Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries

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Ryan M. Seidemann*

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I. INTRODUCTION

In 1990, the United States Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA).¹ This piece of legislation, which was the culmination of more than twenty years of lobbying on the part of the Native American community, set in place a mechanism for the return and reburial of Native American skeletal remains and sacred objects from museum and university collections across the United States.²

The United States has not been alone in its contentious relations with its indigenous inhabitants regarding the disposition of human skeletal remains. Canada, Australia, and New Zealand have encountered substantial opposition to the institutional excavation and retention of indigenous skeletal remains.³

Much of the tension between indigenous peoples and the anthropological community arose during the civil rights movements of the 1960s. While the African-American civil rights protests and demonstrations dominated the news, other minority groups also began to assert their dissidence with Anglo-America. The so-called "Red Power" movement began in the mid-1960s. This was a Native American backlash against nearly five hundred years of oppression. The Native Americans quickly took aim on the anthropological community in their protestations. In 1969, Vine Deloria, Jr. published his provocative book, _Custer Died for Your Sins: An Indian Manifesto_, in which he berates virtually all non-Native American institutions in the United States. One entire chapter is devoted to anthropologists. While making such lighthearted jabs at the anthropological community as "Indians are certain that all societies of the Near East had anthropologists at one time because all those societies are now defunct," some of Deloria’s observations were acute and have become a sounding board for not only Native Americans but many indigenous populations around the globe. Deloria commented that "[a]cademia [including anthropology], and its by-products, continues to become more irrelevant to the needs of the people." Further, and more to

_Henare Appeals to UK Collectors to Return Heads_, The Dominion (New Zealand) (June 23, 1998), at 1998 WL 12741487.

4. The term "anthropology" is used in this paper to refer to the broader field that includes cultural anthropology, physical anthropology, archaeology, and linguistics. Particular subfields will be referenced individually where relevant (primarily archaeology and physical anthropology, which butt heads with the indigenous communities on the issues discussed herein much more often than the other subfields).


6. Thomas, _supra_ note 5, at 203.


8. Thomas, _supra_ note 5, at 201–03. This source details such events as Native American civil disobedience in the late 1960s and early 1970s.


10. _Id._ at 83. Later comments from Deloria follow the same tone: "Archaeology has been a suspect science for Indians from the very beginning. People who spend their lives writing tomes on the garbage of other people are not regarded as quite mentally sound in many Indian communities." Vine Deloria, Jr., _Indians, Archaeologists, and the Future_, 57 Am. Antiq. 595 (1992).

11. Deloria, _supra_ note 9, at 97. This idea is echoed in the Australian Aboriginal perception that Western science’s concerns with the origins of their people are counter to their own belief systems and thus false. _See generally_
the point of the current situation, Deloria characterized anthropology and Native American relations thus: a "[c]ompilation of useless knowledge 'for knowledge's sake' should be rejected by the Indian people. We should not be objects of observation for those who do nothing to help us." Over the past thirty years, this attitude has developed into a general distrust of the pronouncements of academic anthropology. More specifically, indigenous religion has begun to rebuke long-held scientific truisms regarding the peopling of the New World and the Pacific.

Generally, in the United States, Native American groups have begun to break free of scientifically derived notions of their migration across the Bering Strait land bridge some 13,000 years ago. This theory has been replaced by a creationist theory derived from oral histories, placing Native Americans in the New World.

Thomas, supra note 5, for a discussion of the situation in the United States; Brown, supra note 5, for a detailed review of the Australian situation.

12. Deloria, supra note 9, at 98.


15. The term "Native American" is used as a general name in this paper, with cognizance to the reality that Native America is made up of diverse cultures, all with individual belief systems, and some conflicting views to the mainstream. This is a reality often missed by the legal community, evident when authors speak of "Native American religion" rather than "Native American religions." Peter R. Afrasiabi, Note, Property Rights in Ancient Human Skeletal Remains, 70 S. Cal. L. Rev. 805, 808 (1997). Such a conceptualization problem causes overly broad generalizations of the desires of the general Native American community. See generally, Perspectives from Lakota Spiritual Men and Elders (Jan Hammil & Larry J. Zimmerman, eds.) (1983) (Forty-first Plains Conference, Rapid City, SD) (on file with the author). Additionally, Native American, in this paper, does not refer to a racial grouping. This is because biological race, conceived as discrete morphological groups, does not exist. See e.g., Leonard Lieberman, Alice Littlefield, & Larry T. Reynolds, The Debate Over Race: Thirty Years and Two Centuries Later, in Race & IQ (Ashley Montagu ed., Oxford Univ. Press 1999). Rather, Native American refers to a shared cultural identity among a diverse array of groups in the United States. Also, throughout this paper, the same conceptual grouping applies to Australian Aborigines, Canadian First Nations, and New Zealand Maori.

16. The 13,000 years before present timing used in this paper refers to the oldest documented evidence of Native American activity in the New World that has been agreed upon by a panel of authorities on the peopling of the New World. See David J. Meltzer et al., On the Pleistocene Antiquity of Monte Verde, Southern Chile, 62 Am. Antiq. 589 (1997). It is by no means intended to imply that no such activity may have occurred prior to that time.
since the beginning of time.\textsuperscript{17} Such creationist approaches to peopling of particular areas have also surfaced in other regions of the world, such as among some Aboriginal groups in Australia.\textsuperscript{18}

Under such impressions of the world, indigenous groups are becoming increasingly wary of scientific evidence contrary to their religious views. A considerable amount of this disputed evidence is currently coming from studies of human skeletal remains by physical anthropologists.

Much of this introduction has been dominated by a discussion of Native Americans due to the extensive scholarship on the repatriation debate in the United States. The problems being faced by Native American groups and archaeologists are also cropping up among indigenous groups and in academia the world over. This paper briefly examines the relationships of some of these debates in previously colonial nations and how the various governments have attempted to address the concerns of all involved parties through legislation. This paper also addresses questions regarding the possible role of international law in resolving disputes, nationally and internationally, regarding the repatriation debate. However, this paper is not intended to be an exhaustive analysis of the underlying policies and regulations for each of the nations' laws. Rather, the paper is a general overview of the broader laws of these nations with an eye towards how the laws operate and means by which the benefits and detriments of each of the laws can be used to assist in creating a more seamless set of international policies and laws on the repatriation issue. The paper is also intended to present suggestions for the lawmakers in the individual nations to improve on their own laws.\textsuperscript{19}

\textsuperscript{17} See generally Thomas, supra note 5.

\textsuperscript{18} See e.g., Taylor, supra note 14. This creationist approach to the treatment of human remains is not limited to non-Western groups. Certain Orthodox Jewish groups also oppose the excavation and examination of human remains on religious grounds. This has been problematic for anthropologists in Israel who conduct excavations of burial sites that are less than 5,000 years old. See Virginia Morell, \textit{Who Owns the Past?}, 268 Science 1424 (1995).

\textsuperscript{19} One fact must be borne in mind throughout this paper: although there is much more human rights discussion here than in any of my previous papers, this paper, in no way constitutes a deviation from my contention in past writings that repatriation laws are generally intended to strike a delicate balance between the interests of scientific communities and various indigenous groups. The human rights abuses discussed in this paper are intended only to provide historical context and they are presented merely to set the stage for the events leading to the genesis of repatriation legislation in the countries examined. This paper should not be seen, in any way, as advocating the repatriation of unaffiliated remains or arguing against the repatriation of remains affiliated with a particular indigenous group through currently accepted scientific standards. See generally, Ryan M. Seidemann, \textit{Congressional Intent: What is the Purpose of NAGPRA?}, 18(3) Mammoth Trumpet 1 (2003) [hereinafter "Seidemann 1"]; Ryan M. Seidemann, \textit{Time for a Change?}
I. HUMAN REMAINS

A. Scientific Uses of Human Skeletal Material

Human skeletal remains have been the subject of anthropological study since the dawn of the field in the mid-nineteenth century.\(^\text{20}\) Contrary to the claims of some authors,\(^\text{21}\) it should be borne in mind that indigenous populations do not constitute the entirety of curated skeletal collections.\(^\text{22}\) The uses of these remains can largely be divided into two categories: general human history and medical/forensic applications.

Generally, human skeletal remains have been used to interpret the lifeways of past peoples.\(^\text{23}\) More broadly, skeletal remains offer a glimpse into human morphological variation across time and between groups. Who cares? The general consensus in academia regarding these types of studies, especially on ancient skeletal material is that "bones . . . offer a picture of time in our collective history."\(^\text{24}\) Yet another scholar captures the collective history argument thus: "all humans are members of a single species, and ancient skeletons are the remnants of unduplicable evolutionary events which all living and future peoples have the right to know about and understand."\(^\text{25}\)

\(^{20}\) See generally Thomas, supra note 5.
\(^{22}\) Such a belief is often implicit in the writings of those who oppose skeletal research. This occurs in the form of comparisons of the presence of indigenous remains and the general absence of Western remains in curated skeletal samples. Indeed, in the United States alone, extensive collections of nonindigenous skeletons exist at the Smithsonian Institution’s National Museum of Natural History, the American Museum of Natural History, the Cleveland Museum of Natural History, and the Maxwell Museum in Albuquerque. Additionally, at the time of the passage of the NAGPRA legislation in the United States, only 54.4% of the Smithsonian Institution’s National Museum of Natural History’s collection of 34,000 human specimens were of Native American or Native Alaskan ancestry. Sen. Daniel K. Inouye, Repatriation: Forging New Relationships, 24(1) Ariz. St. L.J. 1 (1992). Indeed, many skeletons of European descent have been excavated, curated, and analyzed. See e.g., Charles E. Orser et al., Gaining Access to New Orleans' First Cemetery, 13 J. Field Archaeol. 342 (1986).
\(^{24}\) Afrasiabi, supra note 15, at 808.
On a very simple level, data gleaned from the study of human skeletal remains can provide insights into population movement and migration as well as the specific genetic composition of individual populations. Additionally, skeletal studies provide insights into pathological conditions and their interaction with humankind. Such studies allow for the interpretation of the interactions of humankind with various diseases and have applications to both the study of past peoples and the investigation of crime-related modern human remains. Examinations of dentition and skeletal remains have led to the reconstruction of prehistoric diets and health patterns, a necessity to understanding the complexities of past cultures.

On a more practical level, the study of ancient human skeletal remains contributes to contemporary medical fields. An example of the relevance of studying ancient remains to current medical issues is

26. All of these tests can be accomplished (with varying degrees of accuracy) through the use of nondestructive means by the examination, recordation, and statistical analysis of metric and nonmetric traits of the human skeleton and dentition. See generally G. Hauser & G.F. De Stefano, Epigenetic Variants of the Human Skull (Schweizerbart 1989). See also Buikstra & Ubelaker, supra note 23; Christy G. Turner, II et al., Scoring Procedures for Key Morphological Traits of the Permanent Dentition: The Arizona State University Dental Anthropology System. Advances in Dental Anthropology 13 (M. Kelley & Clark Spencer Larsen eds., Wiley-Liss 1991). Specific instances of such studies are numerous and diverse (e.g., Christopher M. Stojanowski, Cemetery Structure, Population Aggregation, and Biological Variability in the Mission Centers of La Florida (2001) (unpublished Ph.D. dissertation, Univ. of New Mexico) (on file with Dept. Of Anthropology, Univ. of New Mexico). See also Ericka L. Seidemann, Analysis of the Nonmetric Traits of the Skull in the Poole-Rose Ossuary, Ontario, Canada (1999) (unpublished M.A. thesis, Louisiana State Univ.) (on file with author).


