various obstacles the Rapa Nui face in relation to their sovereignty and self-determination on a purely domestic level. And while Rapa Nui’s rights with respect to international law will be explored more deeply in Part III, it is still important to note how intricately related the Rapa Nui struggle for political autonomy is with their cultural autonomy, as the island has been deprived of both for over 150 years.

D. Lost or Stolen Friend

The mysterious, rich, and complicated history of the island of Rapa Nui and its indigenous population is most easily encapsulated in the moai statues. Portrayals in art and movies of the stout carvings with prominent foreheads and protruding facial features have put the island on the map, figuratively speaking, and perhaps even literally, as the allure of the large stone carvings were enticing enough to Western explorers to warrant an expedition to claim one for themselves.⁸¹

Between the arrival of the first Dutch ship in 1722 and the British HMS *Topaze* in 1868, all of the moai on the island were either toppled or buried.⁸² While historians and anthropologists debate whether the toppling or burial of the moai was purposeful, accounts of the rapid decline in moai construction and maintenance in congruence with European arrival suggest the once all-consuming element of Rapa Nui life had lost its value.⁸³ As the

78. Baartmans, *supra* note 76, at 18.

79. *Id.* at 19.

80. *Id.* at 19–20.

81. *See supra* Section II.B.

82. *See* J. Linton Palmer, *A Visit to Easter Island, or Rapa Nui, in 1868*, 40 J. ROYAL GEOGRAPHICAL SOC’Y LONDON 167 (1870), <https://www.jstor.org/stable/pdf/1798641.pdf>.

83. TERRY HUNT & CARL LIPO, *THE STATUES THAT WALKED: UNRAVELING THE MYSTERY OF EASTER ISLAND* 153 (2011).

native Rapa Nui population dipped into astonishingly low numbers in the mid-nineteenth century, Western ships continued to frequent the island. In early November 1868, the HMS *Topaze* led by Commodore Richard Powell arrived on the coast of Rapa Nui. The first of many uncompensated takings of the moai occurred with Powell's arrival.⁸⁴

Powell and his men disembarked from the *Topaze* and encountered a statue buried up to its shoulders. The statue was over seven feet tall, but it sat interred next to much larger statues.⁸⁵ As a result, Powell and fifty of his men excavated the moai with tools from the ship, dragged it across the island, floated it to the ship, and sailed away.⁸⁶ While some accounts suggest the Rapa Nui bartered with Powell for Hoa Hakananai'a and even assisted in its excavation and transportation to the ship, archaeologist Jo Anne Van Tilburg⁸⁷ pointed out this "barter" would have taken place "within a context where the Rapa Nui people were suffering a great deal of deprivation."⁸⁸

This particular moai is called Hoa Hakananai'a, ("Lost or Stolen Friend"), and it has resided in England since Powell gifted the statue to Queen Victoria. She then donated it to the British Museum in 1869.⁸⁹ Since then, over seventy complete moai heads, torsos, *pukao*, and figurines have been removed from the island, twenty of which are full-scale moai.⁹⁰ The significance of Hoa Hakananai'a to the Rapa Nui, however, goes beyond the mere questionable context in which the impressive statue was taken. The statue's geologic makeup is distinct among the other nearly 900 moai as it is one of only twenty carved out of basalt.⁹¹ Hoa Hakananai'a is also distinctive because of the carvings on its back, which many archaeologists believe represent a shift in the spirituality and culture of the Rapa Nui

84. Mike Pitts, *The Easter Island Statues Now Scattered Around the World*, Apollo Int'l Art Mag. (Aug. 29, 2018), <https://www.apollo-magazine.com/the-easter-island-statues-now-scattered-around-the-world/>.

85. *Id.*

86. *Id.*

87. Van Tilburg is the director of the Easter Island Statue Project, the longest running research project devoted to the moai.

88. Alex Marshall, *British Museum Kept a Statue for 150 Years. Now, Easter Island Wants It Back*, N.Y. TIMES (Aug. 16, 2018), <https://www.nytimes.com/2018/08/16/arts/design/easter-island-british-museum.html>.

89. *Id.*

90. *Rapa Nui Claims British Museum's Moai Sculpture*, CULTURAL PROP. NEWS (Sept. 19, 2018), <https://culturalpropertynews.org/rapa-nui-claims-british-museum-moai-sculpture/>.

91. Jo Anne Van Tilburg, *Hoa Hakananai'a Laser Scan Project*, EASTER ISLAND STATUE PROJECT (Sept. 2007), <http://www.eisp.org/10/>.

around the seventeenth century.⁹² Because of its unique archaeological value, coupled with the spiritual symbolism associated with all moai, this particular statue represents a “tangible link” to the island’s history.⁹³

With the support of the Chilean government, Camilo Rapu, president of Ma’u Henua (the Rapa Nui indigenous community on the island), launched a campaign in August 2018 to secure the return of Hoa Hakananai’a from the British Museum.⁹⁴ While negotiations about the fate of the statue have not produced any definite results, the dichotomy of the nationalist versus internationalist perspectives regarding repatriation has emerged.⁹⁵ Though neither Rapa Nui or Chile have hinted toward litigating the issue, the complicated cultural, historical, and political plight of the Rapa Nui people attempting to regain what is rightfully theirs is further muddled by the underdeveloped and uncertain international law regarding repatriation of cultural property to indigenous peoples.

III. Legal Issues Associated with Repatriation

A. Procedural Hurdles

In most incidences, when a dispute arises and nonlegal methods of resolution fail, an aggrieved party will turn to the power of the law to resolve the problem. The seemingly simple turn to litigation can become incredibly complicated, however, when parties are from different nations with different laws. Increasing globalization has spurred a developing body of international law to address many of these procedural issues associated with international litigation, particularly as they relate to jurisdiction and

92. University of Southampton, *Archaeologists Shine New Light on Easter Island Statue*, SCIENCE DAILY (Apr. 11, 2013), <https://www.sciencedaily.com/releases/2013/04/130411075615.htm>.

93. *Foreign Minister Ampuero Will Convene an Interministerial Group for Moai at the London Museum*, MINISTERIO DE RELACIONES EXTERIORES [CHILEAN MINISTRY FOREIGN AFF.] (Aug. 14, 2018), <https://minrel.gob.cl/foreign-minister-ampuero-will-convene-an-interministerial-group-for-moai/minrel/2018-08-14/154845.html>.

