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Reburying An Injustice: Indigenous Human Remains in Museums and the Evolving Obligations to Return Remains to Indigenous Groups

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Introduction

“I’ve come to take you home” begins the poem that poet Diane Ferrus wrote to commemorate the return of the remains of Khoisan Sara Baartman to South Africa in 2002.¹ For years, the South African government and indigenous groups lobbied the Parisian Musée de l’Homme to return her remains. To enable her remains to be sent back to her homeland, the French government finally passed legislation allowing the Musée de l’Homme to return the body to the South African government.² Ten years later, the bodies of a Khoisan couple, Klaas and Trooi Pienaar, were laid to rest again in South African soil after almost a hundred years of being stored in Austrian museums.³ The Pienaar’s remains had been taken from their graves a month after the couple had been interred.⁴ With both of the burial ceremonies for Baartman and the Pienaars, the South African president and his cabinet found the occasion to be large enough to require their presence.⁵ At the Pienaar’s ceremony, South African President Jacob Zuma used the reburial ceremony to call for South Africa and other countries to “decolonize” their museums.⁶

“Decolonizing” museums entails reversing the effects the eighteenth to early twentieth century ethnographic collecting of indigenous cultural property had in depositing these items in Western museums. Since the 1970s, indigenous communities in Asia, the Americas, Africa, and Oceania started to reclaim their heritage and called for the return of their ancestors, who were

¹ DIANA FERRUS, I’VE COME TO TAKE YOU HOME 10 (2010).
⁵ “Hottenot Venus” Laid to Rest, supra note 2.
⁶ Zuma’s Pienaar Speech, supra note 4.
disinterred for collectors of ethnographic items.\(^7\) Now, museums and governments have begun to hear this call and started efforts to find ways to return remains to indigenous communities. Governments utilize various methods to repatriate remains including mandating returns and programs assisting institutions and communities in repatriating human remains. Museums have responded to the indigenous movements with implementing policies regarding the handling and disposition of human remains. With governments and museums beginning to recognize the greater potential to humanity to return remains and human rights issues, cultural shifts have sprung new duties, both legal and professional, on museum officials to investigate and promote the return of these remains, which has lessened the need for international conventions.

This article will begin by exploring two case studies of how remains have been returned. These case studies will present a face and name to some of the issues that encompass the return of ancestral remains to indigenous communities. Part B of the article will present the history of collecting or grave robbing in the nineteenth and twentieth centuries. Part C will describe the general common law on human remains and its inability address the possibilities to return human remains. This part will set up how the gaps in the previous laws needed to be solved by current and future legislation. Part D will focus on the various types of national legislation passed focusing on the return of human remains. Part E will then examine museum and ethical codes to demonstrate the growing awareness of the need to return remains and its potential benefit. Finally, Part F will assess the human rights implications of the storage of remains in museums today and the applicability of international conventions to this issue.

**Part A: The Pienaars and Sara Baartman**

\(^7\) TIFFANY JENKINS, CONTESTING HUMAN REMAINS IN MUSEUM COLLECTIONS 3 (2011).
In his ceremonial speech, Zuma recounted the history of the Pienaars, who were farm workers.\(^8\) Austrian anthropologist Rudolph Pöch and his team dug up the remains of the couple within days of the Pienaars’ deaths from malaria in 1909.\(^9\) Branded a “grave-robber” by Zuma, Pöch excavated about another 80 graves and rock carvings in addition to the Pienaars during his expedition to South Africa and exported these “artifacts” to Vienna.\(^10\) Due to his contributions to the field, Pöch became the first Professor of Anthropology at the University of Vienna.\(^11\) These artifacts among others that were collected became the subjects of Austrian research on the Khosian people and museum displays of the human race.\(^12\)

After their exhumation, the Pienaars’ remains were not handled with the best care. Ciraj Rassool, who has studied the distribution of indigenous South African remains in museums, discovered that the Pienaars’ corpses were broken at the knees and placed in a barrel of salt to best preserve and transport the bodies.\(^13\) This was a better fate than other remains that Pöch collected when his team boiled the body to separate the bones from flesh and any identifying information.\(^14\) Indigenous South African remains were distributed to museums and scientific institutions around Austria and Europe.\(^15\) Pöch did examine the couple, but they were not explicitly identified in his findings published posthumously by his wife.\(^16\) By the 1930s, the Pienaars’ remains were already macerated after extensive deterioration. By this point, Emil Breitlinger, the former head of the Institute for Human Biology at the University of Vienna, was known to have Nazi sympathies. Rassool, \textit{supra} note 13, at 17-18.

\(^8\) Zuma’s Pienaar Speech, \textit{supra} note 4.
\(^9\) Id.
\(^10\) Id.
\(^12\) \textit{Return of Remains of Khoisan couple a Milestone: Mashatile}, SABC.com (Apr. 20, 2012), http://www.sabc.co.za/news/a/c45e31804af4942b887a85195c4a049b/Mthethwa-denies-interference-20122404
\(^13\) Ciraj Rassool, Human Remains, the Disciplines of the Dead, and the South African Memorial Complex 17 (July 8, 2011) (unpublished manuscript), \textit{available at} http://sitemaker.umich.edu/politics.of.heritage/_____schedule_and_papers.
\(^14\) \textit{What the Pienaar Homecoming Means}, \textit{supra} note 3.
\(^15\) \textit{Return of Remains of Khoisan couple a Milestone, supra} note 13.
\(^16\) Breitlinger also was known to have Nazi sympathies. Rassool, \textit{supra} note 13, at 17-18.
transferred the remains to his “private collection,” which was left after his death to the Natural History Museum of Austria.17

After a 2008 presentation by Rassool and another South African historian on the South African view of the Pöch’s legacy, the Austrian Natural History Museum expressed their wish to return the Pienaar’s bodies and brought the request before both the Austrian and South African governments. Negotiations between the South African and Austrian governments and institutions took four years to return the bodies.

To finally rebury the Pienaaars, South Africa spent 1.7 million rand for the ceremony.18 The ceremony included traditional rituals by a Bushman healer, but mostly diplomats and government officials spoke at the ceremony.19 Zuma emphasized that the return and reburial of the Pienaaars have been “re-humanised and have regained their South African identity.”20 However, the funeral was criticized for not including the descendants of the Pienaaars. The Department of Arts and Culture expressed concerns about which claimed descendants were actually related to the repatriated couple.21 The government declined to verify the family members by DNA as they felt that the couple could not be subjected to another scientific study.22 Also due to budgetary restraints, the government disregarded the wishes of some familial descendants to be served halal food, as part of them had become Muslim.23

17 Id. at 17-18.
18 1.7 million rand equates to about $220,000. Diodlo, supra note 11.
19 This left only the opening prayer at the public event and gravesite and a reading of scripture to a Khoisan religious leader. South Africa Department of Arts and Culture, Programme for the Reburial of Klaas and Trooi Pienaar (2012), available at http://iziko.org.za/PDF/PROGRAMME%20FOR%20THE%20REBURIAL%20OF%20KLAAS%20AND%20TROOI%20PIENAAR.pdf.
20 Zuma’s Pienaar Speech, supra note 4.
21 Diodlo, supra note 11.
22 Id.
23 Id.
Ten years earlier, the remains of Sara Baartman were brought back to South Africa from the Musée de l’Homme in Paris with a similar ceremony. Baartman at a young age was brought to Britain and France to perform in shows between 1810 and 1815 as the “Hottentot Venus.”

Baartman attracted attention for her large buttocks and enlarged labia, which were considered a peculiarity of Khoisan women. The shows in Piccadilly Square included exhibiting her in a cage and having her handler order her to act “primitively.” During the final years of her life, Baartman became a prostitute and drank to cope with the humiliation and homesickness she suffered. George Leopold Cuvier, a French Lutheran naturalist, took an interest in her. Baartman died around midnight on December 31, 1915 on the banks of the River Seine, probably from pneumonia. Within 24 hours of her death, Cuvier obtained permission to study and dissect her body. Her body was then cast in wax, dissected, and skeleton articulated. Her genitalia and brain were preserved and placed on display in the Musee de l’Homme. The museum removed her remains from display in 1974 and placed them in a storeroom. In 1994, her body cast was displayed in the Muse d’Orsay as an example of ethnographic sculpture.

Due to Apartheid, few South Africans were aware of the presence of her remains, as many Black South Africans would not have been permitted to travel to Paris. It was not until after Apartheid that her story emerged in the public view. The Griqua National Conference raised the issue with President Mandela causing him to discuss the possibility of returning

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25 Id.
26 Id.
28 Id.
29 Morris, supra note 23, at 24
30 Bredekamp, supra note 25, at 26.
Baartman’s remains with French President Francois Mitterand during a 1994 state visit.\textsuperscript{31} Negotiations between South African and French authorities were held in Paris and Pretoria between 1996 and 1998. Henry de Lumley, a former director of the Musee de l’Homme and part of the French delegation, was supposedly very opposed to the proposed repatriation and pointed out the lack of legal powers of the museum director to deaccession the remains to South Africa.\textsuperscript{32} Despite the French aversion to the return of materials, the Council of the National Khoisan Consultative Conference persisted in urging the South African government to enter into urgent negotiations for the remains of Baartman and other Khoisans so they can “be reunited in a culturally appropriate manner.”\textsuperscript{33}

In 2002, France began to change its stance on the issue. Nicolas About, a French senator, proposed that the Bio-Ethics Law of 1994 did not apply to the Baartman issue, because “the human body, its elements, and products cannot be subject to property rights.”\textsuperscript{34} In support of the return of the Baartman remains, Roger-Gerard Schwartzenberg, the French Research Minister, stated that “human remains are not subject to appropriation and therefore cannot be a State’s or a public body’s property. They cannot be elements of a national heritage.”\textsuperscript{35} That year, the French parliament voted to return the Baartman remains for only this specific instance of return.\textsuperscript{36} On April 29, 2002, a South African government delegation ceremoniously accepted the remains from France.\textsuperscript{37} The delegation returned to South Africa with a crate draped in the South African flag carrying Baartman’s remains at the Cape Town International Airport.\textsuperscript{38} In August 2002, her remains were buried with Christian rights and a large governmental delegation including

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Rassool, supra note 13, at 2.
\item Id.
\item Id. at 3.
\item Id.
\item Bredekamp, supra note 25, at 28.
\item Id. at 26
\item Id.
\end{enumerate}
\end{footnotesize}
President Mbeki with members of his cabinet providing oratories.\textsuperscript{39} Mbeki remarked, “[t]he story of Sarah Baartman is the story of the African people…. It is the story of our reduction to the state of objects who could be owned, used, and discarded by others.”\textsuperscript{40} Mbeki then declared Baartman’s grave to be a national monument.\textsuperscript{41}

These stories highlight a number of issues from the different modes that remains entered into the museum collection, their visibility and invisibility within the museum’s holdings, the balance between government and family needs, the need for involvement with the country holding the remains, and even the scientific value of the remains. Indigenous persons and groups are becoming aware of the fates of their ancestors and want the situations rectified. Museums today feel the need to protect themselves from public scorn and potential litigation by positioning themselves away from the practices of the past. Not all museums have the power to deaccession items within their collection but require the national legislature to authorize the ability to remove artifacts from a collection. Modern institutions do recognize how remains entered their collections and the processes previous curators and scientists used on these remains.

**Part B: The History and Effects of Collecting**

1. The History of Collecting

As museums and governments approached the issue of these remains in their museums, they have had to confront the acquisition histories of the remains. Many institutions hesitate to return remains, because they fear that this would be acknowledging the often-illegal acquisition methods in the nineteenth and twentieth centuries.\textsuperscript{42} Historically, tomb robbers have been present

\textsuperscript{39} “Hottentot Venus’ Laid to Rest, supra note 2.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
throughout the ages. Egyptian pharaohs included complex tunnels and traps to prevent their tombs from being robbed for the massive amounts of gold and treasure accompanying a deceased royal in their afterlife. Grave robbers did not concern themselves with the deceased occupant as much as the treasures inside. Despite the often-valuable artifacts accompanying the deceased inside the tomb, dead bodies could have commercial value in addition to being curiosities and souvenirs. Vendors in Cairo bizarres sold Egyptian mummies as medicine from the twelfth to seventeenth centuries.

Grave goods provided prestige as such in the case of a French visitor who remarked to the Egyptian viceroy: “It would hardly be respectable, on one’s return from Egypt, to present oneself in Europe without a mummy in one hand and a crocodile in another.” Christopher Columbus began grave robbing in North America during his voyages to the Americas, because he believed Indian graves to be valuable sources of gold. Seventeenth century trading companies participated in grave robbing to sell cultural objects from indigenous communities.

Over time some of the attention turned from digging up graves for their valuable contents to using the corpses for scientific studies. Dating back to James Cook’s expeditions, Pacific voyages of discovery and exploration included scientists to observe and collect natural specimens. Museums hoarded abnormal specimens for their collections in the eighteenth

43 Only One of the Ancient Wonders Survives, N.Y TIMES, May 27, 1923. One of the most effective tomb robbing prevention mechanisms has been Shi Huangdi’s purported river of mercury surrounding his tomb complete with booby trapped crossbows. This has kept the Chinese government from determining on how to proceed with excavating the tomb today. Zigor Aldama, El Secreto mejor guadardo de China, El PAIS, Dec 17, 2012, http://cultura.elpais.com/cultura/2012/12/17/actualidad/1355732987_248820.html.
47 Id. at 718.
century.\footnote{Alan G Morris, \textit{History and the Sources of Skeletons in Collections in Human Remains} 152, in \textit{HUMAN REMAINS AND MUSEUM PRACTICE}, supra note 25, at 152.} By the nineteenth century, the collections of human remains were classified to present racial origin and human typology in a Linnaen fashion.\footnote{Id.} In the 1840s, Dr. Samuel Morton, the father of American physical anthropology, collected large numbers of Native American skulls to prove through measurement that American Indians were racially inferior “savages” doomed to extinction.\footnote{Jack Trope and Walter Echo-Hawk, \textit{The Native American Graves Protection and Repatriation Act: Background and Legislative History}, 24 Ariz. St. L.J. 35, 36 (1992)} Not all museum officials gathered remains from native populations of European colonies for racially motivated reasons, but these theories still influenced their seemingly noble beliefs. Many believed they were furthering science by collecting the remains of the last members of groups in danger of extinction.\footnote{Id. at 153}

Museums gathered remains in a variety of means. In 1896, Franz Boas and Ales Hrdlicka arranged for the transport of six living Greenlandic Eskimos to the American Museum of Natural History. When these Eskimos died of tuberculosis soon after arriving in New York, their remains were dissected and curated into the museum’s collection.\footnote{Ryan Seidemann, \textit{Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archeological Context in Formerly Colonial Countries}, 64 L.A. L. REV. 545, 556 (2004). Further humiliation occurred when a father died, the son wanted his father’s corpse to return to Greenland, but Boas lied to the boy and went on with the dissections. \textit{Id.}} In addition, Hrdlicka led expeditions to Alaska to gather Inuit remains from cemeteries and often done in a nefarious action to keep from being seen by living Inuit.\footnote{Id.} Even the National Museum of Australian advertised: “Skeletons of Aborigines are much wanted…. Authentic skulls may be obtained from the graves of the native of each tribe.”\footnote{Hints for the Preservation of Specimens of Natural History, quoted in \textit{Exhibiting Human Remains}, supra note 45.} Western universities encouraged students and faculty members, who worked around the world, to collect and bring specimens to their collection.\footnote{FFORDE, supra note 49, at 57.}
These cultural Darwinistic classification systems fueling the intense thirst for collecting were designed to facilitate and justify European colonial and commercial expansion. The removal and placement of cultural objects into Western collections symbolically reflected the transferred sovereignty of the “conquered peoples.” Additionally, ethnographic classification systems began to place these indigenous cultures into categories inferior to Europeans in the racial hierarchy. External observations of body forms and sizes were fitted to these racial dominance theories. The Pitt Rivers Museum in England divided skulls into different shapes, which corresponded to a different race. Typological research on human remains and their display in this manner continued up until the 1950s as anthropologists took measurements for racial classification.

In addition to placing indigenous persons lower than Europeans, the human remains often were used to justify colonial expansion and domination. The gathering of indigenous human remains often coincided with these genocidal movements. While Pöch’s work was often raiding freshly buried indigenous persons, his collecting came in the immediate aftermath of the German campaigns of extermination against the Herero and Nama tribes of Southern Africa. Battlefields in the US and Australia provided a common source of indigenous human remains. In Australia, Tasmanian human remains had a high value due to being the “most primitive of peoples.” The “Black War” had almost annihilated the indigenous population in Tasmania. Tasmanian indigenous “purity” led a surge to collecting indigenous remains produced from the

58 Id.
59 FFORDE, supra note 49, at 8; KEELER, supra note 46, at 735.
60 FFORDE, supra note 49, at 78.
61 Morris, supra note 49, at 154.
62 Rassool, supra note 13, 17
63 FFORDE, supra note 49, at 53.
64 Id. at 32
65 Id.
diminished indigenous population.\textsuperscript{66} Those pushing and killing indigenous peoples from their lands knew that indigenous remains had a scientific value.\textsuperscript{67} When these frontiersmen who expanded colonial rule collected human remains, they gathered remains with shoddy reporting and little to none archeological examination.\textsuperscript{68} Rarely did the remains enter collections with consent from the deceased’s ancestors. Many of the grave-robbings lacked legal justification other than the racial prejudices fueling the excavations.

Eventually, in Germany, the effects of cultural Darwinism became more apparent to the world by the mid-twentieth century.\textsuperscript{69} The horror of the Nazi regime’s use of racial classification forced anthropologists to end their studies on racial classification.\textsuperscript{70} Colonial empires finally began to reflect on how their expansions affected indigenous populations.

2. Modern Museum Concerns

The recognition of the horrors of the past has caused museums to distinguish themselves from their previous employees and policies. By the middle of the twentieth century, the influx of remains into museums had largely ceased.\textsuperscript{71} Institutions began to focus on the storage of remains or transferring them to other institutions.\textsuperscript{72} Many museums began to separate human remains from their object collections and even built special vaults to hold these remains. When American, Australian, and New Zealand museums took in remains, these new holdings originated mainly from construction projects that unearthed remains.\textsuperscript{73} While remains did not go back out into the display cases, many on permanent display stayed in sight due to the stubbornness to change a

\textsuperscript{66} JENKINS, supra note 7, at 27-28
\textsuperscript{67} FFORDE, supra note 49, at 55.
\textsuperscript{68} Id.
\textsuperscript{69} VRDOLJAK, supra note 58, at 13
\textsuperscript{70} Morris, supra note 50, at 154.
\textsuperscript{71} FFORDE, supra note 49, at 89.
\textsuperscript{72} Id.
\textsuperscript{73} FFORDE, supra note 49, at 89
museum’s permanent collection. As museums are becoming more attuned to the ethical sensitivity of displaying bodies and skeletal remains, museum officials have begun to either remove remains from view or display them by seeking consent with descendants.

Today, museums are uneasy with the acquisition history of many objects in their collection. Unsurprisingly, the UK Working Group on Human Remains found that the majority of repatriation requests for remains come from indigenous groups experiencing colonial rule or unequal power relationships when the human remains were removed. While many museums assert that at the time the digging up of these remains were legal, the moral and legal claims have shifted to concede that many remains were taken without consent of the deceased, their group, or the law. Even if their holdings were legal, the public relations problems of having these collections could place a large stain on the museum’s reputation.

Not all remains can be identified though the information in museum archives. Explorers and laymen sold remains for a quick buck and provided a small amount of information in sales. For every Klaas and Trooi Pienaar, there were countless other bodies boiled to rid the identity of the deceased taken by expeditions in the twentieth century. Sometimes, the unearthed remains were labeled with the name of the deceased, group affiliation, location of grave, date of death, birthdate, and even the cause of death at times. Over time, these details associated with a set of remains were lost. The exchanges between museums and neglect of the large skeletal collections in storage led to the loss of many files containing provenance information of many remains.

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74 Mary M. Brooks and Claire Rumsey, The Body in the Museum 274, in HUMAN REMAINS AND MUSEUM PRACTICE, supra note 25.
75 Id. at 282
76 WGHR, supra note 43, at 168.
77 JENKINS, supra note 7, at 27-28
78 Zuma’s Pienaar Speech, supra note 4.
79 Rassool, supra note 13, at 17
80 Morris, supra note 50, at 155.
Some indigenous groups have complained about the inability to conduct research within museum archives, because museums were not ready or willing to address claims on indigenous remains.\textsuperscript{81} This inability of access has been eroding, and increasingly, indigenous persons are able to examine the archeological reports, genealogies, and photographic collections.\textsuperscript{82} To promote more public access, museums have begun posting online inventories of human remains within their control.\textsuperscript{83} Nonetheless, completing an inventory and determining the provenance of human remains consumes time and resources especially when remains were traded between institutions.\textsuperscript{84}

Museums view their roles as places of learning.\textsuperscript{85} A compelling argument exists that the museum’s role includes the preservation of collected human for scientific research. The argument for the need to preserve specimens from extinct or chronologically remote groups still exists.\textsuperscript{86} Scientists fear the loss of specimens would result in the loss of “ground-breaking research” as DNA testing has advanced greatly in the last few decades.\textsuperscript{87} DNA studies of ancient remains can provide clues into the mapping of the human genome and understand how migration patterns occurred in ancient times.\textsuperscript{88} DNA testing can also aid in deciding the connection of previously unidentifiable remains with current indigenous groups.\textsuperscript{89}

DNA and scientific testing has progressed beyond identifying genealogical information from human tissues. Scientists have argued that society can benefit from learning the dietary

\textsuperscript{81} FFORDE, \textit{supra} note 49, at 132
\textsuperscript{82} \textit{Id.}; VRDOLJAK, \textit{supra} note 58, at 205.
\textsuperscript{84} See Government Accounting Office, GAO-11-515, Smithsonian Institution: Much Work Still Needed to Identify and Repatriate Indian Human Remains and Objects 23 (May 25, 2011).
\textsuperscript{85} VRDOLJAK, \textit{supra} note 58, at 9.
\textsuperscript{86} JENKINS, \textit{supra} note 7, at 36.
\textsuperscript{87} JENKINS, \textit{supra} note 7, at 39.
\textsuperscript{89} \textit{Id.}
patterns and development of ancient man that has come with the study of ancient human remains. Ariela Oppenheim had been studying the bones of ancient ultra-orthodox Jews housed by the Israeli Antiquity Authority until Israeli law changed to force the return of these skeletons younger than 5000 years old back to ultra-orthodox Jews. Her research on the development of thalassemia, a disease affecting mainly people of Middle-Eastern descent, had to be halted as she could not compare the disease markers in the DNA that could show how societal upheavals changed behavior and immunities. Reburying remains could permanently remove important specimens from future studies that could benefit humankind.

The simple issue of the property status of human remains can also have great consequences. Museums and even the law hold that human remains are not property. Museums have worried that the repatriation of human remains could wipe out their entire collection. If museums, indigenous groups, or legal adjudicators begin to see human remains as cultural property, the comparison of these two classifications could have great effect. Other cultural property forms have different concerns than those of human remains, which are often mentioned in museum codes. Many museums are hesitant to label human remains as their property, yet still wish to assert control over them. Keeping human remains separate from cultural property detaches the debate to return Sara Baartman from the Elgin Marbles.

3. Indigenous Groups Concerns

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91 Id.
92 Id.
93 Id.
94 WGHR, supra note 43, at 236; see infra Part C
95 JENKINS, supra note 7, at 20.
When indigenous communities lose their ancestors, they lose their connection with the land and the past. The takings of indigenous cultural property were a symbolic act of colonialism. These wrongs have stayed with indigenous groups over generations. Groups view the storage of remains outside their proper graves to be an ongoing wrong. A Native American group remarked that returning the remains and the grave goods would provide a “liberation” of still living things that have been in trapped in museums, in a limbo between the spirit world and the human.”

Many Australian aboriginals believe that human remains are not material objects but “people who exist in the present” until they are returned to their ancestral home and accorded their last rites. Reburial provides a final rest for the soul of the deceased and can bring closure to the deceased’s descendants.

Not all indigenous groups have the ability or want to rebury their ancestor’s remains. Repatriations cost large of amounts of money to pay for the research to determine connections between claimants and the remains, the transport of remains, and the reburial costs. Many indigenous groups express that they want the Western museums to pay for the reburial of their ancestors. Despite representing five percent of the world’s population, indigenous persons represent over a third of the world’s poor, and even in developed countries, they often lag behind non-indigenous persons in terms of wealth. Indigenous groups often do not have the resources to pay for the extensive research on genealogical and provenance information to complete an investigation into the connection between an ancestor’s remains and the living person. Even to

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97 Id.
98 JENKINS, supra note 7, at 94.
99 WGHR, supra note 43, at 33
begin a search, many indigenous groups are not aware of where their ancestors’ corpses are held.\textsuperscript{101}

Some groups do not wish to have the remains of their ancestors immediately returned. Australian anthropologist Steven Webb found many indigenous persons supported research on remains, because they were actually interested in learning about their past.\textsuperscript{102} After consultation with the tribe, the Naga tribe of India allowed Austria’s Ethnology Museum’s curator to exhibit five human skulls preserved as trophies of enemies taken by an Austrian anthropologist in 1936.\textsuperscript{103} For some groups, the ability to have discretion over research on the remains and their handling is enough.\textsuperscript{104} However, indigenous groups at times are coerced into compromise leading to agreements they are not comfortable with.\textsuperscript{105} Nonetheless, indigenous groups can work with museums if given the chance to be heard and consulted.

\textbf{Part C: Human Remains as Property}

1. General Common Law Property Status

Scholars traditionally classify human remains according to different property regimes. Perhaps the most common classification regime for human remains is quasi-property, a concept derived from common law.\textsuperscript{106} The common law provided little in the ways of protection of the unearthed bodies. At a very basic level, there existed no property interest in human remains.

Nonetheless, descendants usually retain a very limited set of rights of control and access to care for their deceased ancestors.\textsuperscript{107} This stems from Roman law, where human remains were

\begin{footnotes}
\item[101] KEELER, supra note 47, at -69
\item[102] JENKINS, supra note 7, at 111.
\item[104] FORDE, supra note 49, at 111.
\item[105] KEELER, supra note 47, at 770
\item[106] Tsosie, surpa note, at 634.
\item[107] Afrasiabi, supra note 91, at 828.
\end{footnotes}
regarded as the eternal responsibility of the eldest son to care for the tomb of his ancestors.\textsuperscript{108} Human remains were thought as \textit{res religiosae}, non-transferrable sacred property.\textsuperscript{109} By the seventeenth century in England, the Ecclesiastical Courts, which had exclusive jurisdiction in corpses buried in consecrated ground, promulgated a “no property” in human corpses rule.\textsuperscript{110}

Three reasons support the no property in corpses rule: First, there is no ownership when a body is alive, then why should death trigger ownership.\textsuperscript{111} Second, the body was the temple of the Holy Ghost and it would be sacrilegious to do anything other than to bury it.\textsuperscript{112} Finally, it was in the interest in public health not to allow persons to make cross-claims to the ownership of a corpse.\textsuperscript{113}

Similar concepts are found in United States law. The Fourth Amendment of the U.S. Constitution grants all citizens the right to be secure in their “persons, houses, papers and effects,”\textsuperscript{114} but this right does not pertain to dead persons. As sacred materials, remains have been considered to be materials unable to be owned. Most cultures limit the rights of survivors in possessing the corpses of the deceased.\textsuperscript{115}

Separate from common law states, civil law countries are just as unclear on the legal status of human remains. Constitutional protections of human dignity and post-mortem rights can be extended to human remains in Germany.\textsuperscript{116} The \textit{Bürgerliches Gesetzbuch} (German Civil

\textsuperscript{109} Id.
\textsuperscript{110} Id. at 225.
\textsuperscript{111} Id. at 226.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} U.S. Const. amend. IV.
\textsuperscript{115} Hutt and Riddle, \textit{supra} note 109, at 226.
\textsuperscript{116} DEUTSCHER MUSEUMS BUND, \textit{RECOMMENDATIONS FOR THE CARE OF HUMAN REMAINS IN MUSEUMS AND COLLECTIONS} 31-33 (2013).
Code) does not expressly state whether a corpse can be owned or possessed.\textsuperscript{117} Although, the western legal regimes typically have not considered property rights to exist in the remains of the deceased, leading German and Swiss law commenters assert that property rights in human remains can develop after a period of time after the duty of reverence lapses or the expiry of the personality occurs.\textsuperscript{118} In Germany and Switzerland, human remains can transform into transferrable after a period of time according to these leading scholars.

2. The Exceptions to the Common Law

The common-law approach to allow human remains to be treated as transferable property comes from England and Australia. In the first case dating from the beginning of the twentieth-century, \textit{Doodeward v. Spence}, the Australian High Court allowed human remains to be treated as transferrable property.\textsuperscript{119} In \textit{Doodeward}, an Australian woman gave birth to a stillborn two-headed baby.\textsuperscript{120} The doctor, who delivered the baby, took the body and preserved it.\textsuperscript{121} When the doctor died, the body was sold at an auction and bought by Doodeward, who then commercially exhibited the body.\textsuperscript{122} The High Court of Australia created a new rule that allowed Doodeward to keep the body.\textsuperscript{123} Chief Justice Griffith stated that:

\begin{quote}
[\textit{W}hen a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances.]\textsuperscript{124}
\end{quote}

\begin{thebibliography}{99}
\footnotesize
\bibitem{117} \textit{Id.} at 34.
\bibitem{118} \textit{Id.}; \textit{BEAT SCHÖNENBERGER, THE RESTITUTION OF CULTURAL ASSETS} 96 (2009).
\bibitem{119} \textit{Doodeward v. Spence} [1908] 6 CLR 406, 407 (AustL).
\bibitem{120} \textit{Id.} at 406.
\bibitem{121} \textit{Id.}
\bibitem{122} \textit{Id.}
\bibitem{123} \textit{Id.} at 407.
\bibitem{124} \textit{Id.}
\end{thebibliography}
The work or skill rule has allowed for some persons to keep bodies that have been specially preserved to become property. The work or skill rule harkens to a Lockean philosophy about creating property rights from the state of nature even though human bodies are not part of the common property of man.