28. See e.g., Ryan M. Seidemann & Heather McKillop, Dental Indicators of Diet and Health for the Postclassic Coastal Maya on Wild Cane Cay, Belize (on file with author). See also M.W. Elvery, N.W. Savage, & J.B. Wood, Radiographic Study of the Broadbeach Aboriginal Dentition, 107 Am. J. Phys. Anthropol. 211 (1998); Lori E. Wright, Biological Perspectives on the Collapse of the Pasion Maya, 8 Ancient Mesoamerica 267 (1997); Judith Littleton & Bruno Frohlich, Fish-Eaters and Farmers: Dental Pathology in the Arabian Gulf, 92 Am. J. Phys. Anthropol. 427 (1993); Mary Jackes, David Lubell, & Christopher Meiklejohn, Healthy but Mortal: Human Biology and the First Farmers of Western Europe, 71 Antiq. 639 (1997). The variety in the sources cited here illustrates several things: the international scope of skeletal studies, the cross-cultural applicability of research results (see Table 1 in Elvery et al.), and the fact that anthropologists do study the bones of their own ancestors.
the use of DNA analyses of skeletal remains to provide insights into thalassemia. Thalassemia is described as "a group of anemias caused by a variety of genetic mutations at different sites of the gene coding for the structure of the globulin chains of hemoglobin."

Skeletal research on this disease, which generally affects individuals of Middle Eastern descent and results in anemic symptoms varying in severity, has been conducted by Ariela Oppenheim in Israel in the hopes of identifying data from DNA analyses that may lead to a medical cure.

Perhaps an even more common use for human skeletal studies is in their forensic applications. Many of the techniques presently in use in the identification of war dead, victims of mass disasters, and the victims of crimes were and continue to be developed on prehistoric human remains. One example of this is a recent sexing method for skeletal remains that was initially devised and tested on a six thousand year old Native American archaeological sample and has since been developed into a forensic identification method and applied to the identification of American war dead from Southeast Asia. Additionally, nondestructive studies are currently being used to identify relationships between diet and dental pathologies.

31. Afrasiabi, supra note 15, at 821. See also Morell, supra note 18.
33. An example of this was the use of such methods in the recovery and identification efforts following the Branch Davidian compound standoff in Waco, Texas in the early 1990s. See e.g., M.M. Houck et al., The Role of Forensic Anthropology in the Recovery and Analysis of Branch Davidian Compound Victims: Assessing the Accuracy of Age Estimations, 41 J. Forensic Sci. 796 (1996). Additionally, the Society for American Archaeology put out a call to its members trained in skeletal biology in September of 2001 to volunteer to participate in the identification efforts of the World Trade Center dead.
38. Personal communication from Franklin Damann, Anthropologist, United States Central Identification Laboratory, HI (May 4, 2001) (on file with the author).
39. Ericka L. Seidemann, Ryan M. Seidemann, & Glen H. Doran, The Occurrence of the Palatine Torus in the Windover Site Skeletal Sample (2002) (poster presentation at the American Anthropological Association annual meeting,
Finally, the once extensive comparative indigenous skeletal collections around the world were (and to a much lesser degree, continue to be) "used in educating medical scientists concerning bone biology and human variation."40

The curation of human skeletal remains over long periods of time has several benefits. The primary benefit is the possibility that new technology will be developed that will allow for more information to be gleaned from the remains. Who would have imagined that, prior to the advent of PCR amplification of trace DNA material, genetic data could be gathered on long extinct populations or species. Additionally, as was recently demonstrated in a reanalysis of a Florida skeletal sample, the ability to reexamine prior research often leads to a refinement of previous scholars' interpretations. In this case, an original analysis of the individuals from the Calico Hill site in Jefferson County, Florida, identified malignant tumors in the two crania. However, a more recent examination determined that the tumors were actually root damage, a fact that drastically changed the paleopathological status of the sample.46

B. Arguments Against Research on and Collection of Indigenous Skeletal Remains

The general consensus of indigenous communities with respect to the researching of skeletal remains for the purpose of understanding

New Orleans, LA) (on file with author).


41. PCR, or polymerase chain reaction, is a method developed in the late 1980s that allows for the extraction and amplification of small samples of DNA from ancient bone samples. "Prior to the invention of PCR, it was not possible to retrieve enough high molecular weight DNA from ancient remains to perform DNA sequencing or restriction fragment length polymorphism (RFLP) analyses." D. Andrew Merriwether, David M. Reed, and Robert E. Ferrell, Ancient and Contemporary Mitochondrial DNA Variation in the Maya in Bones of the Maya: Studies of Ancient Skeletons at 208 (Stephen L. Whittington & David M. Reed, eds., Smithsonian Institution Press 1997). In short, this recent development revolutionized the field of archaeological DNA analyses.

42. See e.g., Windover: Multidisciplinary Investigations of an Early Archaic Florida Cemetery (Glen H. Doran ed., Univ. Press of Florida 2002).

43. See e.g., I.V. Ovchinnikov et al., Molecular Analysis of Neanderthal DNA From the Northern Caucasus, 404 Nature 490 (2000).


46. Smith, supra note 44.
past and current cultures is that people do not need to know such things. Deloria comments that such studies “continue to become more irrelevant to the needs of people.”\footnote{Deloria, supra note 9, at 97.} This is particularly true from the religious perspective of many indigenous groups around the world.\footnote{See e.g., Taylor, supra note 14; see also Brown, supra note 5.} Many indigenous religions contain concepts of creation that describe how their people came to their current locations, how they have interacted within and without their groups from the dawn of time, and why they have acted in this way.\footnote{See generally Afrasiabi, supra note 15.} Under such a belief system, Western science divining contradictory or even supportive evidence is of no consequence. Indeed, many indigenous groups regard Western science as but another of the world’s religions, with no greater claim to legitimacy than their own.\footnote{José Ignacio Rivera, The Reburial of Our Ancestors: A Moral, Ethical, and Constitutional Dilemma for California, News From Native California 12 (Jan.–Feb. 1989).}

In addition to the general disregard for Western science’s methods and questions among indigenous groups, many of these groups have begun to compile their own histories as per their oral histories.\footnote{D. Gareth Jones \\
& Robyn J. Harris, Archaeological Human Remains: Scientific, Cultural, and Ethical Considerations, 39 Curr. Anthropol. 253, 260 (1998).} The compilation of these histories “often means disputing the scientific version—not necessarily because it is wrong but because it does not contribute to the version of history which the indigenous communities wish to affirm.”\footnote{Roger Byrd, Perspectives from Lakota Spiritual Men and Elders, supra note 15.} Religious differences between many indigenous groups and Western scientists pose the most significant problem for these groups to reaching a resolution on the reburial issue. “We don’t believe in digging up our own people, nor do we believe in digging up other people. When we bury our dead, we use sacred ceremonies, we do certain sacred rituals. . . . It is one of our [religious] laws that we leave our dead alone.”\footnote{See e.g., Vine Deloria, Jr., Secularism, Civil Religion, and the Religious Freedom of American Indians, in Repatriation Reader: Who Owns American Indian Remains? (Devon A. Mihesuah ed., Univ. of Nebraska Press 2000). See also Brown, supra note 5.}

In addition to the religious concerns of indigenous groups with

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respect to the disposition of the remains of their ancestors, the control of these remains has become a component in maintaining group identity. “Possession of material remains can empower such groups, giving them tangible links to their cultural roots and their history.”

Despite the religious and cultural importance and treatment of these remains by indigenous groups, much of the legislation in the countries examined herein deals with human remains in terms of property rights.

III. COLONIALISM

A. Early Anthropological Problems

Another of the major problems that contemporary indigenous groups around the world have with the maintenance of aboriginal skeletal collections in museums and universities centers on what, by today’s standards, would be considered less-than-ethical means of acquiring the material. Examples of such acquisitions are legion, several specific examples are cited here for demonstrative purposes only.

In 1897, Franz Boas and Aleš Hrdlička, the fathers of American anthropology and physical anthropology, respectively, arranged for the transportation of six live Polar Eskimos to the American Museum of Natural History (AMNH) in New York for the purpose of cultural and physical study. Not long after arriving in Manhattan, most of the Eskimos contracted tuberculosis and died. Their remains were dissected and curated into the museum’s collections.

Independent of the AMNH activities, Hrdlička conducted reconnaissance expeditions to Alaska for the Smithsonian Institution’s National Museum of Natural History (NMNH), in which he collected scores of Inuit remains to bulk-up that museum’s holdings. Details of these expeditions in Hrdlička’s diary illustrate the often shady means by which he made his acquisitions. These expeditions often included sneaking around living Inuit so that they would not catch him removing

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55. Brown, supra note 5, at 11.
56. See generally Thomas, supra note 5.
57. Id. at 77–90. The “physical” study should be qualified here. At the time, physical anthropology was much concerned with the morphology of living individuals (hair, blood, and measurements of “fleshed” specimens), an area of study which is all but extinct in the modern physical anthropological literature. For an example of such studies, see Aleš Hrdlička, Physiological and Medical Observations Among the Indians of Southwestern United States and Northern Mexico (Bureau of American Ethnology Bulletin 34, Smithsonian Institution, 1908).
58. This, despite the fact that the museum staff had conducted a false burial of at least one of the Eskimo in order to convince the others that the body had been successfully laid to rest. See Thomas supra note 5, at 77–83.
bodies from their cemeteries. Many of the remains collected in this manner by Hrdlička have been or are in the process of being repatriated by the NMNH.

Perhaps the most touching and sad instance of this type of treatment of indigenous remains is that of Ishi at the Hearst Museum of Anthropology at the University of California, Berkeley. Ishi was "discovered" by anthropologist Alfred Kroeber in 1911. Ishi was believed to be the last living Yahi Indian of California. Kroeber arranged for Ishi to live at the museum while he studied Ishi's knowledge of his people's language and culture. Their relationship has been described as a close friendship. In 1916, Ishi died of tuberculosis at the museum. Kroeber was on sabbatical, but wired the museum that no autopsy was to be performed. Unfortunately, his wire arrived too late and the guilt of Ishi's death and a burial that did not follow the traditions of his people emotionally destroyed Kroeber.

Misappropriation of indigenous remains during the nineteenth and early twentieth centuries were not limited to the United States. Paul Turnbull reviewed the acquisition policies of the Australian Museum and found similar, if not more shocking, policies than those in the United States. Edward Ramsay, curator of the Australian Museum during the late nineteenth century, openly encouraged the collection of recently deceased Aborigines by means akin to grave robbing. Many of these remains were acquired after veritable "ethnic cleansings" in


60. Stephen Loring, Repatriation as a Guiding Principle for the Arctic Studies Center, 17 AnthroNotes 1 (1995). Indeed, I was one of the last people to examine some of these remains in 1996, not then knowing the story behind their acquisition. At that time, an entire section of the NMNH was devoted to the arrangements for this repatriation.

61. Kroeber was one of Boas' students in New York who had also been involved in studying the language and culture of the Polar Eskimos at the AMNH.

62. See Thomas supra note 5, at 83–90. See also Theodora Kroeber, Ishi In Two Worlds: A Biography of the Last Wild Indian in North America (Univ. of California Press 1967). There was also a relatively accurate depiction of Kroeber's and Ishi's relationship in a film, The Last of His Tribe (Home Box Office 1992).