94. *Easter Island Wants Iconic Statue Back, Offers UK a Copy*, BANGKOK POST (Oct. 22, 2018), <https://www.bangkokpost.com/world/1562418/easter-island-wants-iconic-statue-back-offers-uk-a-copy>.

95. Frances Jenner, *Chilean Authorities Attempt to Recover National Artefacts from British Museums*, CHILE HERALD (Nov. 6, 2018), <https://chileherald.com/chile-recover-arteifacts-britain/1543/>; Aislinn Laing & Natalia A. Ramos Miranda, *Easter Island Delegation Heads to British Museum to Lobby for Statue Return*, REUTERS (Nov. 16, 2018, 05:18 AM), <https://www.reuters.com/article/us-chile-heritage-statue/easter-island-delegation-heads-to-british-museum-to-lobby-for-statue-return-idUSKCN1NL1AF>.

choice of laws. If the Rapa Nui people are left with no choice but litigation, these are some of the principles that will dictate the litigation.

1. State Immunity

One of the first places to start when discussing international law is the principle of state immunity. Plainly stated, state immunity is “a legally binding organizational principle developed to prevent foreign courts from interfering with the exclusive state authority as recognized by international law.”⁹⁶ While states can always waive this immunity, it is important to note that state immunity is no longer the absolute shield it used to be, as more and more courts are adopting a more relative theory of immunity.⁹⁷ Under this relative theory, “a state is immune from the jurisdiction of foreign domestic courts in respect of claims arising out of governmental activities (*jure imperii*); it is not immune, however, from the exercise of such jurisdiction in respect of claims arising out of activities of a kind carried on by private persons (*jure gestionis*).”⁹⁸ There are also different rules governing immunity from jurisdiction and execution, as “immunity from suit aims to shield states from being sued by impeding the initiation of legal proceedings in the forum state, whereas immunity from execution is meant to protect state property from pre- or post-measures of constraint.”⁹⁹

These customary principles have been codified in the United Nations Convention of State Immunity (“UNCSI”).¹⁰⁰ The treaty addresses both immunity from jurisdiction and immunity from execution. According to the treaty, the general rule is “that a state has immunity, for itself and its property, from the jurisdiction of other states’ courts” and a state has immunity from execution in that “neither pre-judgment (article 18) nor post-judgment (article 19) measures of constraint can be taken against state property,” and these provisions are subject to very narrow exceptions.¹⁰¹

The UNCSI provides relevant guidance in the event the Rapa Nui people proceed with litigation against the British Museum. As Chile and Great Britain are both UN members, any ensuing litigation would be subject to the state immunity rules codified by the UNCSI. This would likely mean that Great Britain could invoke state immunity on jurisdictional and

96. Alessandro Chechi, *State Immunity, Property Rights, and Cultural Objects on Loan*, 22 INT’L J. CULTURAL PROP. 279, 284 (2015).

97. *Id.*

98. *Id.* at 284–85.

99. *Id.* at 285.

100. *See generally Id.*

101. *Id.* at 285.

execution grounds, essentially eliminating any judicial recourse for repatriation. However, with the growing popularity of cultural property claims and public opinion weighing in favor of indigenous groups' rights, Great Britain would ideally waive its jurisdictional and execution state immunity and submit to litigating these claims in court.

2. *Venue and Choice of Law*

The next procedural steps in international litigation are venue and choice of law. Typically, the source country of the cultural property will commence the litigation in the legal system where the property currently resides.¹⁰² Choice of law, already a complicated issue in international litigation, is further muddled in the context of property like art or antiquities because “most jurisdictions’ choice of law rules . . . relating to the validity of a transfer” of such property “are governed by the law of the jurisdiction where the property was located at the time of the transfer.”¹⁰³

In the context of pre-colonial—or even colonial-era—wrongful takings, choice of law becomes even more complicated. During the colonial period, when cultural property such as the moai was plundered, most, if not all, of the victimized indigenous groups would not have had formalized legal systems. In these instances, if an indigenous group had not yet been colonized and their property was wrongfully taken by colonial explorers in the name of other flags, the choice of law would default to the jurisdiction where the artifacts resided.¹⁰⁴ If colonizing countries had staked claims and enforced colonial rule over an indigenous group, the colonizing country would likely not have deemed the taking of property from indigenous groups illegal, which leaves the indigenous groups now seeking to bring a claim at a seemingly devastating disadvantage.

In the case of the taking of Hoa Hakananai’a in 1868, the Rapa Nui were still a sovereign group, but the island was annexed by Chile twenty years later.¹⁰⁵ Because this taking occurred prior to Rapa Nui’s formal codification of a legal system, and prior to Chilean annexation and exertion of its own legal system over the land and its people, the Rapa Nui would appear to have no choice but to submit to British law. While one would expect a fair and just resolution no matter the venue or choice of law in an

102. JAMES A. R. NAFZIGER ET AL., *CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS* 536 (2010).

103. 77 AM. JUR. PROOF OF FACTS 3D 259 *Proof of a Claim Involving Stolen Art or Antiquities* § 11 (2004).

104. See NAFZIGER ET AL., *supra* note 102.

105. Gonschor, *supra* note 54, at 177.

international dispute, the procedural hurdles indigenous groups face in simply initiating a lawsuit in the current era seem to mirror the unequal balance of power that resulted in the wrongful taking of their cultural property in the colonial era.

B. Substantive Law at Issue

At the heart of repatriation actions is the claiming of people's property interests in the disputed item. But it is important to point out that cultural property has an inherent legal status that dictates certain protections.¹⁰⁶ Great Britain has legislated several protections and recourses for cultural objects, which it defines as "an object of historical, architectural or archaeological interest."¹⁰⁷ It is clear that the Rapa Nui's ultimate goal is the return of the statue to its rightful home, its place of creation. It is unclear, however, what cause of action the Rapa Nui should pursue to achieve this goal.

