

BONES OF CONTENTION: THE *LEX SITUS* RULE AND THE ILLICIT TRADE IN ARCHAEOLOGICAL HUMAN REMAINS

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I INTRODUCTION

In recent decades the illicit trade in antiquities has become “very big business.”¹ The black market in looted and stolen cultural property is routinely cited as being the second largest in the world² and is worth between one and ten billion dollars annually.³ It is unlikely that a 1987 U.S. Court foresaw the growth in the illicit antiquities trade when it said that cases involving original owners attempting to recover their stolen cultural property from good faith purchasers, although interesting, would not be a frequent occurrence.⁴

The illicit trade in archaeological human remains has been correctly identified as a very small part of the much larger picture that is the black market in cultural heritage.⁵ Nevertheless it is a small part that is more controversial and more divisive than the trade in ‘regular’ art or antiquities. The illicit trade in archaeological human remains occupies a unique space between practical reality and legal uncertainty. This article will attempt to clarify this uncertainty as far as possible by addressing two questions: firstly, are

¹ Government of the Islamic Republic of Iran v. The Barakat Galleries Ltd [2008] 3 W.L.R 486 at 490 (Eng.) (Lord Phillips of Worth Matravers C.J.).

² See, for example, Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT’L L. 1177, 1178 (2005). It falls behind the illicit narcotics trade and ahead of the black markets in both weapons and people.

³ *Id.* UNESCO estimates the illicit trade to be worth US\$2.2 billion annually, however the true financial scope of the black market in antiquities is impossible to ascertain: Peter B. Campbell, *The Illicit Antiquities Trade as a Transnational Criminal Network: Characterizing and Anticipating Trafficking of Cultural Heritage*, 20 INT’L J. OF CULTURAL PROP. 113, 113-14 (2013).

⁴ *DeWeerth v Baldinger*, 836 F.2d 103, 108 n.5 (2d Cir. 1987).

⁵ Damien Huffer & Duncan Chappell, *The Mainly Nameless and Faceless Dead: An Exploratory Study of the Illicit Traffic in Archaeological and Ethnographic Human Remains*, 62 CRIME, L. & SOC. CHANGE 131, 133 (2014). The use of the terms ‘cultural property’ versus ‘cultural heritage’ has been hotly contested: *see, e.g.*, Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN ST. L. REV. 641 (2011); Steven Gallagher, *Museums and the Return of Human Remains: An Equitable Solution?*, 17 INT’L J. OF CULTURAL PROP. 65, 65 (2010). This article uses the terms interchangeably.

archaeological human remains considered ‘property’ for the purposes of private international law; and secondly, is the *lex situs* rule the best choice of law rule in multijurisdictional cultural property disputes where the cultural property includes human remains?

This article first sets out the position taken in several common law jurisdictions regarding the treatment of archaeological human remains as property,⁶ as well as the size of the illicit trade in such remains. It then argues that the *lex situs* rule currently applied by most jurisdictions is ineffective and inappropriate for cultural property disputes that involve objects of very high value (both culturally and monetarily). This is of even greater relevance for cases involving archaeological human remains, where the artifacts in question are truly unique. It will be contended that the better choice of law rule for international disputes involving human remains is the *lex originis* rule, which advances wider public policy concerns, national patrimony, and private property rights. The role of international conventions, the possibility of state ownership of human remains, and the potential for an equitable solution are then briefly discussed.

The use of the term ‘archaeological human remains’ in this article refers to human remains (skeletal or otherwise) that have been illicitly removed from either their direct archaeological context or lawful place of residence (for example a museum or private collection).⁷ It does not intentionally include human remains bought and sold for medical purposes (such as reference skeletons) or other items of modern origin that are of predominately ethnographic interest.⁸

⁶ In an attempt to limit the scope of this article the civil law position has not been addressed. This article’s focus on Australia and the United States reflects the biases of the author.

⁷ The term ‘illicitly removed’ refers to archaeological human remains that have been stolen or illegally excavated, as opposed to those lost through fraud or entrustment. For a discussion of these issues see Derek Fincham, Preventing and Repairing These Losses: The Legal Response in the United States and the United Kingdom to the Illicit Trade in Cultural Property 121-23 (Nov. 28, 2007) (unpublished Ph.D. dissertation, University of Aberdeen) [hereinafter Fincham, Preventing and Repairing These Losses].

⁸ Such as trophy skulls, for example.

II ARCHAEOLOGICAL HUMAN REMAINS AND THE PROPERTY QUESTION: A COMPARATIVE ANALYSIS

Historically there has been a general reluctance to recognize property rights in the corpse, and particularly human remains that could be considered part of a society's 'cultural heritage'. Nevertheless, Australia, the United States, and the United Kingdom all allow for some form of proprietary rights to exist in the human body. These jurisdictions will be considered in turn.

A. Australia

Traditionally the English common law, as applied in Australia, has refused to recognize any property right in the corpse.⁹ There are two exceptions to this so-termed 'no property' rule: firstly, the immediate right to possession of an individual's corpse by their estate for the purpose of lawful disposal;¹⁰ and secondly, the right to ownership of human body parts that have been subject to the lawful application of work and skill.¹¹

Given a cursory analysis these exceptions appear to create a problematic distinction for archaeologically significant human remains, whereby an intentionally embalmed Egyptian Mummy becomes property but an accidentally preserved bog body does not.¹² Logical inference would suggest, however, that most archaeological human remains in the academic sphere, and certainly all contained within a museum or other form of collection, fall within the second exception to the 'no property' rule due to the care and skill required for their

⁹ See, e.g., *Williams v. Williams*, (1882) 20 Ch. 659 (Eng.). Interestingly, there is some authority from Australian State courts to suggest that the ashes of a cremated individual, provided they retain their physical characteristics as ashes, are capable of being possessed, owned, bought, sold, and otherwise treated as property: see *Leeburn v Derndorfer* (2004) 14 VR 100, ¶ 27.

¹⁰ *Re Dixon*, [1892] P. 386 at 391 (Eng.).

¹¹ *Doodeward v Spence* (1908) 6 CLR 406, 414 (Austl.).

¹² Rosalind Atherton, *Claims on the Deceased: The Corpse as Property*, 7 J.L. & MED. 361, 365, 365 n.23 (2000).

preservation.¹³ The English Court of Appeal provided some clarification of this issue in *R v Kelly*,¹⁴ suggesting that when part of a human body is altered or preserved in some way for the purpose of scientific examination it becomes the subject of property rights. Following this analysis, archaeological human remains would only be classed as property when coming into the possession of a museum or university and not when first unearthed. What then of the human skeletal matter and other remains that are yet to be excavated? The common law position remains unclear.

Some scholars seek to remedy this ambiguity by suggesting that the ‘application of care and skill’ exception applies to any and all human remains of archaeological importance as a direct result of their age and the information they could provide.¹⁵ This argument, whilst being the only apparent viable means for bringing all archaeological human remains under the umbrella of ‘property,’ is both too vague and too broad to be readily applied in a legal context.¹⁶

The Australian Law Reform Commission has suggested (albeit tentatively) that the common law has implicitly accepted that property rights beyond the right to possession exist in preserved human remains by allowing the continued possession of such remains by museums and other facilities.¹⁷ The Commission noted, however, that the current common law position on property rights in human body parts in Australia is underdeveloped and lacks

¹³ Steven Gallagher has also tentatively reached this conclusion: *see supra* note 5, at 72.

¹⁴ [1999] 2 WLR 384. In this case the Court of Appeal rejected the argument that the removal of preserved body parts from the Royal College of Surgeons was not theft because the body parts were not property and so could not be stolen.

¹⁵ *See* Chris Davies, *Property Rights in Human Remains and Artefacts and the Question of Repatriation*, 8 NEWCASTLE L. REV. 51, 56 (2004). In making this argument Dr. Davies relies on Griffith CJ’s comments in *Doodeward*, 6 CLR at 413-414 (Austl.).

¹⁶ How old, and of how great importance, do the remains need to be in order to ‘cross to the other side’ and become property?

¹⁷ 1 AUSTRALIAN LAW REFORM COMMISSION, *ESSENTIALLY YOURS: THE PROTECTION OF HUMAN GENETIC INFORMATION IN AUSTRALIA* ¶ 20.15 (2003).

a clear judicial statement.¹⁸ Despite these shortcomings, in a 2003 report the Commission declined to recommend a legislative ruling on the issue, instead backing the upholding of the common law status quo. In doing so they recognized the possible unforeseen consequences of legislative reform compared to the incremental case-by-case basis development of the common law.¹⁹

The current bioethical climate must also be considered. In recent years both scientific advances and changes in legal thinking have caused problems for the “trite law that there is no property in a corpse.”²⁰ Much of this recent academic discussion stems from modern biotechnological advances (such as the cryogenic preservation of gametes). In recent years, for example, various Australian courts have decided in favor of property rights existing in the preserved sperm or ovum of a deceased individual.²¹ It is likely that these decisions would aid a court in finding property rights in the remains of the long-deceased.

A strong argument can therefore be made based on the relevant case law to support a limited exception to the ‘no property’ rule that allows for proprietary rights in archaeological human remains.²² This issue does, however, remain unclear. It is unfortunate, then, that Australian legislation does little to clarify the common law position on the legal status of archaeologically significant human remains. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (*‘ATSIHPA’*), for example, makes explicit reference to how Aboriginal human remains are to be dealt with, and the language used suggests that no

¹⁸ *Id.* ¶ 20.10.

¹⁹ *Id.* ¶ 20.37.

²⁰ *AB v Attorney-General (Vic)* (Unreported, Supreme Court of Victoria, 23 July 1999) (Austl.) (Gillard J).

²¹ *See, e.g., Roche v Douglas* [2000] 22 WAR 331.

²² Atherton, *supra* note 12, at 366.

property rights beyond possession can exist in them.²³ Interestingly, *ATSIHPA* states that if, upon discovery of Aboriginal human remains, the relevant State Minister cannot locate “an Aboriginal or Aboriginals entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition,” they are to transfer the remains to a ‘prescribed authority’ for safekeeping.²⁴ The term ‘prescribed authority’ is not defined in *ATSIHPA*, but if the remains were transferred to a state museum or similar institution it is arguable that, by the common law analysis above, they would become the subject of property rights.²⁵

In addition to *ATSIHPA*, the *Protection of Moveable Cultural Heritage Act 1986* (Cth) lists Aboriginal human remains as Class A objects that cannot be exported from Australia.²⁶ The argument can be made, albeit tenuously, that having to explicitly disallow the export of Aboriginal human remains implies that some form of proprietary right of alienation exists in these remains that must be limited to exclude export.

B. *The United States*

In the United States, as in Australia, the ‘no property in a corpse’ rule has been rejected in favor of an approach that recognizes quasi-property rights in the human body. Indeed so similar are the two jurisdictions in their approaches to the question of rights in a corpse

²³ This is particularly evident in section 21 (‘Disposal of Aboriginal remains’), which uses the terms “possession, custody, or control” (s 21(1)(a)).

²⁴ *ATSIHPA* s 21(1).

²⁵ Importantly, *ATSIHPA* s 21(2) states that “Nothing in this section shall be taken to derogate from the right of any Aboriginal or Aboriginals accepting possession, custody or control of any Aboriginal remains pursuant to this section to deal with the remains in accordance with Aboriginal tradition.” This arguably vests any property rights held to exist in the remains at common law in an Aboriginal individual or group with a valid claim to the remains.

²⁶ Section 8(2)(a). See also *Protection of Movable Cultural Heritage Regulations 1987* (Cth) sch 1 pt 1.3(c). Interestingly, non-Aboriginal human remains are listed as Class B objects that can be exported from Australia provided a permit is granted: *Protection of Movable Cultural Heritage Regulations 1987* (Cth) sch 1 pt 2.3(1).

(particularly burial rights) that authority is often borrowed from one and applied in the other.²⁷

These quasi-property rights are generally limited to an immediate right of possession of the corpse by the next of kin for the purpose of burial²⁸ and so would appear to reflect the first exception to the ‘no property’ rule in England and Australia discussed above. Nevertheless, this quasi-property right includes that which is at the very heart of the property interest: the right to possess. Thus U.S. courts have had no difficulty upholding claims of conversion over ashes that were never delivered to the next of kin of the deceased.²⁹

Interestingly, the quasi-property rights upheld by American courts are sufficiently proprietary in character so as to attract the due process clause of the U.S. Constitution, as was found in *Brotherton v Cleveland*.³⁰ The court in this case acknowledged the wider ramifications of their decision, stating:

The importance of establishing rights in a dead body has been, and will continue to be, magnified by scientific advancements. The recent explosion of research and information concerning biotechnology has created a marketplace in which human tissues are routinely sold to and by scientists, physicians and others. The human body is a valuable resource³¹

Remarkably, the United States has passed legislation explicitly allowing for certain archaeological human remains to be dealt with as property.³² *The Native American Graves*

²⁷ See, e.g., *Smith v Tamworth City Council* [1997] 41 NSWLR 680, 686-87 (Austl.) (examining U.S. authorities regarding the right to burial being distinct from a duty to pay for burial in a New South Wales dispute).

²⁸ See, e.g., *Spiegel v. Evergreen Cemetery Co.*, 117 N.J.L 90, 93 (N.J. 1936).

²⁹ See, e.g., *Pedersen v. Taylor Funeral Home*, No. 96C-1588, 1997 U.S. Dist. LEXIS 2901 (N.D. Ill. Mar. 12, 1997) (denying summary judgment to the defendant in a conversion claim).

³⁰ 923 F.2d 477 (6th Cir. 1991).

³¹ *Id.* at 481.

³² Additionally, in recent years several U.S. jurisdictions have chosen to impose proprietary rights on human tissue and bodily fluid samples by way of legislation. In 1995 Oregon became the first U.S. state to grant ownership rights in genetic samples to the donor and their children: Oregon Genetic Privacy Act, OR. REV. STAT. §§ 192.531-192.550 (1995). The statute was, however, amended to remove this right in 2001. STATE OF OREGON LEGISLATIVE COMMITTEE SERVICES, BACKGROUND BRIEF ON GENETIC PRIVACY 2 (2012).

*Protection and Repatriation Act*³³ made it a federal offence to knowingly sell, purchase, use for profit, or transport for sale or profit “the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act”.³⁴ ‘Right to possession’ is defined as “possession obtained with the voluntary consent of an individual or group that had authority of alienation.”³⁵

C. *The United Kingdom*

The English common law position on property rights in the human body is largely identical to that of Australia.³⁶ Interestingly, the relevant legislation in the United Kingdom – the *Human Tissue Act*³⁷ – has expressly allowed for nine specified bodies (including the British Museum and the Natural History Museum) to deaccession their collections containing human remains not more than 1000 years old if they believe it is appropriate to do so.³⁸ Two things are interesting to note about this provision. Firstly, it is clear that remains belonging to a person who died over 1000 years before the *Human Tissue Act 2004* came into force cannot be deaccessioned.³⁹ Secondly, the provision (entitled ‘Power to de-accession human remains’) allows the applicable bodies to “transfer from their collection” eligible human remains.⁴⁰ The term ‘transfer’ is not defined in the Act, however given that ‘deaccession’ is generally accepted as meaning ‘to officially remove an item from a museum in order to sell

³³ 25 U.S.C. § 3001 et seq. (1990).

³⁴ 18 U.S.C. § 1170(a) (1990).

³⁵ 25 U.S.C. § 3001(2)(13).

³⁶ *See supra* Part II.A.

³⁷ 2004, c. 30 (Eng., N. Ir., & Wales). Scotland passed its own Human Tissue (Scotland) Act in 2006.

³⁸ Human Tissue Act § 47. The nine named institutions had previously been barred by statute from deaccessioning human remains – *see, e.g.*, British Museum Act, 1963, c 24 s 3(1).

³⁹ Human Tissue Act § 47(2). Thus most Mummies and bog bodies are excluded.

⁴⁰ *Id.*

it,⁴¹ a strong argument can be made that the *Human Tissue Act 2004* is acknowledging a right to alienation in (at least some) human remains.

D. Legal and Ethical Ramifications

The ownership of human remains of any age is a contentious issue. How a society deals with death and the remains of its dead is both culturally significant and highly emotive.⁴² There is a hesitance in many communities to recognize property rights in human remains because of an underlying reluctance to recognize ownership of the dead.⁴³ The Australian Law Reform Commission acknowledged this issue in a report on the legal status of human tissue and bodily fluid samples containing genetic information.⁴⁴ Whilst not dealing specifically with human skeletal matter, it did raise relevant ethical considerations with the treatment of body parts as property. One of the principal concerns stressed by the Law Reform Commission related to the commodification of the human body and subsequent changes in community attitudes towards body parts and their treatment of living humans.⁴⁵ It is submitted that whilst this is a valid concern and one particularly relevant to the use of genetic material and other current bioethical issues (such as organ donation), it is largely irrelevant to the treatment of the remains of the long-deceased as property.⁴⁶

⁴¹ See, e.g., THE OXFORD ENGLISH DICTIONARY (11th ed. 2009).

⁴² Gallagher, *supra* note 5, at 65.

⁴³ *Id.*

⁴⁴ See *supra* note 17.

⁴⁵ *Id.* ¶ 20.21.

⁴⁶ It is important to note, however, that not all archaeological human remains belong to individuals who died centuries ago. In Eastern Europe, for example, the looting of mass graves of German soldiers from World War II is increasing as the demand for Nazi memorabilia grows in Britain. Inevitably some of the disturbed skeletal matter ends up on the black market. See Rick Dewsbury, *Nazi Grave Robbers Stealing Medals, Equipment and Body Parts to sell*, THE DAILY MAIL (Aug. 20, 2012), <http://www.dailymail.co.uk/news/article-2190953/Nazi-grave-robbers-stealing-medals-equipment-BODY-PARTS-sell.html>.

It is also possible that the recognition of property rights in archaeological human remains could conflict with existing legislation. In the Australian state of Queensland, for example, the *Transplant and Anatomy Act 1979* (Qld) prohibits both the unauthorized buying and selling of human tissue.⁴⁷ ‘Tissue’ is defined within the Act as ‘an organ, blood or part of a human body.’⁴⁸ Great care would have to be taken, then, by those in possession of archaeological human remains that by exercising their common law proprietary rights they do not run afoul of the relevant legislative provisions.

Whilst largely beyond the scope of this paper the issue of repatriation of human remains to indigenous groups must also be considered.⁴⁹ The categorization of archaeological human remains as property is almost certainly the less preferable outcome for claimant indigenous groups. As property rights are recognized in these remains it could become possible for museums and other institutions to refuse to repatriate items in their collections on the basis of a claim of ownership.⁵⁰

E. Conclusion

In the past courts have evinced a strong dissatisfaction with the treatment of human remains, particularly culturally significant ones, as property. In 1988 a New Zealand judge stated that “[t]here can be little, if any, dissent from the proposition that the sale and purchase of human remains for gain and for the purpose of curiosity is abhorrent ... I hope, to any

⁴⁷ Sections 40 and 42 respectively.

⁴⁸ *Transplant and Anatomy Act 1979* (Qld) s 4(1).

⁴⁹ This issue has been the subject of much heated debate. Indigenous groups often argue that the remains were stolen from their rightful burial places by colonising powers, whilst many scientists and institutions argue that the scientific and medical knowledge that can come from studying archaeological human remains outweighs the wishes of the communities claiming the remains. For an interesting overview of current professional opinions on the topic, see WORKING GROUP ON HUMAN REMAINS, DEPARTMENT OF CULTURE, MEDIA AND SPORT, THE REPORT OF THE WORKING GROUP ON HUMAN REMAINS (2003).

⁵⁰ Interestingly, the Museum of New Zealand has explicitly rejected this position, stating that it does not own the human remains it houses and instead exists as a sacred repository of the bones until such a time as they are formally requested to return them to the relevant Maori group: see Robin J. Watt, *Museums Can Never Own the Remains of Other People but they Can Care for Them*, 29 U. BRIT. COLUM. L. REV. 77 (1995).

civilised person.”⁵¹ However these cultural mores appear to be changing, and in 2016 the question of property rights in both human bodies and the remains of the long deceased is by no means a decided one. The relevant case law and legislation appears to suggest that the treatment of archaeological human remains as property is the direction in which the law of at least some jurisdictions is headed.

The illicit trade in cultural heritage is an international one. If archaeological human remains are to be treated as property for the purposes of private international law, the question then becomes: which choice of law rule should apply to them?

III PREVALENCE OF THE ILLICIT TRADE IN ARCHAEOLOGICAL HUMAN REMAINS

There is no denying that the illicit trade in cultural property is big and growing every year. The extent to which this trade includes archaeological human remains is, however, largely unknown. In recent years some attempts have been made to quantify the size of the illicit trade in human remains through statistical analyses of sales in online auction houses. A 2004 study, for example, noted that auctions of prehistoric and historic human remains occur with great frequency online,⁵² using as an example the sale of a Peruvian skull of unknown age but lacking dental restorations in February of 2002.⁵³ More recently a larger analysis of the online trade in human remains found that a large majority of specimens for sale online made up a ‘secondary market’ of former ethnographic or medical specimens.⁵⁴ On some very

⁵¹ *Re Estate of Tupuna Maori* (unreported), High Court, Wellington, P580/88, 19 May 1988, Greig J, at 2.

⁵² *Human Remains Sold to the Highest Bidder! A Snapshot of the Buying and Selling of Human Skeletal Remains on eBay®, an Internet Auction Site*, 49 J. FORENSIC SCI. 1, 3 (2004). Somewhat incredibly the authors state that “[m]ultiple auctions occur everyday under the auspices of educational purposes.” *Id.* at 3.

⁵³ *Id.* at 1-2.

⁵⁴ Huffer & Chappell, *supra* note 5, at 138. Of this secondary market 41.4 percent was comprised of trophy skulls from a variety of geographical and cultural backgrounds. Trophy skulls are rarely of archaeological origin, however the authors did locate one mummified skull from Latin America for sale by a German auction house listed as dating from 800-1000 CE. *Id.* at 146.

rare occasions specimens from the ‘primary market’ (that is, directly from the archaeological record) emerge.⁵⁵ In their analysis the authors of the this study identified four ‘archaeological antiquities’ and five ‘miscellaneous ethnographical curios’ for sale online, comprising 2.1% of the total number of specimens found.⁵⁶

This data was collected by conducting searches for terms such as ‘human remains’ and ‘natural bone’ on popular online auction sites such as eBay and Amazon. In the course of research for this article attempts were made by the author to replicate their findings.⁵⁷ These attempts were met with a surprising level of success. A user on eBay, for example, in late April 2015 sold the frontal bone of a human skull for USD\$120.00. The bone was labeled “Ancient Real Human Ritual Mask – Skull for Medical Use.” The same user then also sold two human tibias, also labeled as ‘ancient’ and ‘real’, for USD\$51.00.⁵⁸ Neither of the listings provided any information as to provenance or history of the items, beyond that they were ancient and original. Perhaps of greater interest was a mummified Egyptian hand listed on a Canadian website for sale at CAN\$5,500.00. This online store proudly states that it is an ethical provider of skulls and skeletal matter to collectors, and some information as to the background of the hand was provided.⁵⁹

⁵⁵ *Id.* at 138.

⁵⁶ *Id.* at 138-139. These included a cranium allegedly from a Neolithic cave site in Algeria and a necklace containing human and animal teeth from Papua New Guinea.

⁵⁷ Searches were done for terms such as ‘real human bone’ and ‘ancient human bone’ on online auction sites such as eBay and Amazon, as well as Google. Results that were clearly from medical collections were ignored, as were listings for trophy skulls.

⁵⁸ Both listings included the phrase ‘for medical use’ as this is a requirement in order to sell human body parts on eBay. See, *Human Remains and Body Parts Policy*, EBAY, <http://pages.ebay.com/help/policies/remains.html> (last visited June 25, 2016). Huffer and Chappell note that the online trade in human remains is for the most part self-policing: *supra* note 5, at 140.

⁵⁹ The item description read:

This is a real Ancient Egyptian mummy hand, estimated to be roughly 3000 years old! The hand was exposed to humid conditions in the late 1800s-early 1900s and has actually excreted natron (Ancient Egyptian embalming fluids)! The thumb has detached from the hand over the millennia but it still fits perfectly onto the hand. This is the mummy hand featured in Billy

Of course, short of purchasing them and testing for age and authenticity there is no way of guaranteeing that bones put up for sale online are truly ancient (or indeed even real bone). What these listings do show, regardless of their veracity, is that there is a real and genuine interest amongst some members of the international community in owning historic human bone. It is important to note however, that when archaeological human remains enter the illicit market, online or otherwise, almost all of the information that they could provide to archaeologists, scientists, and other stakeholders is lost.

IV THE *LEX SITUS* RULE AND ARCHAEOLOGICAL HUMAN REMAINS

A 12th century Hindu idol is illegally excavated from Tamil Nadu in India and bought and sold at least three times before being confiscated by the Metropolitan Police in London.⁶⁰ A painting is removed from Gotha in 1946, passes through Russia and West Berlin, and is put up for sale at Sotheby's.⁶¹ Mosaics looted from a church in Cyprus are sold to an American art dealer at Geneva Freeport in Switzerland.⁶² The illicit trade in art and antiquities almost inevitably crosses national borders to become international disputes. When an original owner seeks to recover their stolen property from a subsequent good faith purchaser these international disputes involve the rights of two relative innocents.⁶³ It is the role of each

Jamieson's show Treasure Trader. It was purchased out of an estate in an antique tobacco tin, which is also included.

Ancient Egyptian Mummy Hand, SKULLSTORE, <http://www.skullstore.ca/collections/humans/products/ancient-egyptian-mummy-hand> (accessed by searching for Skullstore in the Internet Archive index).

⁶⁰ *Bumper Development Corporation v Commissioner of Police of the Metropolis and Others*, [1991] 1 W.L.R. 1362 (Eng.).

⁶¹ *City of Gotha and the Federal Republic of Germany v Sotheby's and Cobert Finance S.A.*, (Unreported, High Court (Chancery), 9 Sept. 1998) (Eng.).

⁶² *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 294 (7th Cir, 1990).

⁶³ Both the original owner and the good faith purchaser have clear claims against the thieving intermediary, however they are often difficult to locate and may in actuality be a series of individuals including the original thief or looter, dealers, auction house and museum staff: Derek Fincham, *Towards a Rigorous Standard for the*

nation's choice of law rules to decide exactly how these rights are to be allocated between the two parties.

The starting point for international disputes involving moveable property (including cultural property) is the *lex loci rei sitae* ('law of the place where the property is situated'), or simply *lex situs*.⁶⁴ This choice of law rule was first accepted as the preferable rule in cases involving moveable property in the 19th century,⁶⁵ and is now deeply entrenched in private international law. Indeed "[f]ew choice of law rules are as well established or universal."⁶⁶

The *lex situs* rule is frequently pointed to as being the paradigm of simplicity, certainty, and commercial efficiency.⁶⁷ At the outset the concept is simple – as the name suggests, the *lex situs* rule states that the governing law in a movable property dispute is the law of the place in which the object was situated at the time of the transfer of title. Questions relating to the transfer of title – for example, what actions are required in order to effect the transfer and the proprietary implications of those actions – will all be answered in accordance with the law of the *situs* in which the property was located at the time of the transfer.⁶⁸ Any title acquired under the *lex situs* will be recognized. Importantly, this recognition will continue if the property is removed from the *situs* jurisdiction, as the rule focuses solely on the validity of the last proprietary transaction.⁶⁹

Good Faith Acquisition of Antiquities, 37 SYRACUSE J. INT'L L. & COM. 145, 160-161 (2010) [hereinafter Fincham, *Towards a Rigorous Standard*].

⁶⁴ See, e.g., *Winkworth v Christie Manson and Woods Ltd. and Another*, [1980] 2 W.L.R 937 (Eng.).

⁶⁵ *Cammell v Sewell*, (1858) 3 H. & N. 617 (Eng.). The history of the doctrine is set out in great detail in *Winkworth* [1980] 2 WLR at 941-48 (Slade J).

⁶⁶ Celia Wasserstein Fassberg, *On Time and Place in Choice of Law for Property*, 51 INT'L & COMP. L.Q. 385, 385 (2002).

⁶⁷ See, for example, Susan M. Nott, *Title to Illegally Exported Items of Historic or Artistic Worth*, 33 INT'L & COMP. L.Q. 203, 205, 206 (1984).

⁶⁸ Wasserstein Fassberg, *supra* note 66, at 386.

⁶⁹ *Id.* at 387-8.

Perhaps the best example of the application of the *lex situs* rule in cultural property disputes is the seminal case *Winkworth v Christie Manson and Woods Ltd. and Another*⁷⁰ (*Winkworth*). This dispute concerned several Japanese *netsuke* (small sculpted objects) that were stolen from the plaintiff in England. The stolen *netsuke* were transported to Italy where they were sold to a good faith purchaser, who then brought them back to London and delivered them to Christie's auction house for sale.⁷¹ The plaintiff (the original owner) sought a declaration that the *netsuke* had at all material times been his property. The good faith purchaser counterclaimed for a declaration that the *netsuke* were his property.⁷²

The question before the English Court was whether the dispute was rightly to be determined by English or Italian law.⁷³ In deciding the issue Slade J explicitly applied the *lex situs* rule, holding that as the transaction that had resulted in the transfer of title had taken place in Italy it was Italian law that would resolve the dispute.⁷⁴ This was bad news for the plaintiff as Italian law favors the good faith purchaser of stolen property over the original owner who has been deprived of their goods.⁷⁵

This is a common divide between common law and civil law jurisdictions – the former, such as England and the United States, generally prefer the original owner; whereas the latter, such as Italy and France, favor good faith purchasers.⁷⁶ Consider, for example, the recent

⁷⁰ [1980] 2 W.L.R. 937 (Eng.).

⁷¹ *Id.*

⁷² *Id.* at 939-40.

⁷³ *Id.* at 940.

⁷⁴ *Id.* at 952.

⁷⁵ Stato francese c, Ministero per i beni culturali e ambientali e De Contessini, Tribunale de Roma, 27 June 1987.

⁷⁶ Compare, for example, § 21(1) of the English Sale of Goods Act, 1979, c. 54 (U.K.), which expressly disallows a thief from passing good title, with art. 2279 of the French CODE CIVIL [C. CIV], which states that in matters of movables, possession is equivalent to title.

case *The Islamic Republic of Iran v Denyse Berend (Berend)*.⁷⁷ In this case an Archaemenid limestone relief dating from the fifth century BCE, having been stolen from Iran and sold at auction to a French woman through her agent in New York, was held to be the rightful property of the subsequent purchaser as French law (the *lex situs* of the dispute) dictated that she had bought the relief in good faith.⁷⁸ If, however, the *lex situs* had been the law of New York the outcome of the case would have been entirely different. New York property law is governed by the Uniform Commercial Code, which states that “a purchaser of goods acquires all title which his transferor had or had power to transfer.”⁷⁹ The thief would therefore have not been able to pass title to the subsequent good faith purchaser, and the limestone relief would have been returned to Iran.

This difference in rights allocation across jurisdictions creates disharmony in an area of law that needs certainty. This is an undesirable situation at the best of times, however when cultural property is at stake this disharmony can injure the interests of individuals, institutions, nations, and our collective cultural heritage alike. This discord in the law prevents parties from predicting legal outcomes and ensures that macro-level policy objectives (such as the protection of cultural heritage) cannot be advanced. It has further ramifications for the legitimate art and antiquities market, as the uncertainty of legal outcomes creates a corresponding uncertainty in the security of acquisition.⁸⁰ Furthermore, outcomes in international cultural property disputes should not depend on the jurisdiction in which the thief has chosen to part with the stolen property.

⁷⁷ [2007] EWHC (QB) 132 (Eng.).

⁷⁸ *Id.* [58]. Under the relevant provision of the French CODE CIVIL [C. CIV.] (set out *supra* at note 76) the transfer was only effected when the woman took possession in Paris.

⁷⁹ U.C.C. § 2-403(1) (2011).

⁸⁰ Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J.L. & ARTS 111, 133 (2008) [hereinafter Fincham, *Adopting the Lex Originis*].

It is improbable that a thief will choose the jurisdiction in which they part with their stolen goods arbitrarily. It has been argued that the *lex situs* rule actively encourages the black market in cultural heritage by encouraging thieves to launder stolen property through jurisdictions that favor good faith purchasers.⁸¹ This is of particular concern in cultural property disputes given the emotive and unique nature of art and antiquities, a concern that is even greater in the case of archaeological human remains. Admittedly, the threat of stolen cultural property being laundered through market states that favor good faith purchasers is lessened by the fact that, by their very nature, good faith purchasers are required to act *bona fide*. Purchasers cannot, for example, limit themselves to a few last-minute phone calls to ensure the validity of their seller and expect to retain good title.⁸²

The tripartite of original owner, thief, and subsequent good faith purchaser has been described as creating a possibly irresolvable triangle of legal claims.⁸³ That through the application of the *lex situs* rule legal outcomes are unclear only adds to the impossibility of the situation. The disharmony of laws relating to good faith purchasers is, however, far from the only concern that arises when the *lex situs* rule is applied to cultural property disputes.

The main policy objective advanced by the *lex situs* rule is that of commercial certainty, a factor Slade J gave great weight In *Winkworth*:

Security of title is as important to an innocent purchaser as it is to an innocent owner whose goods have been stolen from him. Commercial convenience may be said imperatively to demand that proprietary rights to movables shall

⁸¹ See, e.g., Karen Theresa Burke, *International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?*, 13 LOY. L.A. INT'L & COMP. L. REV. 427, 458, 461 n.268 (1990).

⁸² *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 294 (7th Cir, 1990). In this case a purchaser bought four mosaics from an art dealer she knew had been imprisoned for fraud on at least one prior occasion. The purchaser paid for the artifacts in question with cash in a paper bag at Geneva airport. The court noted that in the transaction "All the red flags are up, all the red lights are on, all the sirens are blaring." *Id.*

⁸³ Fincham, *Towards a Rigorous Standard*, *supra* note 63, at 155.

generally be determined by the *lex situs* under the rules of private international law.⁸⁴

It is submitted, however, that given the uniquely valuable nature of cultural heritage this deference to commercial certainty is largely inappropriate in multijurisdictional cultural property disputes. Commercial concerns and cultural property have always made bad bedfellows. As one commentator noted “[i]t is the most distasteful aspect of the current art trade ... that the physical mutilation of certain types of art is rendered profitable because a ... market can be found for fragments no matter how brutally obtained.”⁸⁵

As has been previously discussed, the *lex situs* rule allows for forum shopping as thieves sell their stolen goods in jurisdictions with lower limitation periods and laws that favor good faith purchasers. As such the rule creates an international climate that encourages theft of cultural property to such an extent that the advantages of commercial certainty and legal simplicity seem insignificant.⁸⁶ Cultural property embodies our collective cultural heritage and as a result is entirely different from the fungible goods that are normally the subject of *lex situs* claims. It is necessary to protect cultural heritage and limit the illicit black market trade in cultural property, objectives for which the application of the *lex situs* rule in international cultural property disputes is entirely inadequate.

Generally, a court applying the *lex situs* rule will only look to the substantive law of the *situs* jurisdiction. Some of the *situs*' substantive law will, however, only be recognized as having effect within the situs jurisdiction and will not be enforced outside of it.⁸⁷ These laws include penal and revenue gathering laws, as well as public laws that are considered part of

⁸⁴ [1980] 2 W.L.R. 937 at 951 (Eng.).

⁸⁵ Paul Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 296 (1982).

⁸⁶ Fincham, *Adopting the Lex Originis*, *supra* note 80, at 115 n.23.

⁸⁷ Pippa Rogerson, *Public Policy and Cultural Objects*, 67 CAMBRIDGE L.J. 246, 247 (2008).

the sovereign powers of independent states.⁸⁸ This creates issues when the original owner seeking to recover their stolen cultural property is not an individual but a state, as the latter will often be forced to rely on its public laws. Such a situation arose in *Republic of Iran v Barakat (Barakat)*.⁸⁹ This case concerned title to eighteen carved jars, cups, and bowls from the Jiroft region in Iran dating from 3000 BCE to 2000 BCE.⁹⁰ Both parties in the dispute accepted that as a result of the application of the *lex situs* rule the English Court of Appeal was to apply Iranian law.⁹¹ The plaintiff contended that Iranian law vested in Iran a proprietary title to the cultural property, and further and in the alternative that Iranian law gave the plaintiff an immediate right to possession of the artifacts that allowed for a claim in conversion to be brought in the English court.⁹² The question faced by the court was whether the legislation relied on by the plaintiff could be enforced as part of the *lex situs* rule.⁹³

The English Court of Appeal found for Iran both on their primary and alternative submissions.⁹⁴ In reaching this conclusion it found (somewhat arbitrarily) that Iran's right to ownership of the cultural property came from legislation that asserted a patrimonial claim to the artifacts rather than the compulsory acquisition of property from private owners, the latter being a public law that would not be upheld by a court applying the *lex situs*.⁹⁵

⁸⁸ *Id.*

⁸⁹ [2008] 3 W.L.R. 486 (Eng.).

⁹⁰ *Id.* at 490-91. These artefacts had been illegally excavated and removed from Iran.

⁹¹ *Id.* at 491.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 510. The court found that Iran had shown that it was the owner of the artefacts for the purposes of Iranian law, and stated that if they had not reached this conclusion they would have found that Iran had an immediate right to possession of the cultural property that would vest ownership on possession.

⁹⁵ *Id.* at 523. This conclusion has been criticised as doing little to clear the muddy waters of cultural heritage law: see Rogerson, *supra* note 87, at 249.

This fine distinction between foreign laws that will and will not be included in the *lex situs* rule has been criticized as creating uncertainty.⁹⁶ However it illustrates a further issue with the application of the *lex situs* rule in international cultural property disputes. Instances in which the original owner seeking to recover their stolen property from a subsequent good faith purchaser is a state and not a private individual are almost certainly more frequent in cultural property disputes than in regular movable property conflicts. The issues of legislation classification under the *lex situs* rule faced by the court in *Barakat* are increasingly likely to appear in cultural property disputes as jurisdictions attempt to vest ownership of cultural heritage in the state.⁹⁷ The decision reached by the court in *Barakat*, whilst certainly producing the best result, invited even more uncertainty into an area of law that desperately needs clarity. It is becoming increasingly clear that this clarity cannot be provided by the *lex situs* rule.

This want of transparency can further be seen when the unique position of archaeological human remains is considered. As has been discussed, there is a growing acceptance in many jurisdictions that proprietary rights can exist in body parts of the deceased.⁹⁸ It is perfectly conceivable, however, that a court or legislature in any one jurisdiction may refuse to recognize property rights in such remains. In international disputes concerning archaeological human remains this could lead to two situations: firstly, the forum jurisdiction considers the human remains to be property but the *situs* jurisdiction does not; or conversely the *situs* jurisdiction considers the human remains to be property but the forum jurisdiction does not. The application of the *lex situs* rule in either of these hypothetical situations produces unclear and undesirable results.

⁹⁶ Rogerson, *supra* note 87, at 248.

⁹⁷ See *infra* Part VII.B.

⁹⁸ See *supra* Part II.

Consider the following scenario: a thief steals a 1000-year-old femur from a collector in Country A. The thief sells the femur to a good faith purchaser in Country B, who then takes the bone to an auction house in Country C. The original owner brings an application in the courts of Country C to have the femur returned to her. In the first of the possible situations set out above, Country A (the originating state) and Country C (the forum state) recognize proprietary rights in the femur, however Country B, the *situs* jurisdiction for the purpose of the *lex situs* rule, does not. According to the laws of Country B a valid transfer of title has not occurred, as there exists no property in which to have title. What law does the forum court then apply? It appears to have two choices: either refuse to acknowledge the transfer of title as the *situs* jurisdiction has done and restore the femur to the original owner, or acknowledge the transaction and uphold the rights of the good faith purchaser. The decision is one of complete discretion for the forum court, a situation that entirely belies the certainty in the law that the *lex situs* is said to provide.

In the second of the two situations it is likely that the original owner would not be able bring an application in Country C for the return of her property as the jurisdiction does not recognize proprietary rights in human remains. Could the original owner bring an application on the basis that under the *lex situs* rule property rights exist in the femur (as they are recognized by Country B)? To do so would undermine both the substantive law and public policy of the forum jurisdiction.

It is clear that in both possible situations the *lex situs* rule fails to provide an adequate legal solution. Alternative choice of law rules must be given serious consideration by courts and legislators alike.

V THE MORE APPROPRIATE CHOICE OF LAW – *LEX ORIGINIS*

It is submitted that the more appropriate choice of law rule when deciding multijurisdictional ownership disputes over cultural property is the *lex originis* – the law of the state of origin of the property. The crucial event at the center of this rule is the theft or other unlawful removal of cultural property, and not the subsequent transfer of title as in the *lex situs* rule.⁹⁹ The adoption of the *lex originis* rule advances both broad policy objectives regarding the protection of cultural property and the interests of private persons who have had cultural objects stolen from them. In many instances it also facilitates the return of cultural property to the place with the strongest connection to it.¹⁰⁰ Thus in *Autocephalous Greek-Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts, Inc.*¹⁰¹ (*Autocephalous*) – a case concerning the theft of four sixth-century mosaics from a church in Cyprus and subsequent transfer to a buyer in Switzerland – the place with the strongest connection would arguably not be Indiana, where the buyer had attempted to on-sell the mosaics, or Switzerland, the *lex situs* jurisdiction where the mosaics had spent four days, but rather Cyprus, where the mosaics had spent over 1,400 years embedded in the wall of a church.¹⁰²

This ‘strongest connection’ analysis provides a counter to one of the main arguments given in support of the *lex situs* rule – that it promotes strong inter-jurisdictional (and particularly international) relations.¹⁰³ As public policy both domestically and internationally shifts its focus to better protect cultural property,¹⁰⁴ it can be argued with increasing force

⁹⁹ Symeonides, *supra* note 2, at 1186.

¹⁰⁰ It is important to note that whilst the source state of the cultural property and the *originis* jurisdiction may often be one and the same, the *lex originis* rule refers only to the jurisdiction from which the property was unlawfully removed.

¹⁰¹ 917 F.2d 278 (7th Cir. 1990).

¹⁰² See Symeonides, *supra* note 2.

¹⁰³ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 247(a) (1971).

¹⁰⁴ As of 2009 the UNESCO Database of National Cultural Heritage Laws contained over 2000 laws from more than 170 countries. UNESCO, DATABASE OF NATIONAL CULTURAL HERITAGE LAWS (2009), available at <http://www.unesco.org/culture/en/natlaws/db/brochure.pdf>.

that the principle of comity is upheld more truly by the *lex origins* rule, a rule which more readily allows for the law of cultural property source states to be upheld. This is particularly true in the case of archaeological human remains. For example, provided indigenous groups could prove their society originally held property rights in the remains under the law of the *originis* jurisdiction, the *lex origins* rule could help facilitate the return of the remains of elders and ancestors held in international museums or other institutions.

The *lex origins* rule has at times been met with concern, some commentators noting that it would almost always favor return even when the *originis* state had demonstrated minimal diligence in protecting the property or had only a tangential relation to the objects in question.¹⁰⁵ These concerns are of limited relevance in cultural property disputes. In many cases original owners are not aware their property has been stolen until it resurfaces in the art and antiquities market (as was the case in *Winkworth*) or they are powerless to stop the unauthorized removal (as in *Autocephalous*).¹⁰⁶ In any case, proponents of the rule note that it could easily be formulated so as to ensure due diligence is done and refuse to uphold claims when it is not.¹⁰⁷

¹⁰⁵ See, e.g., Thomas W. Pecoraro, *Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law*, 31 VA. J. INT'L L. 1, 16-17 (1990).

¹⁰⁶ The mosaics had been stolen from the church by vandals following the Turkish invasion and occupation of the region – see Deidre L. Crowell, *Autocephalous Greek-Orthodox Church of Cyprus v Goldberg & Feldman Fine Arts, Inc.: Choice of Law in the Protection of Cultural Property*, 27 TEX. INT'L L.J. 173, 175 (1992).

¹⁰⁷ Symeon C. Symeonides, a proponent of *lex origins*, has proposed a formulation of the rule that provides:

1. Except as otherwise provided by an applicable treaty or international or interstate agreement, or statute, the rights of parties with regard to a corporal thing of significant cultural value (hereinafter “thing”) are determined as specified below.
2. A person who is considered the owner of the thing under the law of the state in which the thing was situated at the time of its removal to another state shall be entitled to the protection of the law of the former state (state of origin), except as specified below.
3. The owner’s rights may not be subject to the less protective law of a state other than the state of origin;
 - a. Unless:
 - i. The other state has a materially closer connection to the case than the state of origin; and

On the surface arguments for the *lex originis* rule appear to be based largely on emotion. There is, however, a strong basis for the rule in the existing case law. In *Winkworth* Slade J discussed a public policy exception to the application of the *lex situs* rule.¹⁰⁸ This exception allows the forum court to refuse to apply the relevant law of the *situs* jurisdiction if the court considers it to be contrary to the public policy of the forum state.¹⁰⁹ In the context of *Winkworth* Slade J considered it theoretically possible that the trial judge to whom the case would be remitted could decide that favoring the good faith purchaser over the original owner of the cultural property as was required by Italian law was so contrary to English public policy that the *lex situs* would have to be disregarded.¹¹⁰

The consideration of public policy in choice of law cases is not, however, without its criticisms. It has been noted that public policy considerations can easily have a negative, rather than a positive, effect on the determined result, and are generally only applied in extremely rare and controversial cases.¹¹¹ To allow otherwise would undermine the basic principles of conflict laws and invite courts to investigate the contents of the foreign law they are applying and to refuse to apply laws they do not like.¹¹² It is submitted, however, that the preservation of cultural property, a unique and endangered commodity, is just such a rare and

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- ii. