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The Hon. Michael Kirby AC CMG

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ABSTRACT

The complexity of dealing with human remains as well as past and new practices traced to ancient and recent times, illustrate a growing sensitivity to displaying and using such objects. The First Part of this article traces the emergence of controversies from ancient times to recent times of war. The Second Part examines trade in body parts, including in collections and dissection for medical training. The Third Part introduces a topic of special importance in contemporary Australia: the display of body parts of Indigenous peoples. The Fourth Part examines the disrespect and indifference to the topic of Indigenous remains. The Fifth Part looks at the growing role of international law. The Sixth Part looks to the future and especially modern museum practice including the UN Declaration on Indigenous Rights. A new methodology for dealing with law, ethics and culture is introduced. There is much to be done. This paper provides a start.

I. THE PAST: FROM ANCIENT ROME TO THE PACIFIC WAR

Human beings, from time immemorial, have formed communities, and later established nation states. Rich and powerful states expressed their power in conflicts and conquests. A feature of this tradition was for one people to

[*] Based on a paper presented to the International Symposium at the University of Geneva on 16 September 2022.

[**] Justice of the High Court of Australia (1996-2009); President of the International Commission of Jurists (1985-6); Chair of the International Bar Association's Human Rights Institute (2018-22); Laureate of the UNESCO Prize for Human Rights Education (1998).

dominate another people. For millennia, it was common for the armies and rulers of conquering states to bring back to their metropolis items of value (to help pay for the war) and items of cultural, religious and other symbolic value (to demonstrate their significance and the superiority of their arms).[1]

One of the earliest readily available records of ancient times, *The First Book of Samuel*[2] in the Jewish Torah, described the price, in lieu of dowry, that was demanded of David by King Saul as the price for David's marriage to the King's daughter, Michal. In lieu of treasure King Saul, demanded a gift of "a hundred foreskins of the Philistines, [so as] to be avenged of the king's enemies". According to this record, David and his men "slew of the Philistines two hundred men; and David brought their foreskins and they gave them in full tale to the king". After which Saul gave Michal to David to marry him.

Gruesome stories of this kind abound in ancient times. They were not confined to Jewish tradition. The Aghori Hindu sect in India collected human remains that had been consecrated to the River Ganges. They made skull cups from the corpses at the same time as Tibetan Buddhists were crafting kanglings: a form of traditional trumpet carved from the human thigh bone. The most common human body part retained by ancient and recent conquerors was the skull. It was the capital prize. It demonstrated the measure of a victory. But it also amounted to a public display of the courage and success of warriors and the superior virtues of the conqueror.[3]

[1] 1 *Samuel* 18:25-27, *King James Bible* (Cambridge, 1611), 323.
[2] Ibid, verse 25.
[3] Academic American Encyclopedia, Vol. 10.

Retaining skulls as trophies lasted well into recent times and far from the Middle East. A consequence that was sometimes exacted for defeat was tribute demonstrated by scalps, skulls and other physical evidence of prevailing in battle.[4] Similar incidents occurred up to the 20th century in Australia.[5] Body parts of people defeated by European conquest were sent by colonial officials to the Royal College of Surgeons in London.[6] One at least one occasion when this was done was in the form of a human scrotum, fashioned into a tobacco pouch. The cruelty that accompanied the murder and torture of native victims is told in stories intended to inculcate hero worship and cultural expectations regarded as normal in times of common foreign conquest or domination.[7]

During a Japanese invasion of Korea, no doubt because of the rapid decomposition of skin and flesh, severed noses of the enemy were not normally retained as such in their natural state. They were commonly pickled and taken back to Japan for deposit in this form in tombs especially designed to keep the severed noses as evidence of warrior heroism, in the samurai ethos.

The thought that these seemingly barbarous practices were missing from the "civilized" activities of Caucasians is not sustained by the evidence. The

[4] In Masada Territory, following conflict with the Sioux, these were displayed for decades by the Minnesota Historical Society. See R.J. Chacon, David H. Dye, *The Taking and Display of Human Body Parts as Trophies* (Springer, 2007).
[5] *Ibid*.
[6] Christie Quigley, *The Corpse: A History* (McFarlane, 2005) 249, 251.
[7] JJ Weingartner, "Trophies in War: US Troops and the Mutilation of Japanese War Dead", *Pacific Historical Review* (Uni of California Press) 61-65.

Scythian practice of collecting skulls of defeated opponents in order to make skull cups from human skulls continued during the Second World War in the Balkans although on a smaller scale than before. In the Pacific War of 1941-5, about 60% of the bodies of Japanese soldiers recovered in the Mariana Islands lacked skulls. Inferentially the skulls were collected as trophies by Allied soldiers who retained them in apparent hostility for earlier atrocities blamed on the Japanese military. In 1944, President F.D. Roosevelt was presented with a gift of a letter-opener fashioned from a Japanese soldier's arm bone. On news of this gift, the Roman Catholic Archbishop of Tokyo appealed for "respect for the laws of humanity, even in total war".[8] Reportedly, the President returned the gift, recommending that the relic "be properly buried".[9]

In 1988, following a visit in France, the author of this article protested to the Archbishop of Sedan about the Ossuary visible through external glass walls of the Roman Catholic Cathedral of that city. The reply, from the cleric, asserted that this was a local cultural tradition, despite the unsettling, even gruesome, imagery presented to tourists and other passers-by, visible in their chaotic state through window panes into the crypt. Caucasians seem to have been just as likely as other races to mutilate the bodies of their enemies. In the Vietnam War there were many reports of the removal of the ears of Viet Cong fighters, later nailed on the wall of American troop accommodation. When these trophies were reported they survived for a

[8] Simon Harrison, "Skull Trophies of the Pacific Wars", *Transgressive Objects of Remembrance",* Vol.12 (4), 825.
[9] *New York Times* (https://www.nytimes.com, 1944/08/10 (10 August 1944).

while until removed because of the "rotting and stink".[10] Seemingly no one was exempt from such horrors and degradation.

As recently as 2005, the Royal Malaysian Customs Department seized 16 human skulls with engravings, purportedly originating in the West Kalimantan Province, bound for an identified collector in Australia. The interception of the skulls by Malaysian inspectors presented a dilemma for Australian customs. The skulls were eventually sent to the state museum in Malaysia. This last public resting place of human relics was justified by reference to the preservation of items from the Dyak "cultural heritage".[11] There are many such stories from both ancient and modern times.