1. Property Law

Litigation concerning movable property has its own complexities, and these complexities are more nuanced in the area of cultural property. Formal classification of chattels is crucial in determining what causes of action are available to claiming parties. One such classification method for movable property depends on whether the property is *res in commercio* (a thing inside commerce) or *res extra commercium* (a thing outside commerce).¹⁰⁸

The classification of *res in commercio* or *res extra commercium* originates from the fifth century work *Corpus Juris Civilis*, ordered by Justinian I.¹⁰⁹ This original work referenced objects subject to "human law" and objects subject to "divine law".¹¹⁰ If the object in question were *res in commercio*, it would then be subject to the laws of man, private causes of action.¹¹¹ Objects subject to divine law were seen as objects that "buil[t] the relationship between god and man" and were considered *res extra*

106. Ho-Young Song, *International Legal Instruments and New Judicial Principles for Restitution of Illegally Exported Cultural Properties*, 4 PENN. ST. J.L. & INT'L AFF. 718, 727 (2016).

107. Dealing in Cultural Objects (Offences) Act 2003, c. 27 (U.K.), <http://www.legislation.gov.uk/ukpga/2003/27/data.pdf>.

108. Song, *supra* note 106.

109. *Id.*

110. *Id.* at 727–28.

111. *Id.* at 727.

commercium, and therefore, unalienable.¹¹² The *Corpus Juris Civilis* established that both divine and public works of art were subject to divine law, and certain art belonged to the state, warranting the classification of *res extra commercium*.¹¹³ However, privately held artwork could still be considered *res in commercio* and therefore subject to private rights of action.¹¹⁴

The survival of these classifications in the context of cultural property law has its advantages and disadvantages. Since most nations acknowledge cultural property is property *res extra commercium*, claiming parties must then navigate how to judicially proceed with their repatriation claims subject to specific cultural property laws, an area that is currently underdeveloped.¹¹⁵ While the general classification of cultural property as *res extra commercium* elevates its status and protects against future alienation, claiming parties are limited to special causes of action for repatriation due to this status. If the object in question was *res in commercio*, a claiming party might seek redress for conversion or replevin. Although the traditional elements of replevin or conversion would be difficult to prove in this case, the legal theories behind these causes of action are the motivation behind cultural property disputes: indigenous peoples had clear title to their property, that property was wrongfully taken, the indigenous peoples want their property back. The lack of precedent in this area and no clear path to victory further disadvantages indigenous peoples who simply wish to exercise their rights as property owners.

2. Intellectual Property Law

A budding subset of cultural property law is the intellectual property (“IP”) implications for the creators of the items. In a world of mass production, souvenirs, and museum gift shops, the development of IP claims related to cultural property can provide an additional avenue of redress for indigenous peoples, but few still are able to recover within the Western development of the IP framework.

Monetization of cultural property can occur in a variety of ways beyond simply the value assigned to goods themselves. As replicas and recreations of indigenous artwork are increasingly displayed for sale in museum gift shops, souvenir shops, and online stores, questions of copyright entitlement rightfully arise. However, this potential avenue for redress is again limited

112. *Id.* at 728.

113. *Id.*

114. *See id.*

115. *See infra* Part IV.

for indigenous groups for a variety of reasons, all of which are intricately related and ultimately yield futile results for groups like the Rapa Nui.

First, copyright law in most jurisdictions dictates protection on new works only, and most indigenous artwork evolves incrementally over generations.¹¹⁶ This is particularly applicable in the case of the Rapa Nui, where construction of the moai spanned centuries, and specific authorship of the statues, including Hoa Hakananai'a, is unknown. Second, most countries' copyright protections are limited to the life of the author plus fifty years.¹¹⁷ Again, this limitation does little to protect indigenous groups victimized in the colonial era. Third, copyright law generally only recognizes joint authorship when it is the clear intention of the authors to do so.¹¹⁸ This notion is typically antithetical to the collective culture of creation employed by many indigenous groups,¹¹⁹ especially the pre-colonial Rapa Nui.

All of this is not to say that copyright law cannot or should not be utilized by indigenous groups who qualify for its protection. While the protection of copyright laws is vital in today's industrialized economy, the gaps in this protection for indigenous groups, while not intentional, can nevertheless result in inequitable outcomes. Unfortunately, the limited remedies copyright law can provide to even contemporary indigenous groups is yet another area of the law that reinforces Western power on the world stage at the expense of indigenous groups.

3. Defenses

A favorable outcome for the Rapa Nui litigating against the British Museum in Great Britain applying British law appears unlikely. Statutes of limitations and laches defenses would almost certainly quash any civil action, as the taking of the statue occurred over 150 years ago and evidence suggests it was likely not a hostile theft, but maybe even a compensated trade.¹²⁰ Even if the court granted an injunction or some form of specific performance to return the statue to the island, compensatory damages would be extremely difficult, if not impossible, to compute in the context of the harm suffered by the wrongful retention of cultural property. The procedural and substantive issues associated with cultural property disputes highlight how ill-equipped traditional methods of adjudication are to

116. NAFZIGER ET AL., *supra* note 102, at 631.

117. *Id.*

118. *Id.*

119. *Id.*

120. *See* Marshall, *supra* note 88.

resolve disputes in favor of indigenous peoples. While the reasonableness and fairness of the law ideally wins the day, traditional law in this area appears to merely reinforce the notion that the powerful who took from the powerless in the past are untouchable in the present.

IV. Comparable Law

The growing concern worldwide for indigenous people's rights—and in particular, their rights to their cultural property—has resulted in international and national protections. Although these positive strides do not necessarily fix the problems the Rapa Nui face in their fight for repatriation, the protections afforded by the international and national efforts offer hopeful examples of a workable legal framework for the repatriation of cultural property to indigenous peoples. Furthermore, the trend toward policies that embrace the nationalist perspective will hopefully make it easier for other indigenous groups to prevail in acquiring their cultural property.

A. International Regulations

International regulation of cultural property is widely viewed under the umbrella of human rights law rather than property, criminal, or tort law. While this classification is mostly positive, it is not without disadvantages. Some of the drawbacks of operating under this framework are retroactivity and enforcement, the treaty or convention membership of the parties, the sovereignty of indigenous groups to bring claims themselves, and the underdeveloped structures for resolving these disputes since little precedent exists.¹²¹ Despite these issues, as most cultural property disputes involve international parties, it is worth exploring the evolution of international law in this area.