The second important case comes from England at the close of the twentieth-century, *R. v. Kelly*,125 which narrowed the common law rule. While acknowledging the *Doodeward* decision, the court held that corpses could be treated as property only “if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purpose.”126 *Kelly’s* narrowing of the definition could actually be used as an argument for why many corpses should be kept in museums. The bodies kept in museums and scientific institutions were used for research and exhibition purposes, however, there might exist a question on the original intent of preparation. When originally buried, these remains were to be kept interred, but the scientists then dug them up and began to change the bodies for preservation.

The *Kelly* doctrine can be an important element in the repatriation debate. The museums assert scientific concerns as a primary reason that they should retain remains. Museums now keep remains in storage facilities that preserve the bodies for further studies using non-destructive methods. New technology and methods make it possible that even ancient remains carry the potential to reveal new information about the past. Modern-day scientists work to distinguish their studies from the race-based “science” that motivated the ethnographic collecting movements in the 19th and 20th centuries. The separation of the operational philosophies of today

126 *Id.*
from these earlier era have emerged along with the arrival of new legislation and efforts to correct the wrongs of the 18\textsuperscript{th} to 20\textsuperscript{th} century ethnographical collecting.

3. Defenses to Actions on Remains

Without property rights to human remains, these items cannot be legally stolen.\textsuperscript{127} To protect graves, the common law created criminal acts and tort claims when wrongful exhumation occurred.\textsuperscript{128} The main problem with pursuing claims based on wrongful exhumation is that either the statute of limitations has run and/or authorities allowed the exhumation of indigenous remains at the time. The legality of the exhumations tends to be murky as many were illegal in principle but allowed in practice.

In terms of cultural property claims, the statute of limitations most likely ran out on human remains excavated over 100 years ago. Courts have created two ways to circumvent and extend the statutes of limitations. The first is a discovery rule in which the statute of limitations does not begin until the injured party discovers the infraction or reasonable diligence would have shown that a cause of action would have been known.\textsuperscript{129} The second is a demand rule where the statute of limitations does not begin until the injured demanded for the return of remains or was in the position to demand for their return.\textsuperscript{130} Many indigenous tribes do know that their ancestors were exhumed, but they often do not know where their ancestors are kept. Also, even if a group does know, it might not be in the position to make a demand or be able to receive the remains.

Museums also have defended their right to retain human remains because at the time of the taking of the human remains the digging up of remains was legal.\textsuperscript{131} This argument subsumes

\textsuperscript{127} Bill White, \textit{The United Kingdom, in The Routledge Handbook of Archaeological Human Remains and Legislation} 479, 483 (2011).
\textsuperscript{128} Hutt and Riddle, \textit{supra} note 109 at 226.
\textsuperscript{130} \textit{Id.} at § 30.
\textsuperscript{131} JENKINS, \textit{supra} note 7, at 15
the belief that colonized cultures were defeated enemies and the collecting of their possessions qualified as either booty or part of legal state imperialism.\(^{132}\) The human remains were part of the booty taken by a victorious army. The takings of artifacts from graves and archeological sites were done to preserve indigenous groups destined to vanish.\(^{133}\) It was reasoned to be best to hold the resources of these people, as Franz Boas once wrote that stealing bones was “repulsive work” but “someone had to do it.”\(^{134}\)

Yet a third justification has been that many indigenous burial practices that do not involve marking the graves to be abandonment.\(^{135}\) Indigenous graves in Australia were unmarked and thought to have been abandoned.\(^{136}\) However, this argument fails as many times the graves still had some sort of caretaking including the presence of wear from people walking near these graves.\(^{137}\) Also, there is evidence of indigenous groups still tending to the land of their ancient burial sites.\(^{138}\)

Even the sanctioned legal exhumation justification has come under attack. The British Working Group on Human Remains (Working Group) notes that there was a lack of consent to the original collection of the human remains through to the research on the remains and their current holding.\(^{139}\) Indigenous groups did not consent to their ancestral graves being robbed nor to the research and destruction of the human remains since their disinterment. Some indigenous groups did at the time of the grave robbing appealed to the authorities and gained injunctions.


\(^{133}\) FFORDE, *supra* note 49, at 69

\(^{134}\) WGHR, supra note 43, at 25


\(^{136}\) *Id.*

\(^{137}\) *Id.*

\(^{138}\) FFORDE, *supra* note 49, at 64.

\(^{139}\) WGHR, *supra* note 43, at 23
prohibiting grave robbing. However, the injunctions were disregarded. In response, grave robbers often had turn to secrecy in their efforts to obtain human specimens and then smuggling the remains out to their institutions. As a result, some remains were gained illegally.

Some scholars have begun to equate the collection of indigenous remains with the unique horror of the Holocaust. The links between the genocidal wars against indigenous groups and the Nazis are discussed above. Heightened awareness of Nazi-era looting caused the creation of several instruments with respect to Holocaust-era cultural property ranging from non-binding declarations calling for nations to investigate the return of objects to some nations even creating legal causes of action to return Nazi looted artwork. These parallels strengthen the urges to create more specific legislation and procedures to address the oft-illegal presence of indigenous human remains in museums.

4. Human Remains as Cultural Property

Aside from labeling human remains as quasi-property, their placement in museums and with grave goods has also given these remains as cultural property. The labeling of cultural property can go both ways for museums and indigenous groups but it subsumes these unique objects into a larger category.

The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Cultural Property defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science… [including] products of archeological

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140 FFORDE, supra note 49, at 62.
141 FFORDE, supra note 49, at 62.
142 WGHR, supra note 43, at 147; JENKINS, supra note 7, at 27.
143 Shönenberger, supra note 117, at 232-236
excavations [and] objects of ethnological interest.” The key to cultural property is that these items have value beyond a monetary value and are aids for a culture to define itself or remember its past.

Two theories dominate the concepts on possessory rights to cultural property. The first theory of cultural nationalism views cultural property as the “cultural heritage of the nation in which it is found or the nation which contains the cultural descendants of its creator.” This theory emphasizes the relationship between an object and its creator. Followers believe that the source nation has the best claim to an object and can dispense with it best for its citizen’s sake. Most antiquities rich countries favor this approach as a way to keep their property from being taken by others.

Wealthy countries and large museums favor cultural internationalism, which believes that cultural property belongs to the collective common heritage of mankind. Cultural property belongs to the general public. Under this theory, no nation has a right to exclude others from researching or transferring cultural property. However, market nations such as the US, UK, Australia, and New Zealand have started to turn away from this theory when dealing with human remains.

With both theories, cultural property definitions place an emphasis on the state to decide the best way to utilize and dispose of cultural property it holds or has a right to. These theories can provide a background theory on which to think about the position of human remains in relation to museums and indigenous groups. However, strictly adhering to one or the other theory

147 Id. at 248.
148 Id.
forgets the more nuanced approach needed to address indigenous human remains. Human remains have greater reverence than other forms of cultural property. Also, many sets of remains cannot be culturally identified as easily as many pieces of art or archeological artifacts. Furthermore, human remains also often present more scientific potential than other forms of cultural property. The current and future scientific and research value could keep a state from repatriating the best specimens to indigenous groups. Cultural nationalist approaches are becoming more in vogue with indigenous cultural property.\textsuperscript{149} In contrast to cultural property, human remains invoke many different moral concerns from the larger category of cultural property.

Part D: Legislating to Return Remains

1. The First Protections

General common law causes of actions do not adequately provide a clear legal method to return remains back to indigenous groups. Within the past thirty years, states and institutions have begun attempts to correct the injustices that occurred to indigenous groups. Before this time, little legal protection was in place for indigenous remains. Before the twentieth century, most cultural property source countries allowed for indigenous artifacts to be taken by expeditions despite general laws prohibiting grave robbing. Halting excavations usually meant an effort to curb the takings by foreign expeditions and financially motivated grave robbers.

When states began to protect their archeological resources, the first laws emerged in indigenous heritage rich countries such as the Americas, Oceania, and Africa. These laws were passed in a response to protect archeological sites from grave robbers and smugglers. Central

\textsuperscript{149} *Id.* at 246.
American countries were some of the first to pass laws to protect their cultural heritage. Honduras passed three laws before 1900 regarding the protection of archeological resources. Countries in other parts of the world followed. The United States passed the Antiquities Act of 1906, which required the examination of archaeological sites on federal land could only be carried out with a permit issued to reputable institutions by the Secretary of Interior. Five years later, South Africa passed the Bushman Relics Act mainly in an effort to control the export of rock paintings and engravings but also directed against the foreign trade in skeletons. The major loophole in this legislation was that no other types of artifacts or heritage were considered in this legislation. Australia placed aboriginal objects under federal customs controls to control their export in 1913. These laws would be enacted by other states and were followed by international conventions prohibiting the illicit movement of cultural property. However, these did not focus on the remains that were already in the collections of museums.

Laws regarding human remains in the museums around the world would not be enacted until the 1990s. Legislation took different forms to cause the return of cultural objects. Governments chose between different mechanisms from mandating inventories and repatriation of indigenous artifacts, providing grants and assistance to indigenous tribes to return remains, and relaxing deaccessioning laws to make museum’s more comfortable in their return of items.

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151 The most lasting result from the Antiquities Act is the creation of the National Monument System. E.g Mark Squillace, The Monumental Legacy of the Antiquities Act, 37 GA. L. REV. 473, 490 (2003).
152 CIRAJ RASSOOL AND MARTIN LEGASSICK, SKELETONS IN THE CUPBOARD 1 (2002)
153 Simpson, supra note 144, at 205.
155 Deaccession is the permanent removal of an object from a museum’s collection. See generally Geoffrey Lewis, Deaccessioning and the ICOM Code of Ethics for Museums, 56 ICOM NEWS 3 (2003).
2. The US and Mandatory Returns

The United States model for returning human remains to Native Americans has been a highly copied procedure to return remains. The United States with two laws, the 1989 National Museum of the American Indian Act (NMAIA) and 1990 Native American Graves Protection and Repatriation Act (NAGPRA), mandated the return of Native American human remains from government institutions and any museum receiving federal funding. The NMAIA required the Smithsonian institution to create an inventory of the Native American remains and grave goods in its collection.\textsuperscript{156} From the inventory, the Smithsonian had to return burial goods and remains to Native American tribes.\textsuperscript{157} Congress stipulated in its findings that about “4,000 Indian human remains [were] taken from battlefields and burial sites” and through excavations and donations, another 14,000 Indian remains were donated to the Smithsonian.\textsuperscript{158} In addition to enabling the return of many remains, the act created a special committee to monitor the repatriation of remains and to facilitate disputes between claimants.\textsuperscript{159}

This legislation was followed by NAGPRA, which broadened the scope of entities required to complete inventories and repatriate remains and grave goods to all federal agencies, museums, and institutions of higher learning that receive federal funding.\textsuperscript{160} For remains and grave goods found on federal land after 1990, NAGPRA vests ownership of remains to the lineal descendants of the Native American or if the lineal descendant is unknown, then in the Indian tribe who either had control of the land where the remains were found or the closest cultural affiliation.\textsuperscript{161} This hierarchy of claimants is also used to determine who may claim a set of

\textsuperscript{157} Id. §80q-9(c).
\textsuperscript{158} Id. § 80q (6), (7).
\textsuperscript{159} Id. § 80q-10.
\textsuperscript{161} Id. § 3002.
remains or grave goods in a museum inventory. The inventories list object by object the human remains and grave goods in the museum and provide the geographical and cultural affiliation if known. NAGPRA also requires that museums complete the inventories while consulting lineal descendants and affiliated tribes if these can be deduced from the museum records. When culturally affiliated objects are identified, the affiliated person or group may request for repatriation of the remains and these requests are published in the Federal Register. The museum has to proceed with repatriation within ninety days of the request and thirty days after publication in the Federal Register. If two or more completing groups or persons claim an object, the museum may hold such items until these claims are resolved through negotiations or court proceedings. Repatriations are done in consultation with the recipients.

Many have hailed NMAIA and NAGPRA as a success. The legislation has returned of remains from many institutions back to indigenous groups. Other countries and museums have copied the procedure to return remains from institutions. These acts have served to advance the international repatriation effort and influenced the creation of the United Nations Declaration of Indigenous Rights. Also, the law is one of the first to recognize the intellectual property rights associated with a dead body. Materials and those associated with it may be returned to the cultural group.

However there are flaws in both acts. First, the acts only affect North American tribes, defined as “any tribe, band, nation, or other organized group or community of Indians including

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162 Id. § 3005.  
163 Id. § 3003.  
164 Id. § 3003(b)(1).  
165 Id. § 3005(a)(1).  
167 43 C.F.R. §10.10 (c).  
169 KEELER, supra note 47, at 734.  
170 KEELER, supra note 47, at 735.  
any Alaska Native village, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”

Under NAGPRA, no group from outside the United States can request for the return of their ancestors’ remains. Additionally, the law can make disputes litigious, because it provides Native Americans to bring claims under federal law into federal courts. Actions in federal courts do not guarantee that the indigenous voice and views on property would be considered.

Furthermore, the law places onerous demands on museums holding remains and grave goods. It has been estimated by the Government Accounting Office that the Smithsonian could take several decades to complete the repatriation process rather than the five years it originally predicted. NAGPRA’s demands take resources away from completing other repatriations back to foreign indigenous groups. Federal agencies have complained about the exorbitant cost it would take to complete thorough inventories. However, the law provides grants to tribes and museums to facilitate requests and returns. Despite these flaws, NAGPRA has served as a model for others to use as a process for returning remains to their indigenous communities.

2. Programs to facilitate returns

Not all governments mandate the return of remains from museums back to indigenous groups. Some legislation facilitates the return of remains back to indigenous groups. There are two ways to encourage a museum to return remains from a foreign museum: grant programs to assist financially in the repatriation of an artifact and relaxing laws on the deaccessioning of artifacts.

172 Id. §3006.
173 Id. § 3013; 43 C.F.R. 10.17.
174 KEELER, supra note 47, at 748.
175 Government Accounting Office, GAO-11-515, Smithsonian Institution: Much Work Still Needed to Identify and Repatriate Indian Human Remains and Objects 22 (May 25, 2011).
176 Government Accounting Office, GAO-10-768, Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act 28 (July 28, 1010).
177 25 U.S.C. 3008 (a),(b).
Many countries have decided to fund programs to pursue the repatriation of human remains domestically and abroad. NAGPRA provides grants to museums and indigenous groups to assist in the efforts return remains within the NAGPRA framework. NAGPRA funding could be used for research into the cultural connection of remains with current indigenous persons and the transport of the remains to their descendant communities. Other nations such as New Zealand and Australia have developed their own programs.

In 2003, the New Zealand government began funding a program at the Te Papa Tongarewa/Museum of New Zealand to pursue the repatriation of Maori and Miriori remains within and outside of New Zealand. The museum began its repatriation efforts in the 1980s, which led to the Te Papa International Repatriation Program. Through an executive-branch decision, the government began to provide additional funds for the museum to expand to include domestic repatriations. The government plays the role of facilitator and does not claim ownership of remains. For foreign repatriations to occur, the overseas institution must come to an agreement with the government for the remains to be returned, and the government does not pay the institution for the return of the remains. The museum maintains that human remains are not to be considered part of the museum’s collection but are the remains of ancestors. The program heavily involves consulting the Maori, including a policy of storing human remains in accordance of Maori Elders’ guidance. For human remains within the museum’s protection,

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178 KEELER, supra note 47, at 748.
180 Id.
181 Id.
183 Id.
the museum will only repatriate remains with a clear provenance with the approval of the
Kaihautū, the Senior Maori Te Papa representative.\textsuperscript{184}

New Zealand took a step beyond pursuing the return of remains from abroad. The
museum created two consecrated storage spaces for the remains, which include a basin of water
for ritual bathing.\textsuperscript{185} Maori elders supervise the spaces.\textsuperscript{186} These vaults allow for those
unidentifiable remains to be returned closer to their homeland and be kept in accordance with
Maori tradition.\textsuperscript{187} However, New Zealand has a more heterogeneous indigenous population than
Australia or the US. New Zealand does not have to consider the interests of non-Maori
indigenous groups. The creation of a space that confers indigenous rites over human remains is
not as practical for countries with more heterogeneous indigenous populations.

In its efforts, the Te Papa museum has repatriated the remains of about 200 from about 50
institutions from 14 countries.\textsuperscript{188} In addition, over 87 ancestral remains have been returned from
the museum to tribes and communities around the nation. The repatriation team examines
historical records from New Zealand, shipping information, accession records from overseas
cooperating institutions, and the prominent collectors of Maori remains.\textsuperscript{189} Toi moko, or tattooed
preserved heads of Maori origin, form one of the largest groups of New Zealand cultural objects
collected.\textsuperscript{190} The toi moko with their tattoos and shrunken size made them easy and attractive

\textsuperscript{184} Id. at 7.2.

\textsuperscript{185} Id. at 3.

\textsuperscript{186} The Museum of New Zealand Te Papa, \textit{supra} note 181, at 4.

\textsuperscript{187} Id.

\textsuperscript{188} \textit{International Repatriations}, THE MUSEUM OF NEW ZEALAND TE PAPA MUSEUM (last accessed Nov. 4 2012),

\textsuperscript{189} \textit{What Repatriation Research is Te Papa Doing at the Moment}, THE MUSEUM OF NEW ZEALAND TE PAPA
MUSEUM (last accessed Nov. 4 2012),
http://www.tepapa.govt.nz/AboutUs/Repatriation/toimoko/repatriation/Pages/WhatrepatriationresearchisTePapadoin
gatthemoment.aspx.

\textsuperscript{190} \textit{What is Toi Moko}, THE MUSEUM OF NEW ZEALAND TE PAPA MUSEUM (last accessed Nov. 4, 2012),
http://www.tepapa.govt.nz/AboutUs/Repatriation/toimoko/history/Pages/WhatisaToimoko.aspx
items collect. The Te Papa museum has received about 124 toi moko from abroad and estimates at least another 100 toi moko in institutions abroad.\textsuperscript{191}

New Zealand’s close neighbor, Australia, has also begun a similar repatriation program. For overseas remains, the Department of Families, Housing, Community Services, and Indigenous Affairs managed the International Repatriation Program to facilitate the return of remains from overseas institutions back to communities within Australia.\textsuperscript{192} Similar to the Te Papa museum, the program researches the inventories of overseas collections, consults with indigenous communities, aids in returning remains, and cares and manages remains that cannot be returned to their community of origin.\textsuperscript{193} Since 1990, about 1100 remains have been repatriated from overseas institutions but 94\% of those came from the United Kingdom. A December 2009 audit of the program found that it suffered from little funding and an unclear process to return remains from overseas institutions.\textsuperscript{194}

In 2011, the program was reorganized under the Office for the Arts of the Department of Regional Australia, Local Government, Arts and Sport.\textsuperscript{195} The program combined the efforts to repatriate remains from overseas and domestic institutions into a single group.\textsuperscript{196} The government funds the cost of repatriating overseas remains and works with communities to identify and arrange the return of remains from overseas.\textsuperscript{197} The Indigenous Repatriation Program in 2011 negotiated for the return of 138 remains of Torres Strait Islanders from the

\begin{flushleft}
\textsuperscript{191}This number does not include those in private collections. \textit{Id.} \\
\textsuperscript{193}\textit{Id.} \\
\textsuperscript{194}DEPARTMENT OF FINANCE AND Deregulation, Performance Audit of the International Repatriation Program (December 2009) (Aus.) \\
\textsuperscript{195}OFFICE FOR THE ARTS, AUSTRALIAN GOVERNMENT POLICY ON INDIGENOUS REPATRIATION 8 (Aug. 2011) (Aus.). \\
\textsuperscript{196}\textit{Id.} \\
\textsuperscript{197}\textit{Id.} \\
\end{flushleft}
National History Museum in London. Also, the Advisory Committee on Indigenous Repatriation, which is made up of five Aboriginal and one Torres Strait Islander, provides advice to the Government on any issue related to indigenous repatriation issues including cultural protocols and strategic decisions.

These programs aid groups in identifying remains abroad. By involving indigenous communities, the countries can tailor the repatriation methods to a particular group. Also, museums can reach out to indigenous groups to help them identify where a group’s ancestors might be kept. The Australian program has fostered a closer relationship with British museums. However, to retrieve all remains more money is needed to cover the full costs of transfers. Also, New Zealand’s sacred vaults probably could not be utilized by other nations due to the wider variety of indigenous traditions to recognize. Despite this concern, museums could create spaces that are mandated to separate remains from the rest of the collection and handle them with universal respect for remains.

3. Efforts to Relax Deaccession Policies

For programs to work, museums and foreign countries must be willing to return remains. Museums often raised their board’s fiduciary obligations prevent museums from deaccessioning cultural property including human remains from their collections. By taking a cultural internationalist approach, museums view themselves as holders of heritage for the public. Based on their location and status, museums face two types of restriction over its collection

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198 Id.
200 Jenkins, supra note 7, at 1, 38-39.
management. For the most part, European museums usually are arms of the government. American museums, in contrast, are mostly private institutions with special non-profit status.\(^{201}\)

American museums face problems in the acquisition and deaccessioning of objects with regards to breaches of fiduciary duty of care and loyalty.\(^{202}\) Despite being mainly private organizations, the general public benefits from the museum’s collection and any changes to a collection must be done with a regard to public service.\(^{203}\) While the museums have a fiduciary duty to the public, it is not often that museums are sued on their fiduciary duty obligations.\(^{204}\) Individuals of the public cannot sue a museum’s trustees on their failures, but these challenges are grouped into “class actions” that a state’s attorney general through the common law *parens patriae* or specific statutory provision represents the general public.\(^{205}\) Often these attorney generals lack the staff and the expertise to actively supervise museum trustees.\(^{206}\) This results in little enforcement of museum’s fiduciary duties.\(^{207}\)

However, the fiduciary duties of museums might be changing to allow for returns of remains to indigenous communities. Patty Gerstenblith has noted that compliance with NAGPRA repatriations are likely to pass judicial scrutiny for challenges on a duty of care on whether to comply with the statute or forego federal funding by not complying with it.\(^{208}\) Gerstenblith has also noted that it is possible that the restitution of human remains mandated by NAGPRA has actually created an affirmative part fiduciary duty.\(^{209}\) Returns can also benefit the


\(^{204}\) *Id.*; Urice, *supra* note 200, at 19.

\(^{205}\) *Id.*

\(^{206}\) *Id.*

\(^{207}\) *Id.* at 22.

\(^{208}\) Gerstenblith, *supra* note 201, at 431.

\(^{209}\) *Id.* at 433.
general public by providing the respect indigenous communities want and by fostering cooperation between indigenous and non-indigenous societies.

European museums often turn to their legislatures for guidance on the removal of objects from their collections. European museums view their role as a collector of international heritage, which is presented for the benefit of the public.\(^{210}\) They hesitate to break up their vast, worldly collections. Museums often do not deaccession artifacts or human remains due to legal barriers and a presumption against deaccessioning items within a collection.\(^{211}\) Robert Anderson, a former director of the British Museum, once responded to a request by a Tasmanian Aboriginal Group for the return of bags containing human ashes: “[Our] collections are held under Act of Parliament which does not permit us to deaccession them: nor would we want to do so, because we are an international museum and resource devote to preserving mankind’s cultural heritage.”\(^{212}\) Fortunately, the presumption against the return of human remains from the United Kingdom has been eroding fairly quickly in the past two decades.

In the United Kingdom, the National Heritage Act of 1983, the British Museum Act of 1963, and the Museum and Galleries Act of 1992 each allowed for a museum board to deaccession an item if it was unfit to be in the collection.\(^{213}\) However, while boards were allowed to deaccession items, many boards did not exercise this ability.\(^{214}\) These laws required the deaccession of an item to not detriment the interests of students.\(^{215}\) The United Kingdom’s institutions often heard the most vocal opponents of repatriation the scientists, archaeologists, and anthropologists currently using human remains in their research.\(^{216}\)

\(^{210}\) Urice, *supra* note 200, at 22.  
\(^{211}\) JENKINS, *supra* note 7, at 2.  
\(^{212}\) JENKINS, *supra* note 7, at 1.  
\(^{213}\) WGHR, *supra* note 43, at Appendix A.  
\(^{215}\) WGHR, *supra* note 43, at Appendix A.  
\(^{216}\) JENKINS, *supra* note 7, at 33.
In 2001, the United Kingdom established the Working Group on Human Remains in Museum Collections to research the issues of holding and studying human remains.\textsuperscript{217} The Working Group released their results in 2003. The Working Group preferred the removal of deaccessioning bars rather than legislation compelling the mandatory return of remains.\textsuperscript{218} According to the Working Group, mandating returns could raise more issues in identifying the best claims, jeopardize relationships already between museums and indigenous, and infringe on a museum’s peaceful enjoyment of their collections according the First Protocol of the European Convention on Human Rights.\textsuperscript{219} The Working Group favored legislation to remove the bars to repatriating objects and the enactment of a mediation-like procedure that takes into account the broad range of interests in settling disputes.\textsuperscript{220} The Working Group also found that adversarial legal processes are not suited to disputes over remains as a “winner takes all” philosophy could cause parties to be more entrenched in their positions on black-letter law rather than focusing on the personal, political, and cultural issues that could be more important.\textsuperscript{221} Also, the Working Group favored the licensing of institutions to hold remains in their collections.\textsuperscript{222}

In response to the Working Group’s findings, the United Kingdom enacted the 2004 Human Tissues Act, which included provisions over the management of human remains in museum collections and their transferability.\textsuperscript{223} Importantly, the Act explicitly authorizes boards of nine museums to deaccession “from their collection any human remains which they reasonably believe to be remains of a person who died less than one thousand years before

\begin{footnotesize}
\textsuperscript{217} \textit{WGHR}, supra note 43, at 1.
\textsuperscript{218} \textit{WGHR}, supra note 43, at 199.
\textsuperscript{219} \textit{WGHR}, supra note 43, at 123-24
\textsuperscript{220} \textit{WGHR}, supra note 43, at 188-89.
\textsuperscript{221} \textit{WGHR}, supra note 43, at 182-83
\textsuperscript{222} \textit{WGHR}, supra note 43, at 188-89.
\textsuperscript{223} Human Tissues Act, 2004, c. 30 (U.K.)
\end{footnotesize}
Also from the Working Group’s recommendations, the Human Tissues Act requires a license for any person before carrying out studies of corpses.

The United Kingdom is not the only country that has permitted deaccessions. German law does not explicitly prohibit the deaccession of items within an institutional collection. German museums are allowed to deaccession remains if they meet certain requirements such as not being consistent with the goals of collection and the removal would steer clear of any museum funding arrangement. The French government has authorized deaccessions from national museums. Unlike the United Kingdom, France has no broad provision allowing a museum to deaccession human remains. The Rouen Museum in 2007 had sought to return Maori tattooed head back to New Zealand but was denied by the French Minister of Culture on the grounds that French law considers art to be “inalienable.” This dispute was resolved in 2010 by the French parliament passing a bill to allow Maori heads kept by the French National Museum to be returned. However, this bill is very specific in the scope of the objects covered and do not extend to other human remains nor Maori cultural property.

Earlier, the French Parliament passed an even narrower bill to return the remains of Sara Baartman to South Africa after seven years of talks between France and South Africa to return her remains. After statements by French senators and minsters that human remains were not

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225 Human Tissues Act, 2004, c. 30, § 16 (U.K.)
226 MUSEUMS BUND, supra note 107, at 50
227 Id. For more guidance on the procedures for German institutions to deaccession items within their collection, see GERMAN MUSEUM’S ASSOCIATION, ‘NACHHALTIGES SAMMELN EIN LEITFADEN ZUM SAMMELN UND ABGEBEN VON MUSEUMSGUT’ ['SUSTAINABLE COLLECTION GUIDANCE FOR COLLECTING AND REMOVAL OF MUSEUM ITEMS'] (2011).
229 Loi 2010-501 du 18 mai 2010 visant à autoriser la restitution par la France des têtes maories à la Nouvelle-Zélande et relative à la gestion des collections [Law 2010-501 of May 18, 2010 to Authorize the Return from France of Maori Heads to New Zealand and on Management of Collections], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 19, 2010, No. 114.
property, the French parliament voted to pass a bill to return the Baartman remains but this law was case-specific, which did not create a precedent for returning other remains. The French process achieved the desired result but in a longer timespan.

It should be noted that deaccessioning laws do not mandate the human remains return but allow the museum to act in its best interest. Countries are hesitant to provide deaccessioning in a broad manner due to fears of what can happen. France enacted specific laws covering either specific objects or a narrow set of objects. This piecemeal legislation takes time and the ability to catch the attention of Parliament members. Legislation focused on the repatriation of remains that do not mandate their return are dependent on the moral duties of museum officials to compel or address the return of remains to indigenous groups.

**Part E: Museum Codes**

1. World Archeological Congress

Museums and the archeological community have actually changed their stance on human remains repatriations fairly quickly. In 1989, the World Archeological Congress adopted the Vermillion Accord, which outlined the museum community’s respect for indigenous rights and customs over the keeping of ancestral remains. In six articles, the Vermillion Accord proposes both the return to and respect of the living community and the recognition of the scientific value for human remains. The accord advocates for “the express recognition that the concerns of various ethnic groups, as well as those of science are legitimate and to be respected, will permit acceptable agreements to be reached and honoured.” In the accord, the indigenous

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232 *Id.*
233 *Id.* at 6.
community’s concerns dominate the first three articles. The scientific community’s concerns are recognized in the fourth article. The last two articles propose for an agreement on the disposition of remains and agreements on remains to be settled by both the indigenous and scientific communities in negotiation. Interestingly, the accord lists the indigenous concerns first before the scientific community. Craig Forrest observed that after the Vermillion Accord the return of human remains has increased and become more acceptable to museums.

Following the Vermillion Accord, the World Archeological Congress adopted the Tamaki Makau-rau Accord in 2006 (2006 Accord). This accord extends the ethical code to sacred objects and materials that are associated with human remains. The 2006 Accord advocates outlines a process for museums to seek permission and advice from indigenous communities before displaying human remains and sacred material. By issuing this other set of principles, the World Archeological Congress formally recognizes that human remains can be ethically displayed. While it is not the most progressive statement in the efforts to cure many of the wrongs of the previous centuries, the 2006 Accord recognizes that scientists and curators may have a legitimate interest in the display of remains.