Whilst skulls and other human body parts have, throughout history, been frequently collected at, or from, battlefields, arguably reflecting the diminished sense of horror in the public and private display of such left-overs of slaughter, the world community in recent generations has begun to respond differently to such collections. The journey towards a more respectful response, national and international, has been a slow one. However, gradually the reactions of the Archbishop of Tokyo has come to prevail over those of the Archbishop of Sedan. To that trend I now turn

II. TRADE IN BODY PARTS: THE BODY AS PROPERTY

[10] Wallace Tay, "Bloods: An Oral History of the Vietnam War by Beach Veterans, Harold Light Bulbs" Bryant, "Canibal Express, 1st Cavalry Division, US Army" An Khe, February 1966-February 1967.
[11] Damien Hufer and ors, "Osteological Assurances of a Seized Shipment of Modified Human Crania: *Implications for Dajak Cultural Heritage Reservation, Global Human Remains Tradition* (Bongo-Katenau) Vol. 7 (1) (2021).

Cicero and Governor Verres: The acute problem of selling and purchasing in a commercial market, body parts for display in museums, private collections or elsewhere, the sources of such items taken from the human anatomy of once living sources are not now likely to be plentiful. An enemy in wartime, or bodies strewn over a battlefield, abandoned or lightly covered with thin earth is, more likely to be the source of more than trivial numbers of human body parts.[12] Separate problems arise in relation to the seizure of items treasured by other states or their peoples. This is not an isolated practice. It can occasion feelings of hurt, affront and injustice as strong as (or sometimes greater than) the seizure and display of human body parts for reasons of science and anthropology. However, feelings of distress and remorse have been more likely to be expressed today than in earlier times.

In the year 70BC the great Roman orator and advocate, Cicero, gave expression to such feelings exhibited by some human beings. Cicero brought a proceeding in Rome against Verres, governor of a Roman province in Sicily. Cicero claimed that the Governor had decorated areas near the Forum in Rome with his treasure trove. Cicero objected. Although possibly "splendid to the eye he claimed that such trophies of conquest and subjugation [were] painful and melancholy to the heart and mind" of some observers. He charged that Verres had:

> "rob[bed] our provinces, by the spoliation of our friends and allies… from Asia and Greece, who happened at the time… to behold in our Forum the revered images of their Gods that had been carried away

[12] See Wikipedia, "Human Trophy Collecting" https://en.wikipedia.org/wiki/Human_trophy_collecting

from their own sanctuaries and recognising as well the other statues and works of art… gazing at them with weeping eyes… objects wrenched from our allies by criminals and robbers."

Phillip and British Museum: In his recent book, *Who Owns History?*, author Geoffrey Robertson draws a lesson from this indictment of disrespectful conduct in the distant past, to explain the desirability, in the former imperial world, to return "booty" to their places of origin, certainly where present human beings were distressed by their retention, far from home.[13] In the British Museum in London, the retention of precious objects acquired in earlier times are often justified by reference to their earlier purchase or other lawful acquisition; by the long-standing safeguarding of the piece of history from destruction; and their availability for free access to a much larger audience of visitors than would otherwise have been available if such objects (body parts or otherwise) were returned to their original place of origin.

Robertson is optimistic that bodily objects and other things will be returned, when he recalls how he had earlier struggled to secure the return the body of Arthur Phillip, first British Governor of the New South Wales colony in the early British subjugation of Australia. Governor Phillip's tomb is in Bath, England. However, Phillip's indigenous companion, Yemmerrawanne, was buried in South London. The aim was to bring the bodies of both of these men to Australia to find repose in Sydney, where they had originally met and where, undeniably they had left their largest footprint on the world.

[13] Cicero, "*The Verrine Oration"* (Harvard Uni Press, 1959) 181-3. Quoted in G. Robertson, *Who Owns History? Elgin's Loot and the Case for Returning Plundered Treasure,* Knopf (Penguin Random House, Australia) 2019, Preface, ix.

Originally, the Church of England in Britain was helpful in principle, so far as the remains of Yemmerrawanne, were concerned. However, it was later revealed that his body could not be found. The Church of England then made it clear that neither Yemmerrawanne's empty tomb; nor its monument; nor any later discovery of his remains if found, could be returned to Australia. The same answer was given thereafter to later attempts to repatriate other Aboriginal remains to Australia. The excuses for this non co-operation was originally the obstacle introduced by the *British Museum Act* 1963.[14] With the Elgin [or Parthenon] Marbles clearly in mind, that *Act* had required that "objects vested in the Trustees as part of the collection of the Museum … shall not be disposed of by them." Exceptions under amended British legislation have subsequently permitted parts of the collection to be removed. These have included Holocaust cultural objects.[15] De-accessioning British Museum acquisitions could therefore, in some cases, be secured. But not, so far, the Elgin [Parthenon] Marbles.[16]

Occasionally, physical objects held in British institutions (such as the sealed copy of the Australian Federal Constitution) – originally a British Act - have been returned pursuant to special statutes; but still "on loan". This course has been taken to preserve the general rule intact against "surrender" of items deemed important for Britain's own substantial cultural history.[17]

III. INDIGENOUS BODY PARTS & DISRESPECT

[14] *British Museum Act 1969* (UK) s3(4).
[15] *Holocaust (Return of Cultural Objects) Act*, s8. See Robertson above n.15, 125-6.
[16] Robertson ibid.
[17] *Protection of Cultural Objects on Loan Act* (2013) (UK).

Disrespecting Indigenes: From the point of view of Australia and its history, the collection of body parts has mostly concerned those of the Indigenous or First Nations people – the Australian Aboriginals. The attempt to respond to this problem has resulted in a complex history often involving racial attitudes, Indigenous disempowerment and long struggle to demand respect to the customs and beliefs of the Indigenous people, often in earlier days in conflict with the claims of public and private collectors. A fundamental impediment that has so far stood in the way of the return of Indigenous body parts held in British institutions, certainly to and from Australia, has been the long history of disrespect for Indigenous peoples. Until recently human beings of Australian Aboriginal provenance were viewed as a species of inferior human beings, or even a possible example of the "missing link" through which 19th century scientists sought to establish the links believed to exist between the body parts of *homosapiens* and an earlier, but profoundly inferior racial species. This was an explanation occasionally given by "experts" in anthropology as to why intensive scientific study and analysis should be facilitated in relation to body parts taken as specimens from Australian Aboriginals, especially if they could be traced to Tasmania (earlier Van Diemen's Land). [18]

When, the early British "explorers" first arrived on the Derwent River area in 1804 at what was later named "Constitution Dock", they established a town (now city) of Hobart. Hobart became the second site of permanent British

[18] After Anthony Van Dieman, Governor-General of the Royal Netherlands East Indies who sent Abel Tasman to map the coastline of the Great South Land (sometimes 'New Holland). The name of the colony of Van Diemen's Land was changed in 1856 to Tasmania.

settlement in Australia, following the convict encampment in Sydney in New South Wales. By 1830, a third of the European-derived population in continental Australia lived on the island, beneath the continental landmass. This became the site of some of the earliest, and one of the most destructive, of the publicly documented hostilities directed against the Aboriginal people in Australia.