63. Indeed, his wire, commenting on the possible scientific potential of Ishi's remains, stated that "[i]f there is any talk about the interests of science, say for me that science can go to hell." Quoted in Christopher Shea, The Return of Ishi's Brain, Lingua Franca, Feb. 2000, at 49 (2000).

64. Thomas, supra note 5. Not only was an autopsy performed, but Ishi's brain was preserved and eventually worked its way into the Smithsonian Institution's collections. It was forgotten there until the late 1990s, when repatriation efforts were begun. Leanne Hinton, Ishi's Brain, 13 News From Native California 4 (1999).

rural parts of the country. Indeed, Ramsay even produced a publication that detailed the methods for removing the skull and brain of a fleshed individual without damaging the "specimen." Ramsay also arranged for the museum's acquisition of skulls of the Moriori of the Chatham Islands, offering Australian Aboriginal skulls as an exchange.

With such a callous and ghastly picture painted of early anthropological collections acquisitions, it is easy to understand the outrage of indigenous peoples with respect to the continued curation of certain remains. Unfortunately, however, this denigration was not the end for indigenous peoples. Seeking to illustrate concepts of racial inferiority, based largely on intentions to objectively refute the more humane treatment of slaves and other nonwhites, early researchers used the remains that were collected under often dubious circumstances to "prove" the white man's superiority. Individuals such as anatomist Samuel Morton used cranial material to (falsely) demonstrate that Native Americans had an inferior intellectual capacity to that of other races. Morton also performed similar "experiments" on the remains of African-Americans, concluding as Thomas puts it, that "[b]lacks could live only in slavery." This mindset was undoubtedly echoed in the racial tensions of the Pacific colonies of Australia and New Zealand.

66. *Id.*
68. The actual text of the letter by Ramsay dealing with this exchange is considerably more shocking than the exchange itself.

Letter from E. Ramsay to J. Hector (Aug. 28, 1882), quoted in Turnbull,* supra* note 65, at 115. In the defense of anthropology, Ramsay was an ornithologist and ichthyologist who happened to be the museum's curator.
69. Indeed, this concept was echoed throughout nineteenth century culture, even by Oliver Wendell Holmes, the father of the future justice of the United States Supreme Court, Oliver Wendell Holmes, Jr. The senior Holmes, in 1855, wrote that the Native American was a "sketch in red crayons of a rudimental manhood to keep the continent from being a blank until the true lord of creation should some to claim it." Oliver Wendell Holmes, *Oration* (Currier and Tilton 1855), *quoted in* Thomas,* supra* note 5, at 42.
70. Thomas,* supra*, note 5, at 42.
Zealand. Unfortunately, such outrageous studies continue to represent a basis for modern racism as evidenced in the writings of psychologist J. Phillipe Rushton, who often cites Morton’s now disproven research to bolster his own erroneous theories.\(^71\)

**B. Recent Problems**

Although much of this cavalier, colonialist attitude on the part of anthropologists is long past, it is easy to understand the anger of indigenous populations when they believe that not only were the means of acquisition often outrageous, but the remains were also used to promote racism that deprived them of their civil rights. For the most part, unethical and immoral acquisition of human skeletal remains from archaeological contexts no longer occurs.\(^72\) However, the recent fiasco surrounding the discovery of a 9,200-year-old skeleton, nicknamed “Kennewick Man,” in Washington state opened an old wound between the Native American and anthropological communities.\(^73\) Although the case resulting from the ultimate disposition of the Kennewick Man remains\(^74\) found for the anthropologist plaintiffs at the district court and in the Ninth Circuit,\(^75\) the long term effects of this case will likely have detrimental effects on the scientific community’s relations with indigenous peoples for some time to come. The major problem in this case, as the Native Americans see it, is one of identity. When the Kennewick Man remains were found, forensic methods were applied to its analysis.\(^76\)

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\(^71\) Although many of these early racially motivated studies were debunked by the mid to late twentieth century in such works as Steven Jay Gould’s *Mismeasure of Man* (W.W. Norton 1981), books such as Rushton’s *Race, Evolution, and Behavior: A Life History Perspective* (Transaction Publishers 1997) continue to cite them as valid research. This not only gives the public an incorrect interpretation of the evidence, but it also portrays modern anthropology in a racist light.

\(^72\) The terms “unethical” and “immoral” are used here from the perspective of Western science, cognizant of the objections of certain indigenous groups to this contention.

\(^73\) For a detailed discussion of the Kennewick Man issue, see generally, Roger Downey, *Riddle of the Bones: Politics, Science, Race and the Story of Kennewick Man* (Copernicus 1999).

\(^74\) Bonnischen v. United States, 217 F. Supp.2d 1116 (D. Or. 2002) [hereinafter “the Kennewick Man case”].

\(^75\) Bonnichsen v. United States, 357 F.3d 962, C.A. 9 (Or.), 2004 (affirmed); Bonnichsen v. United States, 2004 WL 830006, C.A. 9 (Or.), 2004 (rehearing denied).

\(^76\) Rather than considering the antiquity of the skeletal remains, the bones were compared to “racial” groupings typically employed by forensic anthropologists, in which metric and nonmetric analyses suggested a “caucasian” rather than “Asiatic” origin. Had the remains, instead, been analyzed as Native American, the individual would have, at best, been considered a morphological
and the results suggested that he had numerous caucasoid (or Euroamerican) traits. If such a “caucasian” individual were in the United States 9,200 years ago, what implications would this have for modern Native Americans? Such a scenario is, as yet, unclear. However, the Native American community fears that it will marginalize their claims to sovereignty and other rights from the United States government, as they may no longer be considered the original colonizers of the New World.

The United States government, despite the Kennewick Man case, has made substantial strides towards acquiescence to demands for the return of human skeletal remains. The Native American Graves Protection and Repatriation Act (hereafter NAGPRA), passed by the United States Congress in 1990, has mandated the return and reburial of thousands of skeletons and related cultural items from museums and universities around the country. The United States, however, is not alone and indeed was not the first country to pass such legislation. The former colonial nations of South Africa, New Zealand, Australia, and Canada have passed laws addressing the repatriation requests and demands of their indigenous citizens. Additionally, the tune of the anthropological community has changed substantially since the time of the atrocities discussed supra. This paper reviews the laws of the abovementioned nations as well as international law on the subject of grave and skeletal remains protection in order to address several issues. Can there be an international consensus on the treatment of archaeologically derived skeletal remains? What can the United States gain from the laws of other countries regarding the treatment of the human skeletal remains of its indigenous peoples’ ancestors? Should the laws around the world be changed to reflect the ethical tenets of professional

outlier, not a white man.

77. Indeed, Dr. James Chatters, the man who did the initial analysis, after having a clay facial reconstruction done from the skull, commented that Kennewick Man strongly resembled actor Patrick Stewart, a statement not well received by either the Native American or anthropological communities. Thomas, supra note 5, at xiii-xxiv.

78. See e.g., Brown, supra note 5, at 27.

79. Supra note 1. The placement of the NAGPRA legislation itself in the United States Code is significant and significantly different from most of the other nations in that it is not in the “conservation” section, but rather in the “Indians” section, thus demonstrating that Native Americans in the U.S. are beginning to be recognized more as people than relics or endangered species.

80. Australia passed the Aboriginal and Torres Strait Islander Heritage Protection Act of 1984 (amended 1987) several years before NAGPRA was passed in the United States. However, several individual U.S. states had already passed their own graves protection and repatriation legislation prior to 1990. See, e.g., Price, supra note 2; Larry J. Zimmerman & John B. Gregg, A History of the Reburial Issue in South Dakota, 13 South Dakota Archaeol. 89 (1989).
organizations or vice versa? These questions are addressed in light of the legislation detailed below.

IV. INTERNATIONAL LEGISLATION

In response to the centuries of atrocities committed by colonial governments against indigenous populations\(^8\) and the decades of disrespectful collections acquisitions by anthropologists,\(^8\) many governments began to concede to the requests of indigenous peoples for increased protection of in situ burials and the return of curated skeletal remains and sacred objects. The following is a review of the resulting laws in the United States, South Africa, New Zealand, Australia, and Canada. Because many of the laws dealing with the protection/repatriation issue are more broad than that specific topic, only relevant portions of the laws will be examined in detail.

A. United States

In 1990, the United States Congress passed NAGPRA.\(^8\) NAGPRA, which began to take shape in various forms in both the House and Senate in 1987, is seen by many as:

legislation [that] effectively balances the interest of Native Americans in the rightful and respectful return of their ancestors with the interests of our Nation's museums in maintaining our rich cultural heritage, the heritage of all American peoples. Above all, ... this legislation establishes a process that provides the dignity and respect that our Nation's first citizens deserve.\(^8\)

NAGPRA serves several purposes: it provides Native Americans\(^8\) a means of reclaiming affiliated human remains housed in the Nation's museum and university collections;\(^8\) it protects certain Native American burial sites from disturbance or destruction when they are inadvertently discovered;\(^8\) it restricts, to some degree, the amount of scientific research that can be accomplished on

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\(^8\) See generally Thomas, supra note 5.

\(^8\) Supra note 1.


\(^8\) Native Americans under NAGPRA include Native Americans, Native Hawaiians, and Alaskan Inuits.


collections;\textsuperscript{88} it requires an inventory to be made available to Native American groups of all skeletal remains and associated funerary objects curated by federally funded museums and universities;\textsuperscript{89} and it restricts the illegal trafficking of Native American remains for profit.\textsuperscript{90} In order for a successful ownership claim to be asserted under NAGPRA, the Native American group claiming an interest must be able to show a cultural affiliation to the individuals in the pertinent collection. Cultural affiliation is defined in section 2(1) as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."\textsuperscript{91} American institutions with affected remains in their collections had until November 16, 1995, to complete an inventory that was to identify possible affiliations to modern groups. Where such affiliation could not be identified through cursory, nondestructive inventories, the burden shifted to interested Native American groups to prove their affiliation "by a preponderance of the evidence based on geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral tradition, historical, or other relevant information or expert opinion."\textsuperscript{92} Despite the protections of human remains set in place by statute, these remains have been treated by universities and other institutions with great deference to the Native American groups.\textsuperscript{93} Often, remains of questionable affiliation are turned over to groups without requiring a sufficient showing under section 7(a)(4).\textsuperscript{94}

The Kennewick Man case has illustrated some substantial shortcomings of NAGPRA.\textsuperscript{95} The most significant of these shortcomings is the lack of legislation about what is to be done with

\textsuperscript{93}. See e.g., the repatriation policies of the University of Nebraska, at Apologies and a Historic Agreement, [link](http://www.unl.edu/pr/science/9398scifi.html) (last visited Oct. 10, 2002). See also Kathleen S. Fine-Dare, Disciplinary Renewal Out of National Disgrace: Native American Graves Protection and Repatriation Act Compliance in the Academy, 68 Radical Hist. Rev. 25 (1997).
\textsuperscript{94}. See the Kennewick Man case, supra note 74, where the U.S. Corps of Engineers' lackadaisical approach to the conduct of interested Native American groups may have resulted in the partial reburial of that significant and ultimately unaffiliated skeleton. 217 F. Supp.2d at 1122.
\textsuperscript{95}. See generally Wendy Crowther, Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA, 20 J. Land, Res. & Envtl. L. 269. See also, Interview with University of Tennessee at Knoxville anthropologist, Dr. Richard Jantz (National Public Radio broadcast, Sept. 26, 2000).
remains that are too old to be scientifically affiliated. There is no
clear temporal distinction in the criteria for establishing affiliation.
Such a problem is giving rise to claims by likely culturally distinct
groups to unaffiliated remains.96

This distinct shortcoming in the law is echoed in similar laws of
other countries. However, it is possible that a brief review of these
laws may provide insight into the issue of repatriation that can
represent the basis for changes to NAGPRA that will benefit all
parties involved. Another substantial shortcoming of NAGPRA, for
the Native American community, is that it only applies to remains
discovered on federal or tribal lands or curated in federally funded
institutions. This problem was an intentional inclusion in NAGPRA
to avoid the constitutional problems of takings of private property.97
However, it places extensive collections of private individuals outside
of any protection. This problem is unique to the United States among
the nations reviewed in this study. The extension of the protection to
private lands and individuals of human and other archaeological
remains, generally, also exists in the Bahamas, Jamaica, Palau, and
Malaysia.98

Despite these shortcomings, NAGPRA is arguably the most
concise statement on the law related to the treatment of in situ and
curated indigenous skeletal remains of all of the countries reviewed
here. Such clear statements make it easier for all interested parties to
understand their rights and roles in the contentious situations that
often occur over the disposition of indigenous human skeletal
remains.

B. South Africa

As with many other previously colonial nations, South Africa has
begun to take an interest in the disposition and protection of its
indigenous dead derived from archaeological contexts. Prior to 1999,
South African legislation dealing directly with human remains was

96. This is done via the oral history and folklore components of 25 U.S.C.
3005(a)(4), whereby Native American groups sometimes claim that their oral
traditions tell them that they have been here since time began and are thus
"affiliated" with very old remains. This may be in contradiction with archaeological
knowledge of population movements and the theories of the peopling of the New
World. See generally the Kennewick Man case, supra note 74.

97. See infra note 108.

98. See the Bahamas' Antiquities, Monuments and Museum Act of 1998, Part
II, § 8, Part III, § 10; The Jamaica National Heritage Trust Act of 1985, §§ 14, 20,
& 21; Palau's Regulations Regarding the Treatment and Disposition of Human
Remains and Burial Furnishings, Part II, § 2.1; Malaysia's Antiquities Act of 1976
(Act 168), Part II.
limited to the National Monuments Act (NMA). The legislation only provided protection for the graves of individuals who lived before 1652. The NMA further protected “all graves of people who died in wars up to 1914, and gravestones older than fifty years.”

Rather bizarre crenulations in the law left post-1652 graves (other than the graves of war dead) and their contents unprotected unless they were independently declared a national monument. Thus, as noted by Deacon, “[o]ddly, if a grave is marked by a gravestone older than fifty years, the gravestone is protected as a ‘historic site,’ but the human remains are not.”

This rather counterintuitive approach to grave protection changed in 1999 with the passage of the National Heritage Resources Act (NHRA). Such a drastic change in the law regarding the protection of old graves, as NHRA is, should be viewed in light of a general increase in the interest in protecting and establishing a national heritage in many post-colonial African nations at about the same time.

Unlike the NAGPRA legislation in the United States, the South African NHRA is not specifically aimed at the protection of indigenous graves. Rather, it is directed at the general protection of “heritage resources,” including archaeology, architecture, graves, and other items of “cultural significance.” There are, however, several parts of the NHRA that specifically address the disposition of excavated and curated human remains.

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102. Id.
104. Scott MacEachern notes substantial activity in the development of archaeology and national heritage construction in such nations as South Africa, Zimbabwe, Namibia, and Mozambique with the ending of colonial rule in the latter twentieth century. Indeed, MacEachern notes that, “[c]olonial ideologies that belittled African cultural achievements and distorted Africa’s history to political ends have gradually been discarded.” Scott MacEachern, Cultural Resource Management and Africanist Archaeology, 75 Antiquity 866, 868 (2001). Presumably, such a revolution in cultural awareness prompted a reexamination of the protections of cultural heritage such as those contained in the NMA.
105. “Cultural significance” is defined in § 2(vi) as things of “aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance.” See H.J. Deacon & Jeanette Deacon, Human Beginnings in South Africa: Uncovering the Secrets of the Stone Age 195–197 (Altamira Press 1999) for a review of the scope of the NHRA.
106. It is important to note that the NHRA does not repeal the NMA. The NMA
The lax protections of the NMA, discussed *supra*, have been bolstered by the NHRA that provides a blanket protection of all graves older than sixty years. Indeed, section 35(2) reserves all archaeological resources as state property and, if culturally significant, they are to be administered by heritage resource authorities. 107 This is certainly broader than the NAGPRA legislation, which is limited to federal property only. 108 Not only does the NHRA apply to archaeological resources yet to be excavated, but section 35(7)(a) also requires resources held by those other than museums or universities who did not obtain the resources pursuant to NHRA, NMA, or similar provincial legislation, to register a list of the items with a governmental heritage resources authority. 109 This provision reaches deeply into the private realm, presumably to identify the whereabouts of years' worth of looted materials. 110 Despite these protections, Deacon and Deacon point out that "[t]he descendants of the indigenous people... have no particular legal claim to [heritage objects and sites] and have an equal status regarding the protection of this heritage with any other interested party." 111 Thus, while new protections exist in South Africa, they do not empower the indigenous population in the protection of their heritage, but rather reduce remains to objects to be dealt with under property rights regimes. Although this lack of indigenous control (beyond anyone else's control) is present in the disposition of existing collections, as will be demonstrated, indigenous groups are not so powerless as to the protection of remains discovered in situ.

More specific to the topic of this study are the contents of section 36, the rules for burial grounds and graves. This section vests in SAHRA the authority to protect and conserve any burial grounds and graves not covered by another authority. 112 This section distinguishes between two types of burials: victims of conflict and other graves older than sixty years. 113 Section 36(3) protects both categories from still exists as protection for archaeological sites in South Africa, although it is somewhat duplicative of protections in the NHRA.

107. NHRA § 3(1)

108. Indeed, this limit is addressed in the statute at 25 U.S.C. 3002. Additionally, during Congressional debates on NAGPRA, Senator John McCain assured the Senate that "I believe that this bill has been crafted in such a way as to avoid any problems with unconstitutional takings under the fifth amendment." 136 Cong. Rec. S17, 176 daily ed. (Oct. 26, 1990) (statement of Sen. McCain).

109. Museums and universities are exempted under NHRA § 35(7)(b).

110. NHRA §35(8) allows the material identified in reports by private owners to stay in the hands of the private owners and his or her successors, subject to notice of succession to the South African Heritage Resources Agency (SAHRA).


112. NHRA §36(1).

113. *Id.*
destruction, damage, alteration, exhumation, removal, or even disturbance from above in the form of excavation equipment or metal detection. Such areas can only be disturbed, in any capacity, if SAHRA (or a provincial heritage resources authority) issues a permit for such work subject to the requirement of reasonable arrangements being in place for exhumation and reburial. More importantly, section 36(5) mandates that, prior to the issuance of a permit, SAHRA must ensure that the applicant for the permit has:

(a) made a concerted effort to contact and consult communities and individuals who by tradition have an interest in such grave or burial ground; and
(b) reached arrangements with such communities and individuals regarding the future of such grave or burial ground.

This section gives indigenous groups a unique amount of control over the disposition of the remains of their ancestors, discovered in situ, that they do not have with remains that have already been excavated.

Finally, NHRA section 36(6) requires notice to SAHRA and local law enforcement authorities if an unmarked burial is discovered in the course of development. The NHRA requires an identification investigation of the remains to occur in order to decide the ultimate disposition of the find.

With respect to the remains of “victims of conflict,” SAHRA is charged with further duties. “Victims of conflict” is defined in section 2(xviii) as:

(a) persons who died in any area now included in the Republic as a result of any war or conflict . . . , but excluding victims of conflict covered by the Commonwealth War Graves Act, 1992;
(b) members of the forces of Great Britain and the former British Empire who died in active service in any area now included in the Republic prior to 4 August 1914;
(c) persons who, during the Anglo-Boer War (1899–1902) were removed as prisoners of war from any area now included in the Republic to any place outside South Africa and who died there; and
(d) certain persons who died in the ‘liberation struggle’ . . . in areas included in the Republic as well as outside the Republic.

114. NHRA § 36(3)(a) & (b).
115. NHRA § 36(3)(c).
116. NHRA § 36(4).
117. NHRA § 36(5).
118. NHRA § 36(6).
For these individuals, not only is SAHRA charged with protecting their final resting places as discussed supra, but they are also responsible for "assist[ing] other State Departments in identifying graves in a foreign country of victims of conflict connected with the liberation struggle." Following such identification, SAHRA, with the permission of the next of kin, "may re-inter the remains of that person in a prominent place in the capital of the Republic."

While the NHRA appears to provide more substantial protection than the United States' NAGPRA legislation with respect to in situ remains, NHRA's provisions concerning the repatriation of remains curated in museums and institutions is a bit more vague than those of NAGPRA and the National Museum of the American Indian Act (NMAIA). Section 41(1) reads:

> When a community or body with a bona fide interest makes a claim for the restitution of a movable heritage resource which is part of the national estate and is held by or curated in a publicly funded institution, the institution concerned must enter into a process of negotiation with the claimants regarding the future of the resource.

Although this section does not directly address human remains, it appears that, through a four-step process beginning with section 41(1), interested groups can make a NAGPRA-like claim to such remains or other materials. From section 41(1), one must look to section 2(xvi) to find the definition of a "heritage resource." A "heritage resource" is defined as "any place or object of cultural significance." "Object" is defined in section 2(xxix) as:

> any movable property of cultural significance which may be protected in terms of this Act including
> (a) any archaeological artefact;
> (b) palaeontological and rare geological specimens;
> (c) meteorites; and
> (d) other objects referred to in section 3.

Among the "other objects referred to in section 3" are:

> graves and burial grounds, including
> (i) ancestral graves;

119. NHRA § 36(9).
120. Supra note 2. This is the U.S. legislation that deals with the Smithsonian Institution's collections, to which NAGPRA does not apply.
121. NHRA § 41(1).
122. NHRA § 2(xvi)
123. NHRA § 2(xxix)(d)
(ii) royal graves of traditional leaders;
(iii) graves of victims of conflict;
(iv) graves of individuals designated by the Minister by notice in the Gazette;
(v) historical graves and cemeteries; and
(vi) other human remains which are not covered in terms of the Human Tissue Act, 1983.\textsuperscript{124}

Thus, from section 41(1), through sections 2(xvi) and 2(xxix), to section 3(2)(g), it appears that South Africa’s NHRA allows for repatriation of remains and objects of cultural patrimony in much the same way as the United States’ NAGPRA legislation does. However, repatriation is not mandatory under NHRA, only negotiation for repatriation. Interestingly, although NHRA requires registration of privately held resources and protects graves on private property, like NAGPRA, it has no power to repatriate items from private possessors.

C. New Zealand

The interest by New Zealand’s indigenous population, the Maori, in the repatriation of the remains of their ancestors has surfaced much more recently than similar movements in Australia and the United States. In the early to mid-1990s, a “rise in Maori ethnic consciousness”\textsuperscript{125} forced the New Zealand government to reassess its treatment of its indigenous population. Cultural ties of modern Maori people (when considered as a culturally homogenous group) to the remains currently held in museums around the world as well as those potentially unearthed during construction or other excavations are temporally closer than many of those in the United States and Australia.\textsuperscript{126} Much of the repatriation activity over the past five years by the Maori has focused on the return of moko mokai\textsuperscript{127} from

\begin{itemize}
\item \textsuperscript{124} NHRA § 3(2)(g)
\item \textsuperscript{125} de Blij & Muller, \textit{supra}, note 100, at 525.
\item \textsuperscript{126} This is because the culturally distinct Maori arrived on New Zealand circa A.D. 1000 as compared to the culturally unidentifiable (at least in terms of analogues to modern peoples) populations of the United States (circa 13,000 BP) and Australia (circa 40,000 BP). For recent radiocarbon dating information on old New World and Pacific sites, see Thomas D. Dillehay, \textit{The Settlement of the Americas: A New Prehistory} 295–321 (Basic Books 2000) and Geoffrey Irwin, \textit{The Prehistoric Exploration and Colonisation of the Pacific} 5, 78 (Cambridge Univ. Press 1992). “BP” here refers to years before present, where present is defined by the radiocarbon present of A.D. 1950. \textit{See generally} Minze Stuiver & Paula J. Reimer, \textit{CALIB} 4.1 \textit{Manual}, which is \textit{available at} \url{http://depts.washington.edu/qil/calib/manual/} (last visited Oct. 9, 2002).
\item \textsuperscript{127} This is the Maori term for preserved tattooed human heads.
\end{itemize}
museums abroad. However, more recent efforts have resulted in the return of skeletal remains to New Zealand.

With respect to the disposition of human remains of Maori affiliation within New Zealand, the situation is somewhat different. The law that governs such materials is the Historic Places Act (HPA). The HPA is more powerful than the United States' federal legislation that protects areas of historic significance because it applies its protections equally to Crown property as well as private property. However, in contrast to NAGPRA that protects things regardless of age, New Zealand's HPA only protects archaeological sites "associated with human activity that occurred before 1900." It is likely that this 100-plus-year gap in protection, at least of human remains, is covered by the other acts mentioned above. At a minimum, it seems that Maori could assert property interests in remains positively identified to be of Maori origin through the Treaty of Waitangi. The Treaty of Waitangi, still partially in force, was

128. Henare Appeals to UK Collectors to Return Heads, supra note 3. As stated by Mokomokai Education Trust director Dalvanius Prime, "What I find very hard [to believe] is that mokomokai have been taken from all the museums in Australia, but skeletal remains have been left behind because there seems to be arguments about provenance." Maori Remains Handed Over for Return Home, The Daily News (New Zealand), Apr. 18, 2000, 2000 WL 7323992.


130. There are a few provisions of the Antiquities Act, the Burial and Cremation Act, the Coroner's Act, and the Reserves Act that may be implicated in certain situations. Harry Allen, Protecting Historic Places in New Zealand (Dept. of Anthropology, Univ. of Auckland 1998); personal communication from Dr. Harry Allen, Professor of Anthropology at the University of Auckland (Sept. 19, 2002). Such instances are noted, where relevant.


132. It should be borne in mind that, although New Zealand was declared an independent nation from Great Britain in 1907, public holdings and institutions continue to be referred to as "Crown" holdings and institutions.

133. HPA § 2(a)(i). New Zealand's legislation is unique in this respect. All of the other nations discussed in this study have a relative time constraint, in that they are not attached to a fixed date, but rather the age of the thing being protected. Indeed, NAGPRA has no such age restriction. It protects remains buried yesterday just the same as those buried 500 years ago.

134. Supra note 130.

135. At least some Maori groups seem willing to participate in the scientific identification of remains that would be necessary to demonstrate affiliation under the Treaty. See generally, DNA Databank Plan for Returned Heads, The Daily News (New Zealand), Apr. 25, 2000, 2000 WL 7324221. However, the rights granted to the Maori under the Treaty have been substantially scaled back over the
signed by the British Crown and various Maori tribes in 1840. The Treaty established British sovereignty over all New Zealand, but retained to the Maori "full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess ...." Human remains may, arguably, fall under the "other properties" portion of the Treaty of Waitangi. A literal translation of the Maori version of the Treaty seems to give stronger support to this notion. The literal translation reads: "The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages, and all their treasures." Human remains may, arguably, fall under the "other properties" portion of the Treaty of Waitangi. A literal translation of the Maori version of the Treaty seems to give stronger support to this notion. The literal translation reads: "The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages, and all their treasures." In situ human (and archaeological) remains are protected from destruction, damage, or modification before archaeological and Maori values of the site can be determined. Where an application for the destruction or alteration of an archaeological site is submitted to the New Zealand Historic Places Trust, and the site is considered to be of Maori interest, "the Trust shall refer that application to the Maori Heritage Council to make such recommendations as the Council may consider appropriate." Such requirements vest substantial power regarding the protection of in situ remains in the Maori, a factor not always present in current United States legislation. This also applies to the conduct of legitimate archaeological investigations. Despite the broad reach of the Maori voice in the protection of relevant in situ archaeological remains, there is no legislation in New Zealand that provides for the repatriation of human remains or other archaeologically derived materials from any museum to affiliated Maori groups. Although there is tacit evidence that museums in New Zealand and a half. See generally de Blij & Muller, supra note 100, at 525. 136. Through various acts, such as the Treaty of Waitangi Act and the Treaty of Waitangi Amendment Act, this treaty remains a significant legal instrument in the protection of Maori property rights today. Personal communication with Dr. Harry Allen (Dec. 15, 2002). 137. Treaty of Waitangi, May 13, 1840, art. 2, N.Z.-Maori, available at http://www.govt.nz/aboutnz/treaty.php3 (last visited Sept. 21, 2002). 138. Id. The original Maori reads: "Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu - ki nga tangata katoa o Nu Tirani te tino rangatiratanga a ratou wenua o ratou kainga me o ratou taonga katoa." Id. From the Maori original, the term "taonga" or "treasures" "refers to all dimensions of a tribal group's estate, material and non-material - heirlooms, wahi tapu (sacred places), ancestral lore and whakapapa (genealogies), etc." Id. This elaboration on "taonga" from the original Maori version seems to provide a clearer link for the Maori to claims for human remains than simply using the term "other properties." 139. HPA § 11(2). 140. HPA § 11(2)(c) 141. HPA § 14(3) 142. HPA § 18(3) 143. Person communication with Dr. Harry Allen (Sept. 19, 2002).
Zealand will respect any Maori request for the return of such material, the New Zealand government should incorporate a formal statement of this policy into the HPA or the Antiquities Act out of simple respect for the Maori people as well as to establish clear legal standards for dealing with such claims.

D. Australia

In much the same atmosphere as NAGPRA was passed in the United States in 1990, the Australian Parliament passed the Aboriginal and Torres Strait Islander Heritage Protection Act of 1984 (ATSIHPA). The sentiments of the Aboriginal people, generally, include a desire for research on Aboriginal remains to cease and for a return of curated collections to the indigenous communities. This long-held assertion for the return of Aboriginal remains has not wavered over the past twenty or so years, resulting in the return of collections of ancient remains.

As is the case in NAGPRA, the ATSIHPA has no temporal limit on protections of graves and curated museum collections. This similarity marks a significant encroachment onto the understanding and interpretation of all human history, as the remains of individuals potentially as old as 40,000 years are subject to repatriation. Successful claims have already been asserted by Aboriginal groups to remains dated to 15,000 years old. Such claims to remains that are 40,000 years old begin to reach into the realm of paleoanthropology, thus putting Aboriginal property claims on the order of modern Europeans claiming repatriation rights to Neandertal skeletal material.

144. Id. See also Milne, supra note 129.
145. NAGPRA was passed amidst pressure and support from the indigenous community and opposition from the archaeological community. See Thomas, supra note 5 at 209–221.
147. For both Australian and United States perspectives on repatriation at about the time of the passing of the ATSIHPA law, see generally, Webb, supra note 3; Larry J. Zimmerman, Webb on Reburial: A North American Perspective, 61 Antiquity 462 (1987).
148. Webb, supra note 3, at 293.
149. See e.g., Pardoe supra note 40. See also Sandra Bowdler, Unquiet Slumbers: The Return of the Kow Swamp Burials, 66 Antiquity 103 (1992).
150. As in supra note 124, this date of 40,000 years is generally accepted as the latest date by which the Australian continent was peopled. See Irwin, supra note 126.
152. This is based on the general agreement that Neandertals vanished as a species circa 30,000 BP. Christopher Stringer & Clive Gamble, In Search of the
This claim to ancient remains is based largely on Aboriginal religious beliefs that their people have inhabited the continent of Australia since the Dreamtime, and thus have a cultural claim to any human remains, regardless of age. The Aboriginal community is generally unimpressed "by assertions that 'some heritage is universal property,'" thus rejecting scientific beliefs that ancient remains should be studied as belonging to a broader community of all humanity as part of our common heritage as Homo sapiens.

It was within this social atmosphere in 1984 that Australia passed ATSIHPA. ATSIHPA works much like NAGPRA in that it is a federal law that preempts any state or territory law on the subject of Aboriginal heritage protection. Although never overtly referring to the "protection" and "repatriation" of Aboriginal human remains, ATSIHPA provides a substantial range of protection for such materials from "injury or desecration" throughout the Commonwealth. This protection occurs via several provisions of ATSIHPA, namely: sections 3(1), 12, 20, and 21. Section 12 deals with the protection of "significant Aboriginal objects." "Significant Aboriginal object" is defined in section 3(1) as an object (including Aboriginal remains) of particular significance to Aboriginals in accordance with Aboriginal tradition. "Aboriginal remains," also defined in section 3(1):

155. The Aboriginal people have generally referred to such investigations as "[1]earning about the past from a 'Whitefella perspective.'” Taylor, supra note 14, at 6. Such research is conducted outside of the scope of Aboriginal cultural beliefs and is regarded by that community as uninformed.
156. Taylor, supra note 14, at 12.
157. ATSIHPA § 12.
158. And specifically, for the State of Victoria, sections 21A, 21K, 21L, 21P, 21Q, and 21X. The law contains provisions for Victoria because that state did away with its own laws on this issue after the passage of ATSIHPA in 1984. The federal law then had to be amended to account for local idiosyncracies in Victoria, resulting in the sections listed above. Personal communication from Dr. Annie Ross, School of Natural and Rural Systems Management, Univ. Of Queensland, Gatton College (Jan. 8, 2003).
159. ATSIHPA § 3(1).
means the whole or part of the bodily remains of an Aboriginal, but does not include:
(a) a body or remains of a body;
(i) buried in accordance with the law of a State or Territory; or
(ii) buried in land that is, in accordance with Aboriginal tradition, used or recognized as a burial ground . . .”

For purposes of clarification, “Aboriginal” is defined in §3(1) as, “a member of the Aboriginal race of Australia, and includes a descendant of the indigenous inhabitants of the Torres Strait Islands.”

Under section 12, in situ or curated Aboriginal remains are eligible for a “declaration” if they are in danger of “injury or desecration.” Such a declaration provides for “the protection and preservation of the object or objects from injury or desecration” and may provide for the delivery of the remains to “an Aboriginal . . . entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition.” A declaration will only be made by the Minister after receipt of an application “made orally or in writing by or on behalf of an Aboriginal or a group of Aboriginals seeking the preservation or protection of a specified object or class of objects from injury or desecration.” The issuance of such a declaration is also subject to a consideration of non-Aboriginal interests in the object(s). In terms of “injury or desecration,” section 3(2)(b) defines such mistreatment of an object as an occasion when “it is used or treated in a manner inconsistent with Aboriginal tradition.” Under the objections to scientific research discussed supra by the Aboriginal community, it is not a substantial leap to expect declarations to issue against museums or other institutions curating or excavating Aboriginal remains under the guise that such activity is “inconsistent with Aboriginal tradition.”