2. International Council of Museums

In addition to the World Archeological Congress, The International Council of Museums (ICOM) also laid out rules for human remains. ICOM first promulgated its Code of Ethics in 1986 and revised it in 2004. ICOM categorizes human remains as “Culturally Sensitive Material,” which along with material of sacred significance “should be acquired only if they can...
be housed securely and cared for respectfully.\textsuperscript{242} The remains should be collected, studied, and displayed in “in a manner consistent with professional standards and the interests and beliefs of members of the community, ethnic or religious groups from which the objects originated, where these are known.”\textsuperscript{243} Responses to requests must “addressed expeditiously with respect and sensitivity.”\textsuperscript{244} ICOM recognition of the issue is significant as it is the largest museum association of the world. The ICOM code respects that curators can handle remains with care and dignity, but that indigenous groups often have a superior claim. This can be used as further evidence of a universal duty of museum officials on the issue of human remains.

3. Individual Museums

Other museums and organizations have followed ICOM’s example and created their own ethical policies to deal with human remains. In 2005, the UK Department of Culture, Media, and Sport released their \textit{Guidance for the Care of Human Remains in Museums}, which advocated for UK museums to develop their own policies on human remains with the guidance provided in the document.\textsuperscript{245} The British Museum in 2005 developed a policy regarding human remains.\textsuperscript{246} The policy outlines the procedure for the museum to handle remains and evaluate a claim for repatriation, including how to determine standing for the claimant and a public benefit test.\textsuperscript{247} The American Alliance on Museums (AAM) briefly mentions human remains in its 2001 Code of Ethics.\textsuperscript{248} The AAM advocated that the “unique and special nature of human remains and

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\textsuperscript{242} ICOM Code of Ethics, \textit{supra} note 97, at 2.5.
\textsuperscript{243} ICOM Code of Ethics, \textit{supra} note 97, at 2.5, 3.7, 4.3.
\textsuperscript{244} ICOM Code of Ethics, \textit{supra} note 97, at 4.3.
\textsuperscript{247} Id. at 4-6.
\textsuperscript{248} AAM Code of Ethics for Museums, \textit{supra} note 97.
\end{flushleft}
funerary and sacred” should be the basis in decisions on returns of these objects. The Canadian Museums Association also includes that museums should assist in the returns of human remains and be prepared to return these items to indigenous groups. The National Museum of Australia has policies on human remains that each concern Australian indigenous communities and foreign indigenous communities. The German Museums Association most recently released a set of recommendations about the control and return of human remains in museums in April 2013.

The German recommendation provides an obligation for museums to keep their collections transparent but also recommends alternative solutions such as permanent loans and exchanging of other artifacts for remains to return remains.

Codes of ethics are not legally enforceable, but they can be used to show duties of care. Museum codes impose higher standards than what the law requires museums follow organizationally. However, many museums do not make their ethical codes public, which raises the question of how professional guidelines are actually incorporated into practice.

Ethical codes prescribe how museum officials should act. Often they provide for NAGPRA-like procedures in determining and returning remains. While these are non-binding, the codes especially those from ICOM and the AAM provide directions on the duties of care of museum officials when dealing with claims to human remains.

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249 Id.
252 Museums Bund, supra note 117.
253 Id. at 62.
254 Gerstenblith, supra note 201, at 444 n. 151
255 Id.; AAM CODE OF ETHICS FOR MUSEUMS, supra note 97.
256 Gerstenblith, supra note 201, at 424
ICOM/WIPO Alternative Dispute Process

To facilitate disputes in cultural property, ICOM joined with the World Intellectual Property Organization (WIPO) to create a mediation process with respect to cultural property law.\(^\text{257}\) Museums, galleries, libraries, universities, collectors, indigenous communities, and others may bring in disputes to be heard and mediated.\(^\text{258}\) The arbitration process can overcome hurdles such as statutes of limitations, offer lower costs, and provide pre-approved mediators with expertise in this area.\(^\text{259}\) However, before the mediation process may begin, both parties must agree to settle their dispute with this process.\(^\text{260}\) Also, the mediation process may be developed into an arbitration process.\(^\text{261}\) The ICOM process provides a neutral and more efficient means to settle disputes between claimants.

One anonymized case study has shown that at least an indigenous group has used the “good offices” service of WIPO in an attempt to return cultural heritage.\(^\text{262}\) The indigenous group approached WIPO about assisting in the return of a cultural object that had been purchased by a foreign museum.\(^\text{263}\) WIPO exercised its “good offices” to explore the museum’s interest in returning the object.\(^\text{264}\) The museum, however, sent a response that asserted it had purchased the item legally and that it did not see how an alternative dispute mechanism could resolve the matter.\(^\text{265}\) The incident has not gone further as the matter has not been submitted to mediation or


\(^{258}\) Id.

\(^{259}\) Id.

\(^{260}\) Id.

\(^{261}\) Id.


\(^{263}\) Id.

\(^{264}\) Id.

\(^{265}\) Id.
arbitration.\textsuperscript{266} The incident shows that there is awareness of the mechanism by the indigenous community. It still requires the museum to accede to the process to return items to groups. The ICOM/WIPO mechanism allows for a claim to be handled by experts in a neutral setting between indigenous groups and foreign museum. While it has not been used, it can serve as another model in how governments and institutions can set up mediation services.

**Part F: International Conventions**

If the museum does not return remains, international conventions and human rights declarations could be used to aid indigenous groups seeking the return of their heritage. Domestic legislation does not always provide an avenue for indigenous groups to reclaim their ancestral remains. Many British institutions, including the Working Group, have considered the possibility of an indigenous group bringing a human rights claim on the restitution of cultural property.\textsuperscript{267}

1. Human Rights Declarations

Human rights issues with respect to cultural property begin with the 1948 Universal Declaration of Human Rights.\textsuperscript{268} Article 22 stated that cultural rights are “indispensable for [a person’s] dignity and the free development of his personality.”\textsuperscript{269} The first article, which declares, “All human beings are born free and equal in dignity and rights,” provides support for denouncing the use of indigenous corpses for racial studies from the past. Article 5 furthers this by announcing, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment

\textsuperscript{266} Id.
\textsuperscript{267} WGHR, supra note 43, at 252 passim.
\textsuperscript{269} Id. art. 1.
or punishment.”270 The Universal Declaration outlines specific rights to individuals.271 However, individuals must be able to establish their lineage to the specific ancestral remains. States and even organizations within individual states do not agree on how to determine the relationship between living descendants and unidentified or controversial remains.272

The largest problem with the Universal Declaration is that it is only a declaration and not a convention or treaty. In order for the declaration to gain wide acceptance, the drafters had to make sure it was understood to not be a binding legal instrument.273 The US issued the statement after it was drafted that: “[i]t is not a treaty; it is not an international agreement. It does not purport to be a statement of law or legal obligation.”274 It has been argued however that the provisions within the Declaration have been recognized as human rights norms in customary international law.275 The Declaration remains broad, and while its articles set out a high moral compass to follow, it should not be the sole document to lean on for returning the remains of ancestors through a legal process.

While the Universal Declaration would certainly cover these materials, the 2007 United Nations Declaration on the Rights of Indigenous Peoples (Indigenous Declaration) addresses the human right to cultural property, and more specifically human remains.276 Article 11 provides the “right to practice and revitalize their cultural traditions and customs… [which] includes the right to maintain, protect and develop the past, present and future manifestations of their

270 Id. art. 5.
273 DAVID BEDERMAN, INTERNATIONAL LEGAL FRAMEWORKS 100 (2010).
275 DAVID BEDERMAN, supra note 268, at 100.
cultures, such as archaeological and historical sites, artefacts....”

The second paragraph of Article 11 calls for states to “provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples.”

Article 12 specifically provides for the “right of the repatriation of [indigenous] human remains,” with the second paragraph calling for states to “enable the access and/or repatriation of ceremonial objects and human remains in their possession.”

The Indigenous Declaration calls for both human remains and ceremonial objects to be considered differently from cultural property even though it calls for similar repatriation mechanisms. The declaration also allows for states to keep human remains and ceremonial objects in their institution’s collections as long as indigenous groups have access to them and these materials are kept according to the group’s practices.

Furthermore, Article 31 provides the right for indigenous groups to “maintain, control, protect, and develop... their human and genetic resources... [and] their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.” This right provides indigenous groups a greater claim to their ancestor’s remains that are kept over the claims of scientists who are still using them. The right does not bar scientists from using remains in collections for further research, but provides indigenous groups to assert control on whether the remains may be used for certain research.

The Indigenous Declaration can be more persuasive than the Universal Declaration, because it explicitly covers the issue of remains unlike inferring the human rights protection in the Universal Declaration. However, less States adopted the Indigenous Declaration. Originally the United States, Australia, Canada, and the United Kingdom voted against the declaration but

277 Id. art. 11.
278 Id.
279 Id. art. 12.
280 Id.
281 Id. art. 31.
have since come to endorse it.\footnote{282 Erin M. Genia, \textit{The Landscape and Language of Indigenous Cultural Rights}, 44 ARIZ. ST. L. J. 653, 675 (2012).} The Indigenous Declaration has been argued to be a frame of reference and guide for human rights treaty bodies and international and domestic tribunals.\footnote{283 See Clive Baldwin and Cynthia Morel, \textit{Rights of Indigenous Peoples in Litigation, in Reflections on the UN Declaration on the Rights of Indigenous Peoples} 121, 131 (Stephen Allan and Alexandra Xanthaki, ed., 2011) \footnote{284 Id. at 124.} \footnote{285 Id. at 126} \footnote{286 WGHR, supra note 43, at 265} \footnote{287 WGHR, supra note 43, at 265.} \footnote{288 WGHR, supra note 43, at Appendix A.} \footnote{289 Dayla Alberge, \textit{Turkey Turns to Human Rights Law to Reclaim British Museum Sculptures}, THE GUARDIAN, Dec. 8, 2012, http://www.guardian.co.uk/culture/2012/dec/08/turkey-british-museum-sculptures-rights} Bolivia has actually adopted the Indigenous Declaration in domestic law and its Supreme Court has upheld the Indigenous Declaration as domestic law.\footnote{284 Id. at 124.} The Supreme Court of Belize held that because Article 42, which imposes duties on government to promote respect for and full application of the Declaration, embodied “general principles of international law,” and those articles would have the same force as a treaty.\footnote{285 Id. at 126}

Regional human rights courts and conventions could also be a basis for restitution. Perhaps, the most interesting investigation of the Working Group was its consideration of the holding and detention of human remains to be a human rights violation.\footnote{286 Id. at 126} While the group did not go into whether most cases would be successful, the group did determine there were a number of articles in the Human Rights Act of 1998 that an indigenous community could try to challenge a British Institution on the retention of ancestral remains.\footnote{287 WGHR, supra note 43, at 265.} Possible claims included inhuman and degrading treatment, respect for private and family life, freedom of religion, and prohibitions on discrimination.\footnote{288 WGHR, supra note 43, at Appendix A.}

Recently, a Turkish lawyer on behalf of the town Bodrum indicated he intended to submit a claim to the European Court of Human Rights for the return sculptures from the British Museum that had adorned the Mausoleum of Halicarnassus.\footnote{289 Dayla Alberge, \textit{Turkey Turns to Human Rights Law to Reclaim British Museum Sculptures}, THE GUARDIAN, Dec. 8, 2012, http://www.guardian.co.uk/culture/2012/dec/08/turkey-british-museum-sculptures-rights} However, before this case was submitted, the British Ambassador sent a letter to the Turkish lawyer to stop the case from being
This letter has stopped the case from being filed as it was supposed to be filed on January 31, 2013. It was speculated that the Turkish case would invoke Article 1 of the First Protocol for the European Convention on Human Rights (ECHR Protocol 1): “every natural or legal person is entitled to peaceful enjoyment of his possessions.” Invoking this clause could cover a wide variety of claims. If a court accepted this claim and upheld it, museums would be very nervous about keeping their holdings. As seen before, the heightened reverence of human remains would make these claims easier to establish than other forms of cultural property. While not utilized yet, a human rights claim could change how indigenous groups seek the return of objects.