International concern for the plight of plundered cultural property emerged in the early twentieth century following World War I and World War II.¹²² The first international agreement to address the issue of protecting cultural heritage was the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which, as its name suggests, established protocols for the return of or redress for cultural property taken or damaged during wartime.¹²³ While an important

121. Farida Shaheed, U.N. Hum. Rights Council, *Report of the Independent Expert in the Field of Cultural Rights*, ¶¶ 12–17, U.N. Doc. A/HRC/17/39 (Mar. 21, 2011).

122. Song, *supra* note 106, at 729.

123. *Id.*

step for the protection of cultural property, the narrow situational aspect of the 1954 Hague Convention did not offer broad enough protections. The international community began to consider the need to “establish a more comprehensive international instrument” to provide broader protections.¹²⁴

The most prominent international legal convention relating to cultural property disputes is the United Nations Educational, Scientific and Cultural Organization’s (“UNESCO”) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“UNESCO Convention”). The UNESCO Convention was created in 1970 and has been adopted by 140 nations (including Chile and the United Kingdom)¹²⁵ The Convention serves to protect cultural property from illicit activity through “administrative enforcement and international cooperation, rather than by private law.”¹²⁶ The UNESCO Convention’s major contents are succinctly summarized as follows:

- (a) the Convention acknowledges that the import, export, or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention is illicit; (b) member states undertake to set up national services and establish a list of important public and private cultural properties to be protected; (c) they undertake to introduce an appropriate certificate for the export of cultural property; (d) they agree to take the necessary measures against the acquisition or import of illegally removed cultural property; (e) they undertake to impose penalties or administrative sanctions on any person involved in the illicit import or export of cultural property; (f) they undertake to participate in a concerted international effort to determine and carry out the necessary concrete measures under the Convention, and (g) the Convention regards the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power as illicit.¹²⁷

124. *Id.* at 730.

125. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. Paris, 14 November 1970, UNESCO: LEGAL INSTRUMENTS, <http://www.unesco.org/eri/la/convention.asp?order=alpha&language=E&KO=13039> (last visited June 26, 2020) [hereinafter *UNESCO Convention*].

126. Song, *supra* note 106, at 731.

127. *Id.* at 731–32.

While the UNESCO Convention primarily focuses on the prevention of illicit activity surrounding cultural property, it also encourages party states to “admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners.”¹²⁸ Since the UNESCO Convention itself does not establish a cause of action for repatriation, and in the absence of an enforcement mechanism attached to the UNESCO Convention, the party states are limited to whatever judicial recourse is available to them by their own laws.

Although the UNESCO Convention reflects the struggle between cultural nationalism and internationalism, it appears to generally embrace the cultural nationalist perspective.¹²⁹ This is supported by the UNESCO Convention’s preamble:

[C]ultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding is [sic] origin, history and traditional setting, [and] that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export¹³⁰

This nationalist attitude, though not explicit, makes sense in the context of protecting cultural property. Read one way, source nations have a duty to protect their cultural property from illicit activity, but an alternate reading could just as easily “justify national retention of cultural property.”¹³¹ If national retention of cultural property is a hallmark of the UNESCO Convention, then restoring ownership to the source country after such illicit activity is necessary. Unfortunately, the UNESCO Convention provides little more than suggestive measures of cooperation between party nations should a dispute arise.

Some of the main issues with the UNESCO Convention deal with uniformity and enforcement. Since the UNESCO Convention was not self-executing, signing states had to pass their own legislation to implement it, and the ways in which states chose to do so was not necessarily consistent

128. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 13(c), Nov. 14, 1970, 96 Stat. 2350, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

129. Merryman, *supra* note 4, at 833.

130. UNESCO Convention, *supra* note 128.

131. Merryman, *supra* note 4, at 844.

across all signing states.¹³² In the grand scheme of things, the UNESCO Convention acts more as an idealistic prophylactic than a realistic cure when it comes to the issue of repatriation. That is not to say its influence on the trend toward repatriation efforts is insignificant, however. Given the complicated nature of international law, coupled with the legal infancy of repatriation disputes, the UNESCO Convention offers a starting point for future international agreements regarding repatriation.

The number of party states reflects a concerted worldwide effort toward the protection of cultural property, but there remains more to be done to put these principles into practice. However, in the context of the Rapa Nui, and other similarly situated indigenous groups now seeking legal recourse for repatriation of wrongfully taken cultural property, it is important to bear in mind that while the UNESCO Convention may bolster repatriation efforts and claims in the court of public opinion, it has very little legal effect.

Issues with the UNESCO Convention prompted UNESCO to request the International Institute for the Unification of Private Law (UNIDROIT) to add to private law regulations by fully implementing the UNESCO Convention.¹³³ In 1995, UNIDROIT adopted the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (“UNIDROIT Convention”) “to embody the regulations of the UNESCO Convention, and to establish uniform rules among states that would facilitate the effective restitution of unlawfully possessed cultural properties in terms of private law.”¹³⁴ While the UNESCO Convention aimed to prohibit and prevent illicit activity surrounding cultural property, the UNIDROIT Convention focuses on the restitution or return of wrongfully obtained cultural property.

The UNIDROIT Convention’s twenty-four articles essentially outline the procedures for signatory states to follow in order to recover stolen or illegally exported cultural property. In addition to establishing the cause of action, the UNIDROIT Convention also addresses issues such as time limitations to bring the action and compensation for good faith transferees.¹³⁵ Furthermore, the UNIDROIT Convention addresses cultural objects of tribal or indigenous communities and the importance of these items’ return.¹³⁶

132. Song, *supra* note 106, at 732.

133. *Id.* at 733.

134. *Id.*

135. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, art. 3, June 24, 1995, 34 I.L.M. 1322.

136. *Id.* art. 7.

The UNIDROIT Convention's strong conviction in mandating the return of illegally obtained cultural property is a victory for the cultural nationalists in favor of repatriation. However, only forty-eight countries have adopted the UNIDROIT Convention¹³⁷ (compared to 140 for the UNESCO Convention).¹³⁸ Many countries, worried about the UNIDROIT Convention's effects on the art market, are reticent to adopt it. Other practical implications render the UNIDROIT Convention moot in terms of the repatriation of cultural property wrongfully acquired during the colonial period, not the least of which is Article 10's provision that the remedies only exist for property wrongfully acquired after the signatory state adopts the convention.¹³⁹ Although its teeth are not quite as sharp when it comes to repatriation efforts of indigenous peoples like the Rapa Nui, the UNIDROIT Convention is nonetheless a noble step on behalf of the international community to combat the issue of wrongfully obtained property for indigenous groups going forward.