Under section 20, the inadvertent discovery of remains suspected to be Aboriginal is covered. These materials are protected by a requirement of reporting the discovery to the Minister and a requirement that the Minister consult with relevant Aboriginal

160. Id.
161. ATSIHPA § 12(3)(b).
162. ATSIHPA § 12(4)(b).
163. ATSIHPA § 12(1)(a).
164. ATSIHPA § 12(1)(c). These interests might include the objections of scientists who would like an opportunity to study the remains.
165. ATSIHPA § 3(2)(b).
166. Id. Thus, such vague language in the legislation constitutes a substantial threat to scientific study.
167. ATSIHPA § 20(1).
Section 21 covers the ultimate disposition of remains delivered to the Minister. Such remains are to be returned "to an Aboriginal or Aboriginals entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition." In instances where no such return is possible, the remains are to be dealt with "in accordance with any reasonable directions of an Aboriginal or Aboriginals referred to in paragraph (a);" or in the event that no such people exist, the remains are to be transferred "to a prescribed authority for safekeeping."

The regulations of human remains in Victoria largely follow the provisions for the rest of the Commonwealth, discussed supra. However, section 21L provides for the taking of such remains from private individuals. Local Magistrates also have relatively broad powers to enter and search for remains. Section 21X of ATSIHPA specifically and explicitly addresses the repatriation of Aboriginal remains from "a university, museum, or other institution." This section, much more broad in scope than the United States' NAGPRA, does not require any showing of cultural affiliation in order to reclaim remains so held. The only restriction is a spatial one. The remains must have been found or have come from the area around the claiming Aboriginal community. Like NAGPRA, there is also no mention of any temporal restriction to such claims.

E. Canada

Canada has not escaped the worldwide surge of indigenous civil rights. Confrontations between the archaeological and indigenous communities in Canada have occurred much the same as in the

168. ATSIHPA § 20(2), subject to a determination of Aboriginal affiliation.
169. These remains would, presumably, be delivered by way of both inadvertent discovery and as a result of a declaration.
170. ATSIHPA § 21(1)(a).
171. ATSIHPA § 21(1)(b). This is referring to § 21(1)(a).
172. ATSIHPA § 21(1)(c). Both sections 21(1)(b) and (c) create problems substantially similar to those in NAGPRA over the disposition of unaffiliated remains.
173. ATSIHPA, Part II.
174. Some measure of compensation is to be afforded the previous private owner under ATSIHPA § 21M.
175. ATSIHPA § 21S.
176. ATSIHPA § 21(x).
177. ATSIHPA § 3. There are also no specific range limits to this spatial limit.
178. In other words, there is no restriction on a modern community asserting rights to an ancient, possibly culturally distinct, collection.
previously discussed nations. The anger among the First Nations' communities regarding the disposition of skeletal remains has been directed at the archaeological community, developers, and the government. Baikie points out the unjust discrepancy between these interested groups in Canada:

A few years back, skeletal remains of some American soldiers were found in southern Canada. Upon their discovery, a full military burial was planned and initiated. Why are Aboriginal remains held in storage or displayed, and what is the purpose of this? What would the reaction be if Inuit were to come to St. John's, go down to one of the local burial grounds, and dig up some remains, bring them back to northern Labrador and display some of the skeletons and put the rest in storage in the name of archaeological research?

Although some of the confrontations and negotiations between the First Nations communities and archaeologists have ultimately resulted in the reburial of skeletal remains, Canada's indigenous peoples have a reputation for being much more interested in involvement and in benefitting from Western scientific analyses of their ancestors' remains than those groups in the United States and Australia.

Canada presents a unique legal situation in terms of laws relating to the protection and repatriation of indigenous human skeletal remains. There is no national law governing such remains in

179. See generally Baikie, supra note 3.
180. First Nations, and sometimes First Peoples, are used by indigenous groups and the Canadian government (Constitution Act §35(2)) to refer to the Indian and Inuit groups that originally inhabited Canada and their descendants. Catherine Bell, Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate, 17 Am. Indian L. Rev. 457, 522 n.3 (1992).
181. See Baikie supra note 3 for feelings on the archaeological community and the government; see also Brian E. Spurling & Ernest G. Walker, The Fort Qu'Appelle Burial Site: A Canadian Controversy, 14 J. of Field Arch. 481 (1987) for well-deserved anger directed at developers. However, as Neal Ferris rightly points out, Canada's archaeological community has had comparatively better relations with their indigenous groups than have U.S. archaeologists. Personal communication with Dr. Neal Ferris, Ontario Ministry of Citizenship, Culture, & Recreation (Jan. 3, 2003).
182. Baikie, supra note 3, at 11.
184. See generally Moira Farr, Back to the Grave, University Affairs 10 (May 2002). See also Heather McKillop & Lawrence Jackson, Discovery and Excavations at the Poole-Rose Ossuary, 91–1 Arch Notes 9 (1991).
Neal Ferris, an archaeologist in Ontario’s Ministry of Culture, suggests that this absence of federal law “is in part due to jurisdiction issues (provinces like states, are responsible for heritage off federal lands) . . . partly due to the lack of willingness [of the federal government] to grapple with such a complex issue, and partly due to major research institutions . . . being proactive and developing their own repatriation policies in [t]he absence of legislation.” Part of this void in legislation is also filled by ethical mandates of national professional organizations such as the Canadian Archaeological Association and the Canadian Museums Association.

Many of the individual provinces and territories have developed their own management legislation to deal with human remains. It is outside of the scope of this paper to undertake a province-by-province examination of legislation dealing with the protection and repatriation of indigenous skeletal remains.

The absence of some minimum national standard is disconcerting to both the indigenous and archaeological communities. Out of respect for the First Nations, it is past time for Canada to promulgate federal legislation aimed at the protection of indigenous skeletal remains. The lack of certainty about the outcome of a particular situation makes it virtually impossible for these communities to effectively deal with situations as they arise. Indeed, Ferris notes that “[i]t is . . . generally less than satisfying to either archaeologists or First Nations . . . how an individual case of burial discovery and disposition of those remains goes is as wide a spectrum as you can imagine.” As asserted by Baikie, “[b]oth federal and provincial legislation should change to enhance [indigenous] involvement in archaeology.” At an absolute minimum, federal legislation is needed to establish a universal minimum standard for dealing with

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186. Ferris, supra note 185.

187. McAleese, supra note 183, at 46.

188. Alberta is the only one to have a NAGPRA-like law devoted specifically to the purpose of repatriating sacred objects. Additionally, though some of the laws deal with in situ or newly discovered burials (e.g., Ontario’s Cemeteries Act), few of them deal with repatriation issues. Ferris, supra note 185. See also Leclair & Ferris, supra note 185.

189. See Baikie, supra note 3.

190. Ferris, supra note 185.

191. E.g., Spurling & Walker, supra note 181.

192. Ferris, supra note 185.

repatriation issues so as to avoid protracted legal battles between scientists and First Nations communities.

V. INTERNATIONAL ORGANIZATION PROTECTIONS OF HUMAN REMAINS

In contrast to the legislative activity in many of the previously colonial nations, there has been little attention paid to the disposition of in situ or curated human remains in the area of international law and policy. Five instruments have been created over the past thirty years in the international realm that affect the disposition of human remains, some more directly than others. The United Nations Educational, Scientific and Cultural Organization (UNESCO) has created two conventions that tangentially and indirectly address the issue of human remains: the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1) in 1970 and the Convention Concerning the Protection of the World Cultural and National Heritage (World Heritage) in 1972. The United Nations’ Working Group on Indigenous Populations has been in the process of drafting a declaration since 1985 that, in part, directly addresses the issue of the disposition of human remains. This document, the United Nations Draft Declaration on the Rights of Indigenous Peoples (hereafter UN Draft Declaration), first appeared for consideration by interested groups in 1993, but has yet to be adopted. The International Institute for the Unification of Private Law (UNIDROIT) also created a convention that deals tangentially and indirectly with the issue of human remains: the Convention on Stolen or Illegally Exported Cultural Objects in 1995. Finally, the archaeological community has also chimed in on the issue of the disposition of human remains through an international organization, the World Archaeological Congress (WAC). Although the WAC’s Vermillion Accord on Human Remains, adopted by that organization in 1989, does not have the power of law in any nation, it may serve as a reasonable model for future international legal bodies that desire to address this issue.

197. Id. at 210.
198. 34 I.L.M. 1322.
A. UNESCO Conventions

UNESCO is widely held as the primary authority on cultural policy and legal issues on the international scale. However, in the area of protecting items of cultural heritage in the international arena, UNESCO is largely seen as a failure. Through two conventions aimed at the protection of cultural items, UNESCO has failed to stem the tide of international illicit trade in art and antiquities.

Both of UNESCO's conventions, the 1970 UNESCO and the 1972 World Heritage, only tangentially (if at all) cover such items as human remains. Both of these conventions attempt to use public international law to accomplish their protection goals. The conventions set up an enforcement framework, but then rely on individual signatory nations for the actual enforcement.

UNESCO 1 may apply to human remains as "products of archaeological excavations (regular or clandestine) or of archaeological discoveries." Even if this component of UNESCO 1 were found to extend to human remains, much of the repatriation problem would remain unaffected. This is due, in part, to the fact that UNESCO 1 only applies to items exported or imported and not to items moved intranationally, where the vast majority of human remains are disturbed or curated. Another problem with UNESCO 1 is that many of the art and antiquities importing nations are not parties to the convention. Further, UNESCO 1 relies on the signatory nations to adopt enforcement legislation. Such legislation was adopted in the United States (a signatory nation) in the form of the Cultural Property Implementation Act and has been regarded by commentators as a virtually toothless law which was the result of


202. Supra note 194.

203. Supra note 195.

204. Lenzner, supra note 201.

205. Id. at 476.

206. UNESCO 1, art. 1, 823 U.N.T.S. at 231.

207. There have yet to be any cases addressing this question of application.

208. UNESCO 1, art. 2, 823 U.N.T.S. at 232.


eight years of strong lobbying from the art dealing community.\textsuperscript{211} Additionally, UNESCO 1 only applies to "stolen" property and then only to property stolen "that has been inventoried and is appurtenant to a foreign museum, religious or secular institution or public monument."\textsuperscript{212} Because of these shortcomings and because UNESCO 1 was largely aimed at the illegal trafficking of art, this document proves relatively powerless to protect human remains. On a more positive note, at least one source\textsuperscript{213} suggests that the UNESCO conventions and other activities were the inspiration for the Aboriginal and Torres Strait Islander Heritage Protection Act in Australia.

World Heritage also only tangentially, if at all, applies to the protection of human remains. Although aimed more directly at archaeological problems than UNESCO 1, World Heritage only urges signatory nations to protect cultural resources within their own borders.\textsuperscript{214} World Heritage does not mandate such protection as a condition of accession to the Convention, nor does it have a mechanism for enforcement of this aspirational mandate. World Heritage only provides for protection under its own terms for sites listed on the World Heritage List,\textsuperscript{215} which covers 563 cultural sites in the 125 State Parties.\textsuperscript{216} Even with this protection, the convention does not specifically address the proper treatment of human remains. Such materials will only be protected in situ as part of a World Heritage site, and no discussion of excavated remains' disposition exists.