2. International Conventions

A curious way to find a cause of action on the issue of return would be to use the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). ICERD covers a wide range of discrimination including those based on “race, colour, descent, or national or ethnic origin.” ICERD states: “[e]ach State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.” Furthermore, Article 4(c) requires that states “shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.” ICERD provides for disputes between state parties to the convention to bring disputes to the Committee on the Elimination of Racial Discrimination,

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293 Id. art. 1.1.
294 Id. art. 2.2(d).
295 Id. art. 4.2(d).
which was set up by the convention, or the ICJ. Article 5 announciates a series of rights including the “right to own property individually or in association with others.” Importantly, this recognized right should accord with many indigenous groups who wish to assert control of the body of an ancestor. While corpses cannot be owned traditionally, the right to own should be read in conjunction with other Article 5 rights including the right to “freedom of …religion” and “equal participation in cultural activities.”

As shown before, New Zealand, Australia, Canada, and the US have taken measures to correct the wrongs committed previously against indigenous groups within their territory. ICERD does not apply to these situations as these states have met their obligations for this particular issue with respect to indigenous tribes within their territories. A question to ask then becomes could ICERD be used against states that have not protected foreign indigenous groups such as the US or the UK. One potential problem with using the convention in this manner can be seen with article 1.2, which asserts that the convention “shall not apply to… restrictions or preferences made by a State Party… between citizens and non-citizens.”

Seemingly, ICERD concerns itself with protections by a state over persons within its territory. However, the Committee on the Elimination of Racial Discrimination issued a General Recommendation that stated that State Parties still need to report on legislation on foreigners and that this article does not detract from those rights in the Universal Declaration or the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. It has also been stated that the Committee considers this prohibition as discrimination on the grounds of citizenship and none other.

296 Id. art. 22.
297 Id. art. 5(d).
298 Id.
299 Id. art 1.2.
Another General Recommendation was made concerning Indigenous groups. This recommendation again called for states to protect indigenous cultures and allow groups and persons to “practice and revitalize their cultural traditions and customs.”\textsuperscript{300} The Recommendation only mentions restitution with respect to land and not property. However, indigenous groups should raise the argument that grave goods and corpses form part of their group’s cultural traditions.

Some issues raised on discrimination may be considered moot now. Museums and public officials have begun to recognize the need to differentiate their method of holding remains from those of the past. While the corpses were brought into institutions for racially discriminatory studies, almost all institutions have begun to distance themselves from these actions. Tiffany Jenkins in her interviews with museum professionals noted that most professionals she interview made a distinction between older “traditional museums,” who thought about their collection in an elitist manner and officials today who consult with groups on almost all matters.\textsuperscript{301} According to Jenkins, the division between the old and new becomes a strategy that officials use to distance from the past and reframe the public benefit argument in that their cooperation aids in forming bonds to learn from indigenous groups.\textsuperscript{302} The United States, Australia, and New Zealand insulate their museums from legal and moral challenges by requiring that indigenous groups be consulted.\textsuperscript{303} Furthermore, racial discrimination does not motivate museums to hold these remains. It would be difficult to show that discrimination is ongoing.

\textsuperscript{301} JENKINS, supra note 7, at 73-74.
\textsuperscript{302} JENKINS, supra note 7, at 74-75.
\textsuperscript{303} Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3005 (2012); Te Papa Remains Policy, supra note 181, at 7.2; OFFICE OF THE ARTS, supra note 192, at 8.
Another convention to consider is the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Genocide has been argued to encompass not only the pursuance of exterminating a group of people but also destroying their culture. \textsuperscript{304} Rafael Lemkin, the first to use genocide in 1943, defined it as “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”\textsuperscript{305} While not explicitly referred to in the convention, cultural genocide recognizes that genocide in a metaphorical sense can be used in relation to the uprooting of a culture.\textsuperscript{306} Cultural genocide refers to the inclusion of wiping out of a group’s traditions in addition to eliminating the members of the group.\textsuperscript{307} The collecting of remains aided colonialists in pursuing their claims. One would argue that the taking of human remains both furthered the justifications for the extermination of a group and furthered the wiping out of a group’s identity with its past.

However the international legal community has not approved cultural genocide. When drafting the convention, nations did call for an article on cultural genocide but was not included in the final draft.\textsuperscript{308} Other conventions of human rights do not include the addition of culture in genocidal acts.\textsuperscript{309} The Statute of the ICTY excludes acts destroying a group’s religion, historical monuments, and works of art.\textsuperscript{310} In \textit{The Prosecutor v. Krstic}, the ICTY denied the ability to claim cultural genocide as a separate claim but can be considered support for the intent to


\textsuperscript{306} Anayiotos, \textit{supra} note 299, at 101

\textsuperscript{307} Id.


\textsuperscript{309} See UNDRIP, \textit{supra} note 271; Universal Declaration, \textit{supra} note 263.

physically destroy a group.\textsuperscript{311} Furthermore, the US Fifth Circuit has denied a claim of cultural genocide by holding cultural genocide was not sufficiently defined in international law.\textsuperscript{312} Even though the takings of remains coincided with genocidal actions, this cannot be a basis for a claim to repatriate remains.

While human rights law has not evolved enough to use general provisions to cover human remains or hard enough to use as a stand-alone cause of action, these treaties and declarations provide a framework to use for the future. At the very least, these treaties place a moral pressure on states to return remains from their collections back to indigenous cultures especially if the removal of ancestors has caused a disruption to their practices.

**Conclusion**

Indigenous human remains have a special place in the law due to their composition and history. Human remains as shown above do not fall under traditional property concepts or under cultural property classifications. Traditional property concepts fail to provide avenues for indigenous groups to pursue relief. Cultural property classifications could have a damaging effect to either indigenous groups or museums depending on how a court might rule on the return of cultural property and human rights. In addition, the temporal closeness between the gathering of remains and genocidal acts on indigenous populations provides a strong argument for keeping their status separate from other forms of cultural property in a fashion similar to laws dealing with Holocaust looted cultural property.

However, their history urges a moral need to find ways to return remains back or closer to the communities that the deceased were once from. States have found different ways to facilitate and mandate the return of remains. While most visible, a full return of remains similar

\textsuperscript{311} Prosecutor v. Radislav Krstic, Case No. IT-98-33-T, Initial Indictment, para. 303 (Nov. 2, 1998)

\textsuperscript{312} Beanal v. Freeport-McMoran, 197 F.3d 161, 168 (5th Cir. 2003).
to the U.S. NAGPRA law could overburden museums and return materials that groups might want to be studied. Programs that facilitate a group’s research can bring them closer to bringing back a deceased ancestor. However, these programs need to cater the various traditions of many groups. Museums with human remains in storage might not be able to cater to indigenous traditions from Oceania, the Americas, and Africa, but they could accord some universal respect to human tissue.

Creating a new international treaty over indigenous remains would likely be incapable of finding wide support and have a larger impact than the legal instruments and tools in place today. Importantly, the shifts in moral obligations have removed the need for overreaching national legislation to mandate the return of remains. Museum officials now have international standards of investigating their collections with a growing number of regional and national ethical codes that endorse the search for a solution of transferring possession to indigenous groups. Human rights laws and declarations while unseen to be put to force in the area of cultural property do suggest that a solution should be made between institutions and indigenous groups. These legal forces with national laws place pressure on crafting strong duties for curators to investigate and return their collections of indigenous remains. With evolving fiduciary duties obligating museums to return and the creation of programs to assist repatriation, museum officials should opt to find ways to repatriate human remains or make this possibility available rather than being challenged in court or elsewhere. Shifting obligations and awareness have placed pressure on officials to make their museums friendlier to groups. The hardest returns will be those of unidentifiable origin and connection but procedures such as alternative dispute resolution can provide a neutral setting to discern claims. Every time a country allows the deaccession of a set
of remains, the clearer it becomes that a transferred interest in possession should be given to indigenous groups.

Returning remains is a two-way street. Museums and foreign countries need to consider the possibility to return remains. International conventions, declarations, and professional ethics codes do place pressure for foreign States to return remains even on a case-by-case basis. Foreign States can effectively provide for the return of these remains while protecting their own institutions. However, using international agreements to force a State to allow the return of remains should be a last resort due to potential collateral damage.

To best facilitate the return of remains, the many interested parties should be heard. Often it is best for these parties to work together, however previous injustices and long-term protection can make the parties stubborn to cooperate. Governments need not mandate the return and potentially prohibit the return of other remains and cultural property practically or jeopardize previous relationships. Most importantly, the barriers to deaccession and return should be lifted. Governments also could provide programs and procedures to assist in bring these deceased ancestors to their homeland, while considering the potential scientific benefit of remains. Some scars are too deep and the wounds can only be healed by reburial. Providing this mechanism now can show the indigenous groups that museums and governments are willing to cooperate with them and potentially promote future cooperation.