As a result of the rapid reduction of the First Nations people in what is now the Australian State of Tasmania, natural history scholars and museums around the world (especially in Britain) began to take a keen interest in the study of the Indigenous population. In part, this was a curiosity about an Indigenous people who had developed in isolation from the Indigenous people on the mainland. But, in part, it was also a result of the small numbers of the human population who had preceded the arrival of the Europeans. A further part of the explanation for the high interest in the Tasmania 'natives' was because of the belief that, especially in Tasmania, the First Nations population would die out soon as a result of scourges of diseases previously unknown to them and also the hostility by the newcomers, targeted at the Indigenous peoples. [19]

It was for these reasons, overlaying any purely scientific curiosity, that trade in Tasmanian human skulls and bones was quickly established, especially by the middle of the 19th Century. Qualified and amateur anthropologists began to exhibit great interest in acquiring human bones deriving from the Tasmanian Aboriginal population, alongside varieties of native plants and

[19] James Boyce, *Tasmania – Apology for Historic Museum Practices: The Saturday Paper* (No. 540) March 13, 2020, at 340.

fauna unique to the island. From the early days of the settlement a number of government officials of Tasmania sent natural history samples from their habitat to England. Joseph Banks had instilled a great interest in Great Britain concerning the distinctive flora and fauna and human people of the Great South Land. In the case of bones and body parts originating from Tasmania, their special value was enhanced by the belief that this was a distinct race previously cut off from other human communities. Many living in Hobart in the early decades of the nineteenth century believed they were witnessing an example of extinction of an entire race.[20] Later armed encounters contributed to the fulfilment of such predictions.

The interest in Tasmanian body relics was given impetus, in 1843, when the first Royal Society outside Britain, was created in Hobart. This brought together members of the governing class, some qualified scientists and a few amateur anthropologists. By 1869, the creation of a Hobart branch of the Royal Society had resulted in the development of a connection between the local Royal Society and members of the Tasmanian Legislative Council. Many of the latter became life members of the Society. In consequence, a museum was established in Hobart in 1885, well in advance of like developments in most other parts of Australia. Presciently, in the inaugural Presidential address, a public apology was recorded for the wrongs that had been done to the Aboriginal people of Tasmania.

By 1850, some 19 anatomical museums had been created in Britain and Ireland. Many of these acquired Indigenous relics. The gifts of, and trade

[20] Ibid, 2 of 5.

in, Tasmanian ancestral remains secured a boost from the pseudo science of phrenology. This taught that the size and shape of the human skull was an objective indicator of differential personality, brain size, and even morality. Phrenology remained of serious interest amongst aspiring members of the Australian middle class. Certainly by 1939-42 when the present author's skull was measured and assessed, although with results that have been lost to history. Apart from the demands of European (mostly British) museums, private collections in Australia and Great Britain competed to acquire human relics from the bodies of Australian Aboriginals depicted as the most primitive race on Earth.

By this stage, public universities had begun to be established in Australia's principal colonial cities (Sydney 1850; Melbourne 1853; Adelaide 1874; and University of Tasmania 1890). Normally, these moves were accompanied by the establishment of a discipline in anatomy. This, in turn, led to the demand for of the bodies of dead people, donated or otherwise secured for educational dissection. In the University of Melbourne, the Department of Anatomy, quickly acquired 500 skulls and body parts from more than 800 people, at least 12 of whom were Tasmanian Aboriginals.

Because of the ready market for Indigenous skulls and bones, Aboriginal burial grave sites were frequently plundered, principally for Indigenous skeletons that had a special fascination. By the 1870s a Launceston businessman, Robert Gardiner, established a source for the export of body parts, especially of Aboriginals. Many of the latter were secured through the good offices of the Hobart Museum. They were sold or donated to favoured or respected recipients in Australia or commonly in Britain. Gardiner earned

the title of “Resurrection Bob”, because he provided a kind of “second life” to the skeletons secured from (often Indigenous) graveyards.[21]

Eventually, the perceived disrespect of Gardiner towards Indigenous people and the bodies of their dead, a backlash was engendered in Hobart by the local newspaper, *The Mercury*. This led, in turn, to the temporary dismissal by the colonial government of this prominent citizen. He was suspected to have acquired possession of the body of the last male native born Aboriginal who died in 1869. *The Mercury* reflected that, “the common people have a better appreciation of decency and propriety than such of the so-called upper classes or men of education”.[22]

Many settlers in Hobart were shocked by the reported use of William Laane’s scrotum to carry tobacco leaves. Laane had been known in Hobart as “King Billy”; but in death, he was certainly not respected as a king, merely a primitive native. Reputedly, the last surviving Australian Aboriginal woman, Truganini,[23] died in Hobart in the mid-1870s was so distressed over the risk of similar mutilation of her body after her death that public opinion led to the government burying her secretly behind the former women’s prison at midnight on the day before that advertised for her interment. Notwithstanding these precautions, more than a century afterwards, the Royal College of Surgeons in London revealed that their collection included

[21] Ibid, 2.
[22] Loc cit.
[23] Trugernanner (“Truganini”) in L. Ryan and N. Smith, in *Australian Dictionary of Biography*, vol.6, 1976, 305. Her body was exhumed from a grave in the old Hobart cemetery on condition that it not be publicly displayed. It was only to be accessed by special permission for “scientific men for scientific purposes”. However, it was put on display in the Tasmanian Museum 1904-51. She assisted in bringing in her people “so as to scare them from European guns”.

fragments of the skin and hair of Truganini. Although earlier practices were sometimes defended on grounds of cultural differences in the attitudes towards dead bodies and towards scientific enquiry, there was sufficient cross-cultural disquiet over the disrespect shown towards human body parts, particularly those of Aboriginals, as to enliven strongly expressed condemnations. Claims by European residents of Hobart that possession, disturbance and display of Indigenous bones, hair and skin were justified on scientific grounds eventually gave rise to a vigorous debate over the accession and study of Indigenous skeletons and body parts. Specifically, claims of justifications by reference to study of the Darwinian theory of evolution and the cause of science were increasingly rejected as unjustified and frankly absurd.

Body parts as property: As already revealed, attitudes in Australia towards the acquisition and display of bodies and body parts varied considerably over time, including in the same and different places. Such changing attitudes were often influenced by intuitive reactions towards human remains; religious instruction; moral beliefs; and legal provisions.

Tests for differences in attitudes towards human body parts of the dead were illustrated by the differing regulations governing the supply and use of human bodies for dissection by medical students in the course of their education. Obtaining bodies for anatomy instruction had not normally been a legal or social problem in medieval Europe. However, popular attitudes and the law

were (depending on one's viewpoint) "more enlightened in Europe than in Great Britain and Ireland":[24]

> The traditional European approach, seen in France, Germany, Italy and Austria was to require the licencing of anatomy schools and to allow the unclaimed bodies of persons who had died in public institutions to be used for anatomical study.[25]

The laws in England and Scotland were more restrictive. In England, a growing number of anatomy schools were eventually granted access to the corpses of a restricted number of executed felons under Royal charters granted by King Henry VIII and Queen Elizabeth I, the latter being granted in 1564.[26] Generally speaking, "religious resurrectionists" [in England] opposed the provision of corpses, on the basis that human bodies, and parts of bodies, could not be dealt with as mere property, lest this interfere, after death, with the ability of the subject to enjoy the Christian promise of resurrection from the dead. In consequence, up to the beginning of the 19th century in England, great numbers of bodies were "snatched" from graveyards. In Blackstone's, *Commentaries on the Laws of England*, a legal work highly influential on the development of American law, declared in 1765: "Stealing the corpse itself, which has no owner (though a matter of great indecency) is no felony". [27]

[24] R. Scott, *The Body as Property*, The Viking Press (New York, 1981).
[25] Ibid, 24-25.
[26] Id, 5.
[27] Id, 7.

Under more sensitive early French law it was: “directed that a person who had dug a corpse out of the ground in order to strip it, should be banished from society”. Attempts to persuade the English Parliament to enact an anatomy bill, to follow a form of regulation adopted on the Continent, did not succeed until the *Anatomy Act* 1832 (GB). This required licencing of instructors and students of anatomy; to provide for government inspectors; and the filing of detailed reports on use of bodies or medical purposes. This *Act* destroyed the trade of the “body snatchers” in England. Its detailed procedural regulations were later copied throughout the British Empire.

Non-Christian parts of the world, often untroubled by the arguments of the “resurrectionists”, commonly permitted cremation of the body. In some remote districts of Papua, ritual cannibalism of human body parts was excused on proof (to a Caucasian judge) that such behaviour was not an indecent interference with the body but was viewed by the locals “as a reverence or ritual”,[28] and thus outside applicable common law prohibitions. Yet, until 1963, the Roman Catholic Church worldwide did not permit cremation, apparently on “resurrectionist” grounds. That rule was abolished, with many others, following revision of to the Church’s beliefs and teachings. A revival in the demand for human body parts for transplantation purposes followed the decline of the religious prohibition although it lingered on in some quarters. However, the advance in the technology of transplantation; the acute shortage of organs for clinical transplantation; and the seeming uselessness of forbidding access to body parts where they could do much

[28] The case from Papua New Guinea, 1971, see Scott, id, 12-13.

good for the living resulted in further changes in attitudes in the Anglosphere where the science of transplantation was most developed.

Notwithstanding the evidence of ever-increasing utility in the use of body parts of other persons for transplantation, there remained strong opponents to these "unnatural" procedures. Transplantation commenced with the undeniable utility, sometimes necessity, of transplantation of blood and extending to increasingly complex organ transplantation. The first transplantation of a human heart was performed by Dr Christiaan Barnard in 1967 in South Africa. This led to "horror stories" in the popular media.[29] But as the techniques of transplantation became more successful, its utility enlarged as did the willingness of western communities and lawmakers to accept the need for new laws on transplantation and hence of dealing with human and other body parts. As an essential prerequisite for these needs, new laws on the definition of "death" were enacted together with laws governing payment for essential organs. [30]

In Australia a model statute was proposed by the Australian Law Reform Commission chaired, at the time, by the author. A proposed statute was enacted in all sub-national jurisdictions of Australia in substantially common form. [31] The reform was copied in a number of overseas jurisdictions. This also demonstrated a willingness on the part of society, reflected by legislators with access to objective testimony to permit transfer of organs

[29] In February 1975, the *British Medical Journal* published an article on "The Savage Shortage of Organs for Clinical Transplantation". See Scott, id, 17. At the time, the UK's shortage of kidneys, essential for transplantation to prevent renal failure. There were over 2,000 recipients on a waiting list.
[30] Loc. Cit.
[31] ALRC, *Human Tissue Transplantation*, (ALRC 7, 1977). Mr Russell Scott was Commissioner in Charge of that report.

from living donors to living recipients and from donors pronounced to be dead, by transferring body parts to living recipients. Clearly, a kind of utilitarian scale was at work in this change in the law. What earlier had been a revulsion and opposition to 'horrifying' interference with the natural body threatening anatomical integrity, came to be viewed as a permissible, procedure sometimes desirable or even necessary as an intervention with one's own body parts for increasingly safe, skilful procedures that would enhance or even save the life of the recipient.

The generally accepted settlement of major issues affecting the use of human body parts still left for resolution numerous consequential issues. These included:[32]

- The precise definition of 'death' so as protect the interests of donors and their families against risks of premature or unjustified removal of body parts;
- The definition of the circumstances in which payment would be permitted, if at all, for donated organs;
- The determination of whether transplantation of 'omnipotent' tissue harvested from aborted foetuses recovered following lawful abortions, where they would otherwise be discarded; and
- The transplantation of a fertilised human ovum into the womb of someone who might, or might not, be a donor of the therapeutic body sources in question to overcome fertility issues (IVF).

[32] Cf. George P. Smith II, *Dignity as a Human Right*, Lexington Books, London and New York, 2019.

Whilst some of the foregoing, and other suggested problems, remain for resolution, with the aid of evidence and the analysis and recommendations of advisory bodies of experts and representative citizens, the threshold concerning utilisation of human body parts by transplantation procedures has been well and truly passed. True, there remain opponents who point to a human body as "sacred", "made in the image of God", "ensouled".[33] There are still some today who propound absolute prohibitions in the law. Generally, these religious advocates enjoy declining success. The utilitarian formula confronts objections derived from arguments based on "human dignity" for notions that the human body is, in practice, a physical vessel, for God-like human beings. The solution of this tension in most societies is generally achieved by invocation of ethical, moral and practical equations expressed in formulations such as "subsidiarity", "proportionality"; "clarifications and calibrations" and the invocation of vague and opaque notions of "human dignity" referred to in international and municipal human rights law. Reasoning derived from absolutes may work in some moral, religious and autocratic environments. However, other forms of social regulation, generally more flexible and susceptible to compromise, are the social rules that today will normally be preferred.[34]

IV. THE SPECIAL INDIGENOUS PROBLEM OF DISRESPECT

[33] Smith, above n. 32, 39, 49, 50, 67 ff.

[34] These issues lie behind the differences revealed in the recent decision of the US Supreme Court in *Dobbs v Jackson Women's Health Center* No. 19-1392, 597 U.S. ___ (2022), reversing *Roe v Wade* 410 U.S. 113 (1973), for the majority, the 2022 decision was an instance of the Supreme Court, returning power to the people, improperly claimed by the courts in terms of the declaration of constitutional rights. In the view of the minority *Hobbs*, was a reversal, by the ultimate national court, of fundamental rights of women recognised to reproductive health 50 years earlier.

Indigenous rights: A disadvantageous beginning

In a considerable number of cases of seizure of human body parts, already mentioned, the source or 'donor' in question did not have any say in the subsequent utilisation of part of their body. In the case of body parts taken from deceased prisoners, convicted by legal process of a serious crime (felony) or taken from those wounded or killed in military conflict, their disadvantageous status was a sign of their subjugation.

However, there was a further element of racism that must be recognised to understand the special interest of imperial rulers and their people in the anatomies and body parts of Indigenous peoples.

The "enlightenment" that accompanied the expansion of European empires "beyond the seas" was accompanied by a fascination, already mentioned with flora and fauna; and anthropology in foreign lands as they were explored and "opened up". Sometimes scientific enquiry was genuine even if sometimes misplaced. It developed as if, in order to understand human society in Europe, it was necessary (or at least useful) to observe and display examples of "exotic" foreign plant life, trees, foodstuffs and human physiology, particularly as these had evolved in distant places.

The paradigm case of a global voyage of discovery, ostensibly undertaken for scientific purposes, was that of Lieutenant James Cook RN on HMB *Endeavour* in 1770. Cook was accompanied on his voyage to the South Seas by an amateur, but notable, botanist, [Sir] Joseph Banks. The latter was subsequently elected President of the Royal Society in London. The ostensible purpose for Cook's voyage to the Pacific was to witness, and

record, the transit of the planet Venus and the Sun. That was a comparatively rare event calculated to be best witnessed in 1770 in Tahiti. Although there was a genuine scientific purpose of value to humanity, there were also commercial and political purposes having nothing to do with science.

A commercial purpose lay in the development of chronometers that would give British vessels and traders an advantage in international sea-faring voyaging. The political purpose, and still further possible commercial purposes, were comprised of "secret instructions" given by the British Government to ordain what should be done in lands that were "discovered and peoples who were encountered in those lands".[35]

As we now know, the instructions given to Cook cautioned him against laying claim to "possession" of any foreign lands or people and the trading potential that they might offer. These notwithstanding, after travelling around the islands now known as Aotearoa New Zealand and then proceeding Eastwards to the so far unmapped coastline of present Australia, on 22 August 1770, Cook climbed a hill on the northern tip of Cape York (which he named Possession Island). There, and seemingly in conflict with the secret instructions Cook laid claim "as first discoverer" to the entire Eastern coast of Australia. This was done in the name of King George III, as a British territory. This formality was to prove a fateful encounter upon which later legal claims to British "sovereignty" over Eastern Australia was to hinge. This was ironic because we now know that the secret instructions expressly

[35] M.D. Kirby, "250 Years of the Crown in Australia" (2021) 95 *Australian Law Journal*, 520.

commanded Cook that he was only to claim territory with the consent of the Indigenous inhabitants. Manifestly, he did not do that.[36]

Joseph Banks and an accompanying Swedish naturalist, Daniel Solander, set out busily collecting, drawing and recording samples of the unusual flora and fauna of the huge land. These created a sensation when Cook returned safely to London. His journal was published. He and Banks became celebrities. Their writings were remembered 17 years later when the British colonists in North America declared their independence from the British Crown. As a result, they refused any longer to receive Britain's convicts as they had previously done. When considering the need for an urgent solution to the problem of finding a new place for a convict settlement, the descriptions of Eastern Australia written by Cook and Banks were remembered. So too was the claim in 1770 to British sovereignty over this vast and seemingly temperate and hospitable territory. Although research has suggested that the Indigenous peoples in New Zealand were fiercely hostile to Cook and the First Nations people were apparently fewer in number and reportedly, for the most part, less hostile, a question was still presented to the British authorities in London as to their claim of right to possess the territory on the other side of the world.

Indigenous rights: Denial and Disrespect

In the then state of international law the British claim to part of the Australian continent rested on the premise that it was an empty land (*terra nullius*) found by Britain as "first discoverer". From these somewhat fragile legal beginnings

[36] See ibid, fn2.

the claim to the huge new territory was made and quickly expanded. Relevantly, by international law in 1770-1788, a country like Great Britain might lay claim to overseas territory on the basis of cession, conquest or settlement of unoccupied territory.[37] Such a claim was not clearly accepted by the First Nations People. There are reliable records of some Indigenous resistance to the newcomers. Savage but unequal conflict accompanied the encounter and spread of the English newcomers. The First Nations People, as we now know, suffered indignities; indifference; subjugation; and denial of their long-standing rights.

Particularly surprising is that no protective treaty was negotiated. Until relevantly recently, in *Mabo v Queensland [No.2],*[38] any legal rights of Indigenes in Australia were not recognised. Their title to customary or traditional lands was not accepted. Substantially, the Indigenes were subjected to humiliation and disrespect. Not much was done in the Australian legal system about this disadvantage. Things only began to change in 1967 when a referendum changed the *Australian Constitution*. Since that change was adopted demands for constitutional recognition, land rights, economic reparation and legal reform have become increasingly vocal. They are now amongst the most important and urgent political, economic and social issues raised in national and sub-national elections. A proposal was made in July 2022 for a further change to the *Australian Constitution* to afford the First Nations People a direct "Voice" to the Australian nation and Parliament. That claim has been accepted in July 2022 by a newly elected federal government of Australia.

[37] *Mabo v Queensland [No.2]* (1992) 175 CLR 1; (1992) 66 ALJR 408, and at 435 at 439 per Deane and Gaudron JJ.
[38] (1992) 175 CLR 1.

The foregoing background to the general disregard for the rights of the original inhabitants of the Australian continent must be understood if the feelings of racial and legal superiority that existed in Australia before 1788 is to be understood. Most vividly that attitude was reinforced after colonial times by the "White Australia" policy that sought to reserve migration to Australia to people of the Caucasian (White) races. Laws that underpinned that policy had the political support of virtually all citizens and their political leaders. Eventually, after 1967, those laws were gradually repealed.

Notwithstanding such changes, attitudes of racial superiority towards people who constituted "lesser breeds beyond the law"[39] persisted after the legal end to "White Australia" was achieved. An important manifestation of this attitude was the denial of "native title" to land. This survived the end of British colonial rule. Feelings of racial superiority were sometimes evident in the law enacted to qualify rights to migration and asylum. Occasionally new laws were enacted by the Australian Federal Parliament, purportedly to protect Indigenous Australians. However, at the same time, legal disadvantages were imposed on them without just terms, a requirement of the Australian federal Constitution.[40]

Attitudes towards Indigenous body parts:

The attitude of most Australians in the 19th Century, and of many, in the 20th century, to seizure, distribution and display of the body parts of Indigenous

[39] R. Kipling, *Recessional* (composed for Queen Victoria's Diamond Jubilee in 1897).
[40] *Wurridjal v Northern Territory of Australia* (2009) 237 CLR 309 at 424 (per Kirby J dissenting); but see per French CJ at 337 [14]. See *Australian Constitution* 1901, s51 (xxxi).

peoples reflected closely the feelings of superiority, commonly shared by most people in Australia throughout the past 250 years.

Putting it bluntly, until quite recently, most Australians considered that they did not have to think much about First Nations people. This was because they were "dying out". To add to that common attitude of racial superiority was the seriously disadvantaged economic, health, medical and housing conditions of Indigenous people. The general feeling of the majority of the people was widespread. Until the first decade of the 20th Century, Indigenous Australians were commonly seen as a form of "subhuman" species. The same was also common in other lands in the Anglosphere, with Indigenous minorities including New Zealand, the United States and Canada and other lands considered superior because of their culture, wealth and "white" skin.

It is shameful, but necessary, to put the issue of retention and display of Indigenous human body parts in Australian and overseas museums into the context of these attitudes of social and legal superiority. Unless those attitudes are understood, the particular disadvantage in disrespect for Indigenous body parts will not be comprehended.

Fortunately, in 1992, in *Mabo v Queensland [No.2]* a revolution occurred in Australia's law. This was before my appointment to that court.[41] It arrived in the form of a decision of the High Court of Australia, not an enactment of the nation's Parliament. In deciding *Mabo*, the High Court of Australia divided

[41] *Mabo* was decided in 1992. The author was appointed to the High Court of Australia in 1996. See however, *Wik People's v Queensland* (1996) 187 CLR 1; *Wirridjal* above n.39; *Yorta Yorta v Victoria* (2002) 214 CLR 422.

six justices to one.[42] It upheld the claim of Indigenous Australians to residual rights to their lands proved by evidence and available unless legal ownership had earlier been granted under Australian law before recognition. At the time of the decision, it was roundly attacked by politicians, some lawyers and virtually all mining and many corporate interests. However, the decision in *Mabo* was to prove a catalyst. That decision, and others that followed it, occasioned substantial reconsideration of Australian law, policy and attitudes towards the status and rights of Aboriginals.[43] As a consequence, the Aboriginal people have increasingly found leaders and supporters who are outspoken and insistent about the validity of their rights and claims. Their messages and demands have helped other citizens, descended from many racial and ethnic backgrounds, to understand. The consequence is that there is now a much greater understanding of the needs for re-expression of popular attitudes and of rights to reform in the law.[44]

The consequence of this large change in the law of Australia is that the disrespect hitherto exhibited towards First Nations people, on the subject of the acquisition and display of the of the skulls, bones and other body parts of their forebears; the display of such objects by local and overseas collectors and museums; and the ambivalent attitudes towards their release and return to their homelands have significantly changed. The entitlement of First Nations people to burial and other peaceful repose is increasingly something to be determined by their own people, not necessarily by the

[42] Mason CJ, Brennan J, Deane J, Toohey J and Gaurdon J; Dawson dissenting.
[43] Cf *Fejo v Northern Territory* (1998) 195 CLR 6.
[44] Uluru Statement from the Heart (26 May 2017). See N. Pearson et al, *A Rightful Place: A Road Map to Recognition*, (Ed. Shireen Morris), Black Inc., 2017; N. Watson and H. Douglas, *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision Making*, Routledge, Oxford.

intuitive assessment of others and not necessarily the same as earlier handed down from law or attitudes in respect of Indigenous people living in the same land. In respect of Indigenous people, certainly in Australia against the background that has gone before, the application of a common rule or utilitarian equation will not necessarily be appropriate or just. New measures for respect and action are required. Because of what has gone before in Australia, the changes in the law and practices is large indeed.

V. THE FUTURE: INTERNATIONAL LAW & NATIONAL INITIATIVES

UN fundamental rights: What was the key that the majority judges in the High Court of Australia in *Mabo* used to effectively reverse 150 years of Australian land law? What did those judges, raised in the era of "White Australia" and aware of deep seated and legally supported, prejudice against First Nations people accept as authorising a new beginning to laws affecting a seriously disadvantaged racial minority? Is the same new beginning appropriate for the way in which body parts must in the future be respected differently from the ways of the past?

It would have been easy to write a judicial opinion rejecting the claim of Eddie Koiki Mabo and his people to land rights over their traditional lands in Queensland, Australia. Yet, belatedly, and through the words of six of the seven Justices of Australia's highest court, new and binding legal rules were expressed that accepted a new starting point.

What judges of earlier times in a different legal universe, had declared to be the law, judges in 1992 would reconsider and apply newly respectful and uniquely different principles of law. What Australia's legislatures at every level had failed to alter, judges using ancient techniques of the common law would re-express. What the *Australian Constitution* of 1901 had omitted to assure to the First Nations people, the judgment of the highest court in *Mabo* gave back to them. The High Court of Australia recognised remarkable advances in the acceptance of universal human rights that had occurred, especially since 1945. This happened with the creation of the United Nations *Charter* in 1945. And the adoption soon after, in 1948, of the *Universal Declaration of Human Rights* (UDHR). In the decades after this, a great panoply of human rights treaty law has been adopted by the members of the United Nations which included Australia. They have done so in the form of legally binding statements and treaties of universal human rights law, expressing the rights common to all civilised nations.

Treaty law is not, as such, part of the law of Australia. Our Constitution adopted in 1901, is silent on most such "universal rights". However, reasoning by analogy from universal principles of human rights was imported by judicial decisions into the law by way of the *Mabo* decision.[45] In the words of Justice F.G. Brennan, (with whom five other Justices reasoned in like manner) said:[46]

> "Whatever the justification advanced in earlier days for refusing to recognise the rights and interest in land of the indigenous inhabitants

[45] *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 42.
[46] *Ibid* at 42 per Brennan J, with whom Mason CJ and McHugh J concurred.

> of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord, in this respect, with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the [ICCPR][47] brings to bear on the [Australian] common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands."

To some extent this important advance in thinking may have been influenced by an earlier report of the Australian Law Reform Commission, for the most part written by Commissioner, the late Professor James Crawford.[48] This fundamental principle of basis rights draws for its impact upon the content and principles of the international law of human rights. This, therefore, was

[47] *Mabo*, loc cit, 7, reasons of Brennan J.
[48] Later a Judge of the International Court of Justice. ALRC Commissioner 1982-1984; died in office in the ICJ on 31 May 2021.

the “key” that the High Court of Australia accepted as affording Australian law the opportunity and duty to re-express and reverse deprivations of fundamental human rights that were incompatible with the objectives of the United Nations *Charter*;[49] the UDHR; and the body of universal human rights law. This interpretation of *Mabo* is not universally accepted.[50] However, it does, in my view, help to explain how a deep and longstanding rule of the law in Australia could be overturned and reversed in 1992 by judges. One principle of universal human rights law that most clearly cannot be contradicted is that nobody should be deprived of their universal human rights (including their basic dignity) where to do so would be in breach of international law accepted by the wider civilisation of the international community forbidding racial discrimination.

VI. THE FUTURE: LAW & MUSEUM PRACTICE

Indigenous Peoples’ Declaration: Although there were many advocates for the rights of Indigenous peoples before the establishment by the United Nations Organisation, that resulted in the most profound changes to perceptions of universal human and people’s rights. The *Charter* of the United Nations of 1945 contributed a radical manifesto for “the equal rights of men and women and of nations large and small”.[51] The dedication of the new global organisation to the principles of “justice and international law” was a reaffirmation of “faith in fundamental human rights in the dignity and

[49] *Charter*, Preamble.
[50] *Al-Kateb v Godwin* (2004) 219 CLR 562.
[51] *Charter* of the United Nations, Preamble, second paragraph.

worth of the human person". It envisaged "respect for the principle of equal rights and self-determination of peoples".[52]

The foregoing commitments contributed to the dismantlement of empires; the emergence of political independence; and the expansion of the notion of "peoples rights", existing alongside human rights.

The *Charter* led, in 1948, to the adoption, with no dissent, of the UDHR. The notion of sub-servient peoples, under foreign dominion, was also challenged in other Declarations adopted by the General Assembly and other organs of the United Nations. They also gave rise to the large body of international law, expressed in UN treaty law. The primary expressions of this body of universal law were the *International Covenant of Civil and Political Rights* (ICCPR) *and the International Covenant on Economic Social and Cultural Rights* (ICESCR).[53] The common first article of these two treaties declares that "all people have the right of self-determination".[54]

The concept of a "people" in both Covenants was later elucidated by UNESCO, an agency of the United Nations with a relevant mandate. An expert group later developed a "description" of a "people" including notions of the number of the people concerned; then sharing of commonalities of race, language, history etc; possessing institutions giving expression to

[52] Ibid, Article 1.
[53] Ibid, Article 2.
[54] Id, Article 1 "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

these commonalities; and asserting the desire to be recognised as a "people" for the purposes of international law.[55]

In many instances of a "people", expressions of their distinctive identity had to be reconciled with colonial boundaries that did not necessarily reflect a cohesive "people". This reality has had many consequences, including for the existence of Indigenous peoples living within the borders of a diverse independent nation state. Such states sometimes coincided with the self-determination of "peoples". In others, it led to demands for new statehood in the form of separate nation states. Sometimes, for example, in relation to Indigenous people, they might express their identity as a sub-national part of a larger nation, perhaps by embracing a federal form of government. In the context of larger nation states they might produce new sources of conflict. One such conflict is evident today between Ukraine and the Russian Federation; or between Israel and the Palestinian peoples; or between Australia and its First Nations people.

Amongst the efforts of the United Nations to express the rights of Indigenous people was the adoption by the General Assembly on 13 September 2007 of the *UN Declaration on the Rights of Indigenous People* (UNDRIP). Four nations, each with substantial populations of Indigenous peoples (Australia, New Zealand, Canada and the United States) voted *against* the UNDRIP when first propounded. They did so, although (as a Declaration not a treaty) this instrument was not as such a legally binding source of rules under international law. Against these four opponents, 144 nations voted *in favour*

[55] ICCPR (16 December 1966) undocA/616(1968).

of adopting the Declaration. Eleven nations abstained, including the Russian Federation and Ukraine. Each of the opponents subsequently announced their adherence to the Declaration. So did some of the countries which had abstained (including Ukraine).

For present purposes, relevant to respect for human body parts of Indigenous Peoples, the most relevant articles of UNDRIP were Articles 12.1 and 12.2. These provision state:

> Article 12:
>
> 12.5 Indigenous people have the right to manifest, practise, develop and teach the spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access to privacy, to their religious and cultural sites. The right in the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
>
> 12.2 States shall seek to exercise the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with the Indigenous peoples concerned."

Laws addressing the obligations of museums and others to protect and repatriate different forms of cultural property have also been adopted. Some of these comprise treaties that establish obligations of international law binding on participants. Such treaties include the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import,*

Export and Transfer of Ownership of Cultural Property and the UNESCO *World Heritage Convention* (the 1972 *Convention concerning the Protection of Cultural and National Heritage*).

Such laws have been ratified by most states, members of UNESCO and of the United Nations. Normally these provisions relate to property stolen or illicitly exported from the country of origin which had been specifically designated by a requesting state as having importance for "archaeology, prehistory, literature, art or science; or comprise monuments, buildings; and works of man (with or without nature) judged to be of outstanding universal value". Such conventions and especially where they have been ratified and implemented by municipal law, evidence of a growing trend in the international community to oblige the return of objects claimed to be of special importance to the culture of states of origin.

The foregoing international treaties and declarations show the growing insistence of the international community obliging or encouraging the return of specified objects as "part of the culture" of claimant nations. These developments, in turn, provide the context in which the UN Indigenous Peoples Declaration should be interpreted. Of course, member states must give priority to the language and purpose of that Declaration.

Increasingly, municipal courts and the International Court of Justice itself have examined asserted claims for repatriation of property.[56] By analogy, nations are becoming accustomed to demands for the return of property,

[56] ICESCR; UNTS No. 14531 (1976).

deposited with museums, institutions and private collections overseas, to return such property to the place from which it was taken in earlier unequal times where there were no such legal obligations or remedies.

Stimulated by international treaty law, municipal law and United Nations Declarations, national property rights are now being invoked by non-national claimants, relying on the importance of such objects to the cultural, moral and spiritual values of claimants. Sometimes claims of this kind are succeeding. It is not now so surprising, in international claims, to find that the so-called "finders' keepers" rule in favour of the principle that state sovereignty no longer necessarily trumps the cultural heritage of the objects stolen in earlier times from grave sites in the claimants jurisdiction. The concept involved here is expressed in the Preamble to the 1970 UNESCO Convention:

> "It is essential for every state to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations."

This concept was expressed more than 50 years ago. It is an idea that lies behind Article 12 of the UNDRIP. In particular it is reflected in the specific mention of the "right to the repatriation of… human remains". This is mentioned in both articles 12.1 and 12.2 albeit in a non-binding Declaration, not a binding treaty.

Examples of repatriation: Many illustrations are now available of national museums, working in cooperation with similar overseas institutions, who have returned ancestral remains and sacred items to First Nations people.

Inevitably my familiarity of these developments has mainly concerned the new practices in Australia.

In Australia, the Australian Museum in Sydney has returned body parts of 469 ancestors, earlier on public display. The consequence of such return has resulted in the body parts so returned being reburied, together with secret-sacred objects originally removed in colonial times from their places of origin. On each such repatriation, the Australian Museum has worked closely with the First Nations stakeholders involved. They have consulted government departments, Aboriginal Land Councils; Aboriginal organisations; Elders and appropriate community Elders and relevant individuals.[57]

The Australian Museum plans and administers its own repatriation program. It does so in cooperation with the Australian Office of the Arts, Commonwealth Repatriation Team and the Aboriginal Cultural Heritage Services Team. These bodies have been established in Heritage New South Wales. The Australian Museum collaborates with institutions such as New South Wales Health and universities in the State. These bodies often cooperate in returning body parts of ancestors. Sometimes these have been repatriated from overseas institutions that have been traced to the State of NSW. Care is taken on the part of the Australian Museum to work in close partnership with Aboriginal heritage officers and Aboriginal land councils in each region of the State, with whom there is a strong program of repatriation, audited handovers and support for communities through Back to Country

[57] ICCPR, Art. 1 and ICESCR, Art. 1.

Limited. This is a not for profit First Nations company, governed by a knowledgeable board that facilitates the return of body parts (often skulls) to their original country when this can be found. Burial of body parts is carried out under the guidance of trained senior Indigenous people with established experience of Aboriginal burial practices. A previously outdated repatriation policy, formalised in 2007 and 2012 is being updated as part of the Reconciliation Action Plan for 2022-2025. This is happening in cooperation with the NSW State Government. It includes an agreement to facilitate decommissioning of ancestral remains and objects from the collection of the Australian Museum itself. This has been formulated in close consultation with relevant Museum personnel and elders from relevant Aboriginal communities in Australia. In exceptional cases, where the precise place for repatriation of body parts cannot be determined, they will commonly be stored for safekeeping at the Museum on behalf of the relevant community that is able to guarantee that the objects will be treated respectfully, where appropriate, conserved for the future and in accordance with applicable cultural protocols that govern access to sensitive objects under authority granted by the First Nations' community.[58]

A federal Office of the Arts in Australia has established a repatriation program. It receives federal funding. The Australian Museum in Sydney still holds over 370 ancestral remains and over 2,500 secret or sacred objects. Many of these may be traced to the most relevant known places in the State. The Australian Museum (which was founded in 1827) is the legal repository for Aboriginal ancestors in the State of New South Wales. The Museum has

[58] Based on confidential and sensitive information provided by Australian Museum and partly redacted for that reason.

adhered carefully to advice received from First Nations' representatives in identifying appropriate places in which the body parts of ancestors may be buried and where those with a known interest can gain access to them to honour them and to mourn.[59]

The first Indigenous Australian to hold the office of federal Minister for Indigenous Australians in the previous federal government (Hon. Ken Wyatt MP) established a "Ngurra Precinct". This is a word meaning 'home, a place of belonging, inclusion'. In the past, conflicts have sometimes arisen between scientists who wish to preserve scientific accessibility to ancestral remains. Granting access to such remains has led to conflicts between the claims of asserted communities and the claims of scientists.

The object of the Ngurra Precinct is to endeavour to achieve an accommodation between ancestor claimants and the asserted requests of scientists.[60] Assuring that First Nations' remains find a respectful place of rest under conditions affording access under claims for research, is not always one easy to resolve. It presents difficulties where the remains have been deposited in museums or graves, marked and unmarked, throughout Australia. The same is also true in England, Scotland and Ireland, where many such body parts were sent under inter-museum exchanges then in place throughout the world.[61] This dispersal of Aboriginal remains to museums throughout the former British Empire makes the implementation of

[59] UNESCO, Expert Group on the Rights of People, (Paris 1998) Report. M.D. Kirby, Rapporteur and chairman.
[60] Discussed Robertson, above n.13, 137-141.
[61] Ibid, 150. See G. Cace concerning (Cambodia v Thailand [1962] ICJ 6 at 336.

an Australia-wide policy of recovery constitutes a special difficulty. In the case of skulls, bones and preserved organs, it is particularly difficult.

To the credit of many museums in Australian and overseas, genuine efforts have been made to retrieve spears taken by Lt James Cook from their Indigenous craftsmen and owners. Some of these artifacts are deposited at universities and institutions in Sydney and others in museums in the British Isles (including Ireland).[62] The retrieval of Imperial "loot" (such as the "Benin Bronzes", housed for long periods in a gallery in New Zealand) presents other tricky problems when the demands for return are made. The Elgin [Parthenon] Marbles 'rescued' from Greece and now held on display in a special gallery in the British Museum in London, is a paradigm case in point.

Strategy for respect and return: The foregoing history of valuable objects taken from Australia and other colonised countries and scattered around the world, provides to the present generation of officials, in the post imperial age, and Indigenous representatives of a later time, great challenges and often difficult dilemmas. Some of these derive from the imperial times in which such precious objects and individual body parts were taken. Today's curators face demands for repatriation and the surrender of items now precious to both the country of origin and the venue of repositories: both Indigenous people and to officials in museums and other institutions of science and learning.

[62] *Webb v Ireland* [1988] IR 353 (Ireland).

Such disputes are difficult to resolve, and sensitive. This is sometimes because the objects in question are part of a shared history of the original place of origin and of the place of acquisition and display.

A global reaction in recent decades has seen increasing demands for return of 'stolen' objects to their sources, where known or reliably deduced. The return of skulls, bones and other body parts that cause disquiet to contemporary citizens because of the special and sensitive character of the parts of human bodies who once were human beings (perhaps ancestors) who lived, walked, loved and fought on our planet. The *Declaration on Rights of Indigenous Peoples* provides a formula, to be respected, observed and obeyed by recipient countries, especially where their provenance or DNA can show their origins, although not necessarily identify their earthly ancestors and forebears.

Clearly, it is important to establish the investigation and practices to restore such objects, if so desired, to their place of origin where they can find respect and perpetual rest. Equally, institutions such as arbitral tribunals are needed to assess such claims; to express the conditions for their retention or return; and, where repatriation is refused, to afford alterative opportunities for respect to be accorded and rest to be assured. This is why the investigations and understanding of these issues constitute a valuable contribution, to issues historical, economic, cultural and sometimes spiritual. We are still on the journey to explore and express the principles that will govern a just and respectful approach to resolving these problems. The present article demonstrates the ambiguity of the issues raised. And the still imperfect rules for their resolution.