\textbf{B. UNIDROIT Convention}

In light of the rather weak protections provided through the UNESCO conventions, UNIDROIT, in 1995, sought to fill in the lacunae left by UNESCO, through which substantial amounts of art and antiquities were still leaking.\textsuperscript{217} The Convention on Stolen or Illegally Exported Cultural Objects\textsuperscript{218} is also limited in its scope of protection of art and antiquities and even more limited with respect

\begin{itemize}
    \item \textsuperscript{211} Lenzner, supra note 201, at 477 n.78.
    \item \textsuperscript{212} Monique Olivier, The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property, 26 Golden Gate U. L. Rev. 627, 648 (1996).
    \item \textsuperscript{213} Museums Australia, supra note 200.
    \item \textsuperscript{214} See generally 1037 U.N.T.S. 151.
    \item \textsuperscript{215} The World Heritage List, available at http://whc.unesco.org/heritage.htm (last visited Sept. 27, 2002).
    \item \textsuperscript{216} The United States, South Africa, New Zealand, Australia, and Canada are all parties to this convention.
    \item \textsuperscript{217} Olivier, supra note 212, at 655.
    \item \textsuperscript{218} Supra note 198.
\end{itemize}
to human remains. Improvements over UNESCO 1 include: the use of private law, opening up the field of possible claimants beyond just the signatory nations themselves;\(^2^{19}\) also the law of the injured nation as to repatriation of stolen property applies in disputes. Both of these attributes make the UNIDROIT convention substantially more powerful than UNESCO’s attempts. Primarily due to the sovereignty problem of one nation subjecting itself to the law of another in disputes, far fewer nations have become signatories to this convention. Indeed, none of the nations discussed in this paper are signatories to the UNIDROIT convention. One commentator has noted that, were the United States to become a party, “the United States [would] have to enforce all foreign export and cultural property laws.”\(^2^{20}\)

The UNIDROIT convention recognizes the rights of indigenous groups to reclaim cultural objects when the item is of traditional or ritual importance,\(^2^{21}\) a factor which may cover human remains, though this is not directly addressed. As with UNESCO 1, the UNIDROIT convention only applies to illegally exported objects,\(^2^{22}\) substantially limiting the scope of the protection. Further limiting this convention is its application only to materials stolen after 1995,\(^2^{23}\) thus placing most collections out of indigenous peoples’ reach. The most this convention can do with respect to human remains is to provide for restitution of such materials illegally exported from a signatory nation to a signatory nation after 1995, subject to claim prescription limitations.\(^2^{24}\)

C. UN Draft Declaration

The UN Draft Declaration on the Rights of Indigenous Peoples appears to include the first substantial attempt to remedy the oversights of the UNESCO and UNIDROIT conventions from an international law-making body.

Although no mention of the importance of cultural heritage occurs in the “findings” section of the UN Draft Declaration, there is no vagueness in Articles 12 and 13 as to the import the United Nations

\(^{219}\). Olivier, supra note 212, at 656; 34 I.L.M. at 1323.
\(^{220}\). Olivier, supra note 212, at 663.
\(^{221}\). UNIDROIT, art. 5(3), 34 I.L.M. at 1324, 1333.
\(^{222}\). UNIDROIT, art. 1, 34 I.L.M. at 1331.
\(^{223}\). UNIDROIT, art. 10, 34 I.L.M. at 1334–35.
\(^{224}\). The whole prospect of protection under this convention begins to fade when one considers that only 22 nations signed the convention, few of which are major import nations, all of which are major sources of illicitly sold art and antiquities. The list of signatory nations can be found at http://www.unidroit.org/english/implement/i-95.htm (last visited Sept. 26, 2002).
places on such issues. Article 12 clearly mandates that indigenous peoples in signatory nations should have:

the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, . . . as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13 further adds that such peoples should have “the right to the repatriation of human remains.” Despite the fact that Articles 37 through 41 place the onus of effectuating the provisions of the UN Draft Declaration on the signatory nations (as do the UNESCO conventions), Article 13 explicitly mandates that those nations “take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.” 225 These provisions of the UN Draft Declaration represent a significant interest, not heretofore seen, in the disposition of human skeletal remains, in situ or curated in institutions. This is a long overdue recognition of the importance of respecting the wishes of affiliated groups as to the disposition of their ancestors’ remains. This is not to suggest that the UN Draft Declaration does or should apply to unaffiliated human remains. Determinations of cultural affiliation will have to be worked out among politicians, experts, and indigenous groups in each nation. 226

There are a few shortcomings to the UN Draft Declaration. The primary problem is that it is just a draft. The preliminary text of the declaration has existed since 1985. 227 Although it was adopted by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1994, it has been bogged down in debates by individual nations and “elaborations” by the Working Group of the Commission on Human Rights since 1995. 228 Despite the fact that “the draft is being prepared for consideration and adoption by the United Nations General Assembly during the International Decade of

225. It is possible that Article 29 holds yet more protections that may affect human remains through the suggestion that indigenous peoples should have the right to control their sciences, including human and genetic resources.

226. Such determinations of affiliation are necessary to ensure that science is not substantially injured in its study of unaffiliated remains and to ensure that the wishes of the dead are adequately protected.


228. Id. at 260. See also Working Group on Draft Declaration, at http://www.unhchr.ch/indigenous/ind_wgdd.htm (last visited Sept. 26, 2002).
the World’s Indigenous People”\textsuperscript{229} (1995–2004), it does not appear that the adoption will meet that deadline. Much of the opposition to the draft revolves around “the recognition of collective rights and self-determination implicit in the opening phrase of each article.”\textsuperscript{230} Recognizing shortcomings such as this, the International Law Association’s Committee on Cultural Heritage Law recommended, in 2000, the drafting of an individual declaration on the protection and repatriation of cultural heritage, separate from the UN Draft Declaration.\textsuperscript{231} Such a separation of interests seems especially prudent at this point considering the protracted debates and negotiations that have occurred since 1985. Such a declaration could consist of simply lifting out Articles 12, 13, 29 and the enforcement provisions of Articles 37 through 41 and placing them in a separate document and eliminating the “self-determination” references.\textsuperscript{232} Such language could be replaced with language allowing a signatory nation to assert such rights on behalf of indigenous peoples within its borders. Although this somewhat undermines the aims of the UN Draft Declaration to provide equality to indigenous peoples, it will allow for an expeditious adoption of the provisions of that declaration that deal with often endangered sites or collections while reserving the protection of equality rights, generally, for the passage of the entire UN Draft Declaration. Additionally, creating an instrument solely for the purpose of dealing with human remains will help to avoid much of the opposition to previous conventions on art and antiquities protection by the art dealing community.

\textbf{D. Vermillion Accord on Human Remains}

Following a suggestion by the International Law Association’s Committee on Cultural Heritage Law,\textsuperscript{233} another avenue for independently addressing the problems of drafting national or international laws dealing with repatriation may be to consider codes of ethics of professional organizations. The Vermillion Accord on Human Remains (Vermillion Accord), created by the World Archaeological Congress (WAC), represents the only international agreement among the anthropological and indigenous communities on the issue of human remains. Adopted by the WAC in 1989,\textsuperscript{234} the Vermillion Accord centralizes respect for the dead and urges groups

\textsuperscript{229} Working Group, supra note 228.
\textsuperscript{230} Burger, supra note 196, at 210.
\textsuperscript{231} International Law Association Committee, supra note 200, at 4.
\textsuperscript{232} E.g., Burger, supra note 196, at 211 (“Indigenous peoples have the rights .......

\textsuperscript{233} Supra note 200, at 5.
\textsuperscript{234} Supra note 199.
or individuals interested in studying human remains to consult with indigenous communities prior to undertaking such research.\textsuperscript{235} Additionally, researchers should be able to demonstrate the value of their research to indigenous communities prior to undertaking investigations.\textsuperscript{236} However, Article 2 only requires conforming to the wishes of the dead "when they are known or can be reasonably inferred," thus returning to the question of affiliation discussed \textit{supra}. Such a declaration adopted by an executive committee with twenty representatives of the archaeological community from all regions of the world and eight indigenous peoples\textsuperscript{237} should be afforded substantial consideration as a model agreement between stereotypically opposing parties when attempting to draft legislation regarding the disposition of human remains.

VI. DISCUSSION

\textbf{A. Can There be International Consensus on the Treatment of Archaeologically Derived Skeletal Remains?}

The preceding examination of individual nations' laws on the treatment of human remains illustrates a general similarity among the purposes and scope of these laws. Such similarities belie an underlying commonality among these nations: an interest in the protection of the archaeological record to the extent possible under the laws of each nation with an overriding desire to provide some measure of control over affiliated remains to relevant indigenous groups. Under this generalization of human remains laws, several shortcomings of individual laws should be noted as requiring attention in the near future and still other positive attributes need to be highlighted in order that they may be incorporated, where possible, into existing or newly drafted laws.

The absence of a temporal limit to claims of indigenous affiliation in the United States and Australia represents a substantial source of tension between the scientific and indigenous communities in these nations.\textsuperscript{238} Some standard should be developed that applies both archaeological techniques and indigenous beliefs to the determination of a culturally based temporal limit to repatriation claims, beyond which interested modern indigenous groups cannot be said to

\begin{itemize}
\item \textsuperscript{235} \textit{Supra} note 199, art. 5. Unfortunately, because the Vermillion Accord is not law, it cannot mandate such activity, but it can urge interested parties in the direction of cooperation.
\item \textsuperscript{236} \textit{Supra} note 199, art. 4.
\item \textsuperscript{237} \textsc{WAC Organisation}, which is \textit{available at} http://www.wac.uct.ac.za/constitution/wacorg.html (last visited Sept. 24, 2002).
\item \textsuperscript{238} \textit{E.g.}, Downey, \textit{supra} note 73; Mulvaney, \textit{supra} note 151, at 17.
\end{itemize}
represent the extinct culture embodied by the remains in question. This limit may have to be region specific, based on the amount of time cultural continuity with the modern groups and past groups is known to extend. A concise application of a similar approach has recently been applied in the United States in the Kennewick Man case, where the United States District Court Judge found there to be no evidence of a cultural connection between the extant groups in the region and the circa 9,200-year-old remains, thus refusing the claimant tribes’ assertions that they knew the correct way to handle the materials.239 The well-reasoned decision in this case covers concepts of cultural affiliation in a practical, legal context that could be legislatively adapted for application to remains in virtually any nation.240

Provisions concerning the protection and repatriation of human remains must be clear, as they are in the United States’ NAGPRA.241 Implicit protections, such as those in Australia’s ATSIHPA, New Zealand’s various heritage preservation laws, and the international conventions of UNESCO and UNIDROIT, create a problem of vagueness that may weaken their intended protections in practice, in contravention to the interests of both the scientific and indigenous communities. Additionally, as with the United States’ NAGPRA, laws on the issue of human remains should stand alone to ensure their independence from all other laws, rather than couching the provisions in larger historic preservation laws.242 This organization would also help to eliminate some of the vagaries mentioned earlier.

Irrespective of the practice of archaeological and museum communities, explicit provisions for the repatriation of remains must be incorporated into the law. Such is not the case in New Zealand and Canada. However, as in Canada, some measure of reliance on professional ethical codes may go a long way to addressing specific concerns of interested groups.

239. See generally Bonnichsen, supra 217 F. Supp.2d at 1155.
240. The soundness of this decision is supported by the Ninth Circuit’s affirmanation of the district court’s opinion. See generally, Bonnichsen, supra note 75.
241. Ignoring, for the moment, some of the vague provisions that complicated the Kennewick Man case. This reference refers to the fact that the protection, in one form or another, is explicit in the NAGPRA legislation and that that legislation exists for no other reason than to protect such remains.
242. E.g., South Africa’s NHPA, where the protections of remains are all embedded within the law, but are diluted by other issues, such as general heritage protection. A successful example of this autonomy, besides NAGPRA, is Palau’s Regulations Regarding the Treatment and Disposition of Human Remains and Burial Furnishings. See generally Seidemann 2, supra note 19, for a discussion of the problems inherent in including such protections in religious freedom or human rights legislation.
Finally, as in South Africa and New Zealand, all nations with laws concerning the protection and disposition of human remains, to the extent possible, should attempt to exert some measure of control over privately held materials. Although outright assertions of property interests over privately held materials, as in New Zealand, would likely constitute a "taking" of private property, a tracking database as is maintained by SAHRA in South Africa would provide an invaluable resource to researchers interested in analyzing material not publicly held and beneficial to indigenous groups attempting to locate the whereabouts of affiliated remains. Such provisions could be effectuated under the rubric of providing for the understanding of our common history, a reasonable policy in several nations.\(^{243}\)

To ultimately answer the question of whether or not there can be an international law consensus on these issues, the answer appears to be "yes." However, even the broadly protective UN Draft Declaration does not address many of the important issues discussed in this section. Before such a law is enacted, these potential problems must be addressed in order to ensure equitable treatment of all interested parties.\(^{244}\)

One successful example of the application of multinational repatriation laws to create a new set of regulations comes from the Republic of Palau. Palau's Regulations Regarding the Treatment and Disposition of Human Remains and Burial Furnishings illustrates how the best components of several different laws can be combined to form a set of laws for a nation. Alternatively, this approach of combining national legislation could act as a model for establishing international protections of human remains. The Palauan regulations were based largely on NAGPRA, but also on United States state law (e.g., Texas) and certain provincial laws in Canada (primarily Alberta).\(^{245}\) Despite these influences, there is a distinctly national undercurrent to the Palauan regulations, demonstrating the


\(^{244}\) Such a problem is exemplified by the NAGPRA legislation in the United States, where the failure to directly address the details of affiliation, a topic discussed in the congressional hearings, resulted in the public relations nightmare that was the Kennewick Man trial. See generally Robert W. Lannan, Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unsolved Issues of Prehistoric Human Remains, 22 Harv. Envtl. L. Rev. 369 (1998). Cf. Seidemann 1, supra note 19, for a different perspective on the role of the affiliation issue in Congress before the passage of NAGPRA.

\(^{245}\) Dr. Lorne Holyoak comments that less than fifty percent of the regulations were borrowed directly from NAGPRA, but that the structure of the regulations does come largely from NAGPRA. Personal communication from Dr. Lorne Holyoak, Department of Religious Studies and Anthropology, University of Saskatchewan (Jan. 2., 2003).
adaptability of these laws. Thus, the Palauan experience represents a positive indicator that existing laws on the protection of human remains can be and are being adapted for use in other nations. The Palauan regulations’ use of the laws of other nations as models also suggests that there are at least some commonalities among the interests of indigenous groups and scientists around the world that can serve as a basis for a set of minimum standards on the treatment of human remains on an international scale.

The area of international law appears to be uniquely situated to provide a broad range of protection where none has heretofore existed. This protection is becoming increasingly necessary, as the internet and other venues have opened up a whole new area to the illegal sale of indigenous human remains on both the national and international scale. International law represents a unique area where a set of minimum standards for the treatment and disposition of human remains could be created. Such minimum standards could take the place of the need for the creation of such laws at the national level in nations that do not already have laws protecting the remains in their indigenous populations. Additionally, in an international context, such laws could create a conduit to facilitate the repatriation of affiliated remains between nations.

Having addressed the question of whether or not international law should or could be used to assist in the protection of human remains, the next necessary issue is, how are these remains to be protected? In the current international law environment, the creation of property rights in situations where cultural affiliation is clear would avoid the problems with cultural rights that are complicating the passage of the UN Draft Convention. The property rights focus of the national laws examined in this study belie an underlying preconception of their drafters: cultural rights

246. One example of this is the presumption that all remains are Palauan. This is a result of the unique settlement and occupation history of the islands as well as a response to problems with local developers. Generally, the other culture that may have an interest in Palauan burials is the Japanese; however, due to the short occupation of Palau by the Japanese (1914–1945) and the well-marked nature of the Japanese cemeteries, there is little chance of the presumption being wrong. Dr. Lorne Holyoak, personal communication, January 2, 2003. A similar presumption in favor of the Native Americans in the United States was rejected by the court in the Kennewick Man case. Bonnichsen, 217 F. Supp.2d at 1136.

are not the primary issue when human remains are involved.\textsuperscript{248} Remains can be more readily protected by working within the established frameworks of the national laws when drafting international laws, with the possibility of cultural rights to be protected subsequently by other laws. In other words, in the interests of efficiency and expediency in respecting the concerns of the indigenous peoples of the world, the drafters of international law should press the property rights avenue to promote acceptance of these laws on a broad scale, thereby avoiding the UN Draft Convention problems of cultural rights.\textsuperscript{249}

Affiliation under such new international approaches to the protection of remains should be determined along the NAGPRA/Kennewick Man lines. Such a scheme would protect the interests of indigenous groups as to affiliated remains while also protecting scientists' interests in unaffiliated, ancient remains. Local variations in the archaeology and oral history of particular modern groups can be addressed, for affiliation purposes, by national review boards, comprised of scientific and indigenous representatives, in each signatory nation. Additionally, ideally, in situations where affiliated remains are reclaimed under an international agreement, the international law would provide for a grace period, during which "salvage"\textsuperscript{250} bioarchaeological investigations could take place.\textsuperscript{251}

Such international laws could provide for the standardization of regulations concerning the import and export of human remains for scientific study. Such regulations could also help to protect against the illicit trade sought to be stemmed by the UNESCO and UNIDROIT conventions.

\textsuperscript{248} This is not to suggest that remains should not be protected under a cultural rights regime, but rather that the current conception of the drafters of existing laws on this issue places remains in a property law context.

\textsuperscript{249} Burger, \textit{supra} note 196, at 210–11.

\textsuperscript{250} The term "salvage" is borrowed from archaeology. This is used to refer to research done in anticipation of archaeological site destruction (i.e., salvaging whatever information from the site you can). \textit{See} Gordon R. Willey & Jeremy A. Sabaloff, \textit{A History of American Archaeology} 188, 211 (3d ed. W.H. Freeman & Company 1993). \textit{See also} David L. Carlson, Cynthia A. Bettison, Marc Kodack, & Henry Cleere, \textit{Cultural Resource Management, in The Oxford Companion to Archaeology} 156–160 (Brian M. Fagan ed., Oxford University Press 1996) for a more general discussion of salvage archaeology (also known as cultural resource management).

\textsuperscript{251} Due to the sample-specific nature of each claim, the reasonable length of each study period should be determined on a case-by-case basis. Presumably, such an arrangement would allow for nondestructive analyses. Destructive tests could be carried out with the permission of the validly affiliated claimant group.
B. What Can the United States Gain from the Laws of Other Countries Regarding the Treatment of Human Remains?

As discussed supra, some measure of the application of NAGPRA to the private sector, even if it is just in the form of creating an inventory database (to avoid "takings" problems) would be of great benefit to scientists and indigenous groups in the United States. Such provisions currently exist in New Zealand and South Africa.

The South African model of requiring direct consultation between parties interested in disturbing areas where human remains are known to be interred and indigenous groups may be a wise approach for the United States to take in light of the recent disasters caused by agency control. This approach would cut out a considerable amount of agency red tape and may foster a more congenial attitude between these parties. Such a requirement could also apply to the scientific community prior to the undertaking of research on affiliated, curated remains for the same purposes. All such actions would, of course, be subject to agency and ultimately court review.

C. Should the Laws Around the World be Changed to Reflect the Ethical Tenets of Professional Organizations or Vice Versa?

The International Law Society suggests that ethical codes could provide a strong source of information for the development of a comprehensive international law on the protection and repatriation of human remains. Instruments such as the Vermillion Accord could provide a basis for sound understandings of the scientific community's interests in the human remains debate, but any international drafter should be cautious of relying too heavily on these sources, as they may lead to a bias against indigenous groups. The

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252. This refers generally to the botched job of communication and manipulation by the United States Army Corps of Engineers in the Kennewick Man case, where their efforts to appease the Native American claimants possibly caused them to destroy the discovery site, thus restricting access to material that may have been able to establish the requisite affiliation. See generally Downey, supra note 73; Bonnichsen, 217 F. Supp.2d at 1120.

253. International Law Association Committee, supra note 200, at 5.

254. Anthropological codes of ethics are no longer (if they ever were) biased against indigenous groups. Indeed, they recommend more dialogue with such groups than likely occur in practice. See e.g., the "Accountability" section of the Society for American Archaeology's Principles of Archaeological Ethics. Society for American Archaeology, Principles of Archaeological Ethics, 61 Amer. Antiq. 451 (1996). See also the American Anthropological Association's Code of Ethics § III(A), available at http://www.aaanet.org/committees/ethics/ethcode.htm (last visited Jan. 13, 2003). This warning is intended to ensure that the scientific
scientific and indigenous communities are not always diametrically opposed, and where this is the case, ethical statements may be valuable sources of international law.

VII. CONCLUSION

"Times change. Not only has archaeology become more professional, but . . . [I]ndigenous peoples now have much greater presence in archaeological research." Archology has ceased to conduct clandestine collecting of human remains for the purpose of creating oppressive race-based theories of population biology. Indigenous peoples, too, are becoming more interested in scientific analyses of the remains of their ancestors as an alternative interpretation of their own past as a people. However, the burials of past peoples continue to be threatened by development and looting on a worldwide scale. Additionally, some measure of restitution for past injustices are due affiliated indigenous communities by the scientific community with respect to curated remains. Although such restitution should not come in the form of a blanket repatriation of all remains regardless of cultural affiliation, some returns under certain circumstances should occur. Humanity has much to lose in the understanding of our collective past through the mistreatment of remains as well as the reburial of them. The steps taken by the United States, Australia, New Zealand, South Africa, and Canada are movements towards negotiated decisions as to the disposition of certain human remains, but much remains to be ironed out. Such issues as temporal limits and affiliation must be addressed legislatively. The international law arena could provide the impetus for such change through the adoption of a concise treaty or convention that considers issues important to all parties and provides a reasonable forum for all interested parties. The international and national communities should try to be more open minded about all concerns rather than following a single course of politicalization to satisfy one party.

255. Taylor, supra note 14, at 7.
256. See e.g. McKillop & Jackson, supra note 184. See also James E. Bruseth, James E. Corbin, Cecile E. Carter, & Bonnie McKee, Involving the Caddo Tribe During Archaeological Field Schools in Texas: A Cross-Cultural Sharing, in Working Together: Native Americans & Archaeologists 129–132 (Kurt E. Dongoske, Mark Aldenderfer, & Karen Doehner eds., 2000). However, this avenue of divining history is but one alternative for such groups, other alternatives include religious beliefs and oral traditions.