Another notable international effort regarding repatriation of cultural property to indigenous groups is the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). Though UNDRIP does not provide binding legal remedies for repatriation, it is a persuasive authority advocating for the cultural nationalist approach on behalf of indigenous peoples.

Article 11 of UNDRIP recognizes indigenous peoples' rights with regard to their cultural property, enumerating "[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."¹⁴⁰ With these tenets formally recognized by the UN, the argument for the cultural internationalist viewpoint becomes even more ludicrous.

Because the international community is becoming increasingly aware of the cultural property infractions suffered by indigenous communities, the progression of international law favoring repatriation seems imminent. While there are currently gaping holes in the international law framework

137. *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, UNIDROIT, <https://www.unidroit.org/status-cp> (last modified Dec. 2, 2019).

138. *UNESCO Convention*, *supra* note 125.

139. *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, art. 10.

140. G.A. Res. 61/295, *United Nations Declaration on the Rights of Indigenous Peoples*, art. 11 (Sept. 13, 2007).

for the Rapa Nui to successfully navigate a repatriation action, the pieces in place insinuate a drift toward cultural nationalist ideology on the global stage.

B. Effective National Models

As many international agreements rely on the domestic laws of their adopters, it is worth exploring how certain countries address issues of cultural property, especially as they relate to indigenous populations. Furthermore, analyzing a country's laws regarding repatriation to indigenous groups, although not on an international scale, can still be useful in determining how to implement effective legal remedies for repatriation on a global level. While many countries have developed laws in response to these issues, this section will be limited to the discussion of the United States' body of laws and cases regarding repatriation to indigenous peoples, France's recent report on the ethical need to return cultural property taken and retained in the spirit of colonialism, and Canada's efforts to return sacred ceremonial objects to its First Nations.

1. The United States

The United States enacted the Native American Graves Protection and Repatriation Act¹⁴¹ ("NAGPRA") on November 16, 1990, "to provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony."¹⁴² The two main objectives of NAGPRA are "first, to control the removal of Native American remains and cultural items from federal or tribal lands . . . and second, to address the disposition of Native remains and cultural objects currently held or controlled by federal agencies and museums."¹⁴³

The legislation defines cultural patrimony as "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, . . . which, therefore, cannot be alienated, appropriated, or conveyed by any individual."¹⁴⁴ The law's first section provides definitions, and the subsequent sections provide mandates for: ownership; inventory for human remains and associated funerary objects; summary for unassociated funerary objects, sacred objects, and cultural

141. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2018).

142. S. REP. NO. 101-473, at 1 (1990).

143. Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND RESOURCES & ENVTL. L. 259, 267 (2005).

144. 25 U.S.C. § 3001(3)(d).

patrimony; repatriation; review committee; penalty; grants; savings provision; the special relationship between Federal Government and Indian tribes and Native Hawaiian organizations; regulation; authorization of appropriations; and enforcement.¹⁴⁵ Its main components concern the mandatory inventory for human remains and associated funerary objects, where every federal agency and museum is charged with compiling an inventory of all Native American remains and funerary items and notifying the affiliated tribes of said inventory, as well as the mandatory repatriation of said remains and funerary items should the affiliated tribe request them.¹⁴⁶

NAGPRA's passage would suggest the United States' policy toward repatriation is that of a nationalist perspective. The legislative intent and language of the law seem to invoke the notion that Native American remains and associated cultural patrimony belong to the indigenous groups from whence they came, and thus, should be returned. And there have been positive results in light of this policy. Since the implementation of NAGPRA nearly thirty years ago, the U.S. Department of the Interior has cataloged 48,238 NAGPRA inventories.¹⁴⁷ However, lurking in § 3005 (Repatriation) is a provision that cultural items should be returned to the lineal descendant or indigenous group who requests a return "unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States."¹⁴⁸ While this language would suggest a limited time period the cultural property could be maintained by the institution, it nonetheless creates a statutory declaration that there might be cases when scientific interests outweigh those of indigenous groups.

Much of the NAGPRA litigation since its enactment has addressed procedural issues similar to those faced by indigenous peoples attempting repatriation in the international arena.¹⁴⁹ The most famous NAGPRA case to date, often referred to as The Kennewick Man Case, centered around the determination of establishing tribal affiliation for prehistoric remains.¹⁵⁰ The controversy started after an inadvertent discovery of ancient human remains on federally owned land, wherein the U.S. Army Corps of

145. *Id.* § 3001.

146. *Id.* § 3005.

147. *National NAGPRA Online Databases*, NAT'L PARK SERV., <https://grantsdev.cr.nps.gov/Nagpra/Summaries/default.cfm> (last visited Nov. 3, 2019).

148. 25 U.S.C. § 3005(b).

149. Yasaitis, *supra* note 143, at 269.

150. *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004).

Engineers took possession.¹⁵¹ Initial studies revealed the remains were between 8340 and 9200 years old and did not bear an identifiable resemblance to modern Native Americans.¹⁵² A coalition of local tribes requested the remains for reburial, and the Corps ceased its study and published the notice of repatriation, but the scientists evaluating the remains opposed the repatriation and requested further study.¹⁵³ After the scientists' request was denied, they sued and received a remand to the Corps for more evidentiary hearings.¹⁵⁴ The Corps allowed the Secretary of the Interior to make the NAGPRA determinations, who then decided the remains were both Native American and culturally affiliated with the local tribal coalition, warranting repatriation.¹⁵⁵ The district court found that the Secretary had acted arbitrarily and capriciously in violation of the Administrative Procedure Act, and the Ninth Circuit affirmed.¹⁵⁶

The Ninth Circuit held there was a lack of substantial evidence to suggest the remains were "Native American" within the congressional definition of the term.¹⁵⁷ The court also held the "remains are *so old*" that a cultural connection cannot be established between the Kennewick Man and current tribes within the definition of "Native American" under NAGPRA.¹⁵⁸ This dangerous reasoning further limits repatriation efforts of indigenous peoples in a variety of ways. First, it gives judges the final say in determining whether an indigenous group can request repatriation for remains and cultural items that are "too old" and thus not clearly affiliated with a particular indigenous group. Second, it demonstrates the way in which scientific interests can defeat an indigenous people's claim in the context of legislative interpretation. And third, it highlights how legislative, administrative, and judicial complexities can limit repatriation.

While the current Rapa Nui don't have the same burden in establishing their ancestral link to the moai as the local tribes did in the Kennewick Man case, the decision nonetheless serves as a caution for the limits of judicial recourse in repatriation cases, even in jurisdictions with clear and binding methods of repatriation. The issues that Native Americans face in attempting to exert their rightful ownership of cultural property are often

151. *Id.* at 869.

152. *Id.* at 869–70.

153. *Id.* at 870–71.

154. *Id.* at 871.

155. *Id.* at 871–72.

156. *Id.* at 872, 882.

157. *Id.* at 876–79.

158. *Id.* at 882.

met with the same internationalist pushback that indigenous groups around the world encounter. Countervailing scientific, artistic, historical, or anthropological interests often run against cultural property repatriation claims, and in a legislative scheme, it is vital to defer to the indigenous groups rather than the argued internationalist interests. Although NAGPRA has some procedural restraints that can result in less-than-optimal outcomes for the claiming indigenous groups, these groups at least have an established set of laws to govern their proceedings.

2. France

Though not an established framework for repatriation proceedings, *The Restitution of African Cultural Heritage. Toward a New Relational Ethics* (“the Report”) offers a harrowing and necessary critique of the human history of cultural property plundering and the ethical case for repatriation.¹⁵⁹ Commissioned by French President Emmanuel Macron, economist Felwine Sarr and art historian Benedicte Savoy (“Sarr and Savoy” or “the authors”) compiled the Report on how the French can start to atone for their imperialistic history by returning cultural heritage back to Africa.¹⁶⁰

Sarr and Savoy begin their lengthy report by echoing the promotion of a nationalist approach to cultural heritage and property and flatly denouncing the internationalist approach. Sarr and Savoy allude to the long-lasting negative effects of confiscated cultural objects from indigenous groups that endure through generations: “[t]he Intellectual and Aesthetic appropriation[,] combined with the economic appropriation of the cultural heritage of the other, which, within the cities of the conqueror, within his houses, his circles of experts and on the art market acquire a value, another life disconnected from their origins.”¹⁶¹ They cite nineteenth-century German philosopher Carl Heinrich Heydenreich, who considered the European practice of taking cultural objects away from newly colonized peoples “‘a crime against humanity’ . . . depriving [the victim] of the spiritual nourishment that is the foundation of his humanity.”¹⁶² Considering France’s colonial history in Sub-Saharan Africa, as well as its time-honored tendency to display plundered cultural property in museums,

159. See generally FELWINE SARR & BENEDICTE SAVOY, *THE RESTITUTION OF AFRICAN CULTURAL HERITAGE. TOWARD A NEW RELATIONAL ETHICS 1* (2018), http://restitutionreport2018.com/sarr_savoy_en.pdf.

160. *Id.*

161. *Id.* at 7.

162. *Id.* at 8.

this awareness of the problematic nature of such practices and call for restitution are incredibly significant.¹⁶³

The authors continue their report by discussing the complexities involved in the restitution of cultural property back to Africa. They define restitution as an act that returns an item to its legitimate owner “for his legal use and enjoyment, as well as all the other prerogatives that the item confers To openly speak of restitutions is to speak of justice, or a re-balancing, recognition, of restoration and reparation”¹⁶⁴ Sarr and Savoy’s polemic for restitution encapsulates the notion that the return of cultural property is both a humbling act and an admission of wrongdoing by the plundering group, and the idea that restitution is a vital step toward justice for the violence suffered by victimized groups.

Sarr and Savoy point out the effect that the passing of time, population decrease, and the erasure of indigenous culture suffered by victimized groups have on the desires and efforts by descendants of such groups for restitution.¹⁶⁵ The authors discuss the generational trauma suffered by these groups, which further limits their agency in reclaiming their cultural heritage as “the part of History refused by politics is transmitted from generation to generation and fabricates psychic mechanisms that keep the subject within a position of shame for existing.”¹⁶⁶ This self-feeding cycle strengthens the bargaining power of the plundering party, while the victimized group has even more obstacles to overcome to prove its case for restitution. This is seen not only in Sarr and Savoy’s report, but also in the case of the Rapa Nui’s efforts toward self-determination.

Museums themselves are a major critique in Sarr and Savoy’s report and are viewed as perpetrators of the flawed internationalist view of cultural property. While the authors concede not all museums are blameworthy for the issues surrounding cultural property,

[t]he problem arises when the museum no longer becomes the site for the affirmation of national identity, but . . . is seen rather as a museum of the *Others*; when the museum conserves objects procured from somewhere else and assumes the right to speak about these *Others* (or in the name of the *Others*) and claims to declare the truth concerning them.¹⁶⁷

163. *Id.*

164. *Id.* at 29.

165. *Id.* at 31.

166. *Id.* at 36 (citation omitted) (internal quotations marks omitted).

167. *Id.* at 37 (footnote omitted).

The pervasive and dangerous idea of “the *Others*” is a vestigial remain from imperial or colonial eras used as an excuse for violence against indigenous groups manifested through genocide, rape, pillaging, and forced slavery. As Sarr and Savoy point out, the concept of “the *Others*” lives on in how these groups and their cultural property are portrayed in Western museums and exhibits.¹⁶⁸ “[T]he *Others*” are contrasted; their clothing, art, religion, and way of life are different than ours, and museums—as controllers of such objects—reinforce this notion.¹⁶⁹

Sarr and Savoy argue that restitution is the solution to breaking this paradigm. They assert:

Restitution, through the transfer of propriety that it allows for, breaks up this monopoly of control concerning the mobility of objects by Western museums. These cultural objects are then free to circulate in a new manner, but within a temporality, a rhythm and a meaning, placed on them by their legitimate owners. These newly freed objects could help to re-draw transnational territorial borders . . . , but also . . . help expand the circulation of these objects on a more continental and global scale.¹⁷⁰

To return these objects to their rightful owners, according to Sarr and Savoy, would empower indigenous groups to again control the narrative surrounding their own heritage in relation to the rest of the world.

The Report also mentions issues surrounding compensation and reparation, briefly discussed in Part III of this Comment.¹⁷¹ Sarr and Savoy point out that in cases of wrongfully taken cultural property, not only are the indigenous groups deprived of the physical object, but with that deprivation also denotes “reserves of energy, creative resources, reservoirs of potentials, forces engendering alternative figures and forms of the real, forces of germination,” concluding these losses are “incommensurable.”¹⁷² The authors posit that simply returning these objects to their proper homes “won’t be the proper compensation. This force arises from a relation and mode of participation in the world that has been irremediably trampled upon.”¹⁷³ The authors call for more specific performance and monetary

168. *Id.*

169. *Id.*

170. *Id.* at 38.

171. *See supra* Section III.B.

172. SARR & SAVOY, *supra* note 159, at 40.

173. *Id.*

compensation and demand the wrongful bailors of cultural property to not only relinquish their physical loot, but do so with a concerted effort to recognize and repair the harm their conversion caused.¹⁷⁴

Sarr and Savoy spend the next section of the Report outlining their proposed plan for restitution of cultural property from French museums and collections back to descendants of the original creators. The authors suggest repatriation should be effectuated in three phases. The First Phase includes:

- [1] The common establishment . . . of a practical methodology for restitutions.
- [2] The transfer (i.e. the material return) of these pieces to their countries of origin . . . seeking reclamations
- [3] In parallel with these initial actions, there should be an adoption of legislative measures and rules so as to ensure that these restitutions remain irrevocable.¹⁷⁵

The Report then lists particular regions and objects on which to focus repatriation efforts.¹⁷⁶ The Second Phase would include creating a digital inventory of the objects, sharing the inventory among the affected groups, conducting workshops to educate involved actors, and establishing joint commissions to ensure accurate execution of the repatriation process.¹⁷⁷ The Third Phase intimates the necessity for continued maintenance of the repatriation process.¹⁷⁸

If France were to follow through on these phases suggested by the authors, it would provide not only a culturally and politically sensitive example for other countries to follow when planning their own repatriation efforts, but it would also ensure continued protective legal status for cultural property going forward. However, the authors also recognize the incompatibility between traditional jurisprudence in this area and complete repatriation of cultural property explored in Part II of this Comment, acknowledging that “[t]he procedure of restitution supposes a positive evolution of law, within the framework of a modification of the cultural heritage code, articulated in the principle of inalienability of public collections.”¹⁷⁹ Sarr and Savoy understand that the international perspective maintained by museums and other public collections of cultural property

174. *Id.* at 40–41.

175. *Id.* at 63.

176. *Id.*

177. *Id.* at 67–69.

178. *Id.* at 69.

179. *Id.* at 72.

has not proven to be infallible, even within the legal framework that seems to favor such a viewpoint.

The Report alludes to two ways in which cultural property can be properly restituted to the rightful owners even within traditional jurisprudential methods. First, human remains have a special status outside of public ownership, which has been codified in French legislation,¹⁸⁰ as well as in legislation of other countries, such as the United States.¹⁸¹ This protected status for human remains could potentially be expanded to more objects associated with cultural heritage, especially those closely related to ancestral memorial, such as the moai are for the Rapa Nui. The second way to subvert traditional jurisprudence as it applies to public property is “through its status of non-belonging to the collection.”¹⁸² Similar to the UNESCO Convention and UNIDROIT, this exception does little to protect property that was wrongfully taken before classification regulations for illicitly trafficked items went into effect (such as Hoa Hakananai’a). However, the current enforceable protections the Report alludes to serve to bolster the arguments for groups now bringing claims for repatriation, particularly that cultural property does not lose its significance to its creators or its descendants simply because of its passage through space and time. Nor are colonizing parties immune from proper recourse, simply because of when in time the taking occurred, or where the object ended up.

Sarr and Savoy conclude the Report by offering their vision for the judicial apparatus to assist in the restitution process. The authors reiterate the need for definitive restitution as the primary element for cooperation, and so recommend a binding bilateral agreement to legitimize the new procedure of restitution to be overseen by the governments of all involved parties.¹⁸³ The authors also advocate for a modification to France’s Cultural Heritage Code to make it easier for the joint commission of experts to carry out restitution in favor of the claiming party.¹⁸⁴

Although the Report’s focus is between cultural property housed in France and why it should be returned and has no discernable binding effect

180. Loi 2016-925 du 7 juillet 2016 relative a la liberte de la creation, a l’architecture et au patrimoine [Law 2016-925 of July 7, 2016 Relating to the Freedom of Creation, Architecture and Heritage], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 8, 2016, p. 158.

181. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2018).

182. SARR & SAVOY, *supra* note 159, at 74.

183. *Id.* at 77.

184. *Id.* at 79.

on any future litigation, its applicability within the global issue of restitution of cultural property is undeniable. By calling such blatant attention to the reprehensible actions of past regimes in their wrongful seizure and retention of cultural property, along with admitting the lasting harm these actions have inflicted on the victimized groups, the argument for restitution of cultural property is clearly articulated by one of the world's most notorious perpetrators of such acts. If the French government can commission such a scathing self-criticism which all but mandates execution of its suggested methods, other world powers guilty of the same atrocities can and should follow suit.

3. *Canada*

Alberta, Canada passed the First Nations Sacred Ceremonial Objects Repatriation Act (FNSCOR) in 2000.¹⁸⁵ Though not as extensive as the United States' NAGPRA, Alberta's comparable legislation highlights a pivotal shift in repatriation efforts that focus on property necessary for cultural expression of contemporary indigenous groups. The repatriation efforts, led by the Blackfoot tribe, which produced FNSCOR, have not only resulted in the return of hundreds of ceremonial objects but also a renewal of ceremonial activities.¹⁸⁶ And this cultural reawakening linked to repatriation evidences precisely why indigenous groups should reclaim their cultural property.

Similar to the plight of the Rapa Nui and their moai, the artistic and ethnographic fascination with Blackfoot ceremonial objects during the colonial age led to the commodification and transfer of these sacred objects in the nineteenth century.¹⁸⁷ Though these transfers were not always illegitimate or questionable, as was the case with Hoa Hakananai'a, many of them were nonetheless indicative of the same cultural sacrifice in the face of structural violence perpetrated by colonial powers. In particular, the commodification of Blackfoot medicine bundles, coupled with high rates of tribal poverty and unemployment for the Tribe, resulted in many of these sacred objects being sold to private collections.¹⁸⁸ The impact of these dispossessions was then felt throughout the Tribe, as Blackfoot writer

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

186. Moira Simpson, *Museums and Restorative Justice: Heritage, Repatriation, and Cultural Education*, 61 MUSEUM INT'L nos. 1&2, 2009, at 121, 126.

187. *Id.* at 125–26.

188. *Id.* at 126.

Beverly Hungry Wolf noted: “With each bundle that disappeared there was one less ceremony.”¹⁸⁹

When FNSCORA was passed in 2000, more than 250 ceremonial objects that were considered on loan to Canadian museums were immediately repatriated to the Blackfoot Tribe, and hundreds more have been returned since.¹⁹⁰ In addition to the repatriation of these items, museums have collaborated with the Blackfoot Tribe to help facilitate both intra- and intercultural educational programs focusing on the cultural significance of the ceremonial items.¹⁹¹ This positive partnership between indigenous groups and museums not only restores cultural property to its rightful owners, but also ensures agency and respect for the indigenous groups and their culture as a whole.

The enactment of FNSCORA shows what can happen when governments and museums embrace the nationalist approach to cultural property. By understanding that cultural objects are not merely marvels made by people far removed by space, time, and familiarity, but rather integral parts of a resilient heritage, indigenous groups can then more fully assert their agency and autonomy.

*V. Repatriation as a Means to Reconcile, Respect,
and Renew Relationships with Indigenous Groups*

Like any categorical approach to a particular issue, the nationalist versus internationalist perspectives regarding cultural property each have their merits and their limitations. Though the polemic for a nationalist against an internationalist approach can appear to shake down to a good versus evil binary, examining the case for cultural property repatriation to indigenous groups reveals a much deeper story. The objects at the center of these cultural property debates not only have significance to the descendants of their respective creators, but the struggle itself also impacts the global community as a whole. The nationalist approach to the issue of wrongfully obtained cultural property created by indigenous groups does not automatically foreclose the possibility of intercultural appreciation of such cultural heritage. On the contrary, the process of repatriation can bring the

189. BEVERLY HUNGRY WOLF, *DAUGHTERS OF THE BUFFALO WOMEN: MAINTAINING THE TRIBAL FAITH* 139 (1996).

190. Otiena Ellwand, *Alberta Government to Expand Policy Around Return of Sacred Items to Indigenous Communities*, EDMONTON J. (May 28, 2016), <https://edmontonjournal.com/news/local-news/alberta-government-to-expand-policy-around-return-of-sacred-items-to-indigenous-communities>.

191. Simpson, *supra* note 186, at 126.

global community closer, as the interest and fascination with the impressive and the unfamiliar can be embraced from the perspective of mutual understanding and respect.

Although there are advantages of preservation and protection of ancient or structurally vulnerable cultural property that internationalists claim only museums can provide, both ancient notions of cultural property's intrinsic significance¹⁹² and evolving governmental attitudes favoring repatriation minimize this core tenet of the internationalist approach. The internationalists also point out the comparative lack of preservation infrastructure by indigenous groups like the Rapa Nui compared to the immense museum technology resources of the British Museum.¹⁹³ However, the systemic patrimony at the heart of this argument perpetuates the notion that indigenous groups are inferior: a self-fulfilling prophecy on behalf of the taking countries which only reinforces the divide between the powerful and the powerless. If advocates for the international approach are truly concerned with sharing cultural property far and wide in the global community, a perfectly temperature-controlled museum gallery open to tourists is certainly not the only manner in which to do so. The different government-sponsored repatriation efforts by different countries explored in Part IV imply other successful alternatives.

While the connotations of a nationalist approach to cultural property can be an initial turn off in an increasingly divisive political global climate, the argument for repatriation is not a suggestion that all cultural property is returned and that all indigenous groups are to be then left in solitude, reminiscent of a time before any colonial or imperial interaction. My interpretation of the nationalist approach is, alternatively, that of reconciliation, respect, and renewal of international relationships.

As evidenced in the example of the Rapa Nui, the resilience of indigenous groups since the colonial era is indicative of both the tenacity of the human spirit and the universal notion of working toward self-actualization. The globalization of culture, communication, and information we are now privy to provides ample opportunities to support and appreciate our fellow global citizens, no matter how distant in time, space, or likeness. Indigenous rights movements toward agency can only add to the full realization of human potential, and a key component of this realization rests in sustainable cultivation of cultural heritage, which "in its tangible and

192. Song, *supra* note 106, at 721.

193. Anthony Prinzivalli, Note, *Enhanced Preservation: Modifying the Protect and Preserve International Cultural Property Act to Better Protect Syrian Antiquities*, 35 CARDOZO ARTS & ENT. L.J. 775, 797 (2017).

intangible forms is integrally linked to social structure, ceremonial life and cultural identity.”¹⁹⁴

The less-than-stellar promotion of this respect for indigenous people’s agency is unfortunately glaringly obvious in the historical and legal treatment of their cultural property. But repatriation of cultural property back to indigenous groups is a significant step toward righting past wrongs, respecting our differences while celebrating our similarities, and beginning a new chapter in human history that embraces equal and equitable treatment of all people. While the British Museum returning Hoa Hakananai’a back to the Rapa Nui would not automatically mend the pain suffered by the Rapa Nui over the last nearly 300 years, or grant the current Rapa Nui people the agency they seek to achieve from Chile, it would be a deeply meaningful first step toward solidifying their agency on the global stage. And just as the moai were said to have “walked” across Rapa Nui with the help of their creators, eliciting marvel and awe which led to his capture, for Hoa Hakananai’a to return to Rapa Nui “walked” by his sculptors’ descendants through their vocal efforts should likewise provoke the same marvel and awe, as he would no longer be “Lost or Stolen,” but at home with his friends.

194. Simpson, *supra* note 186, at 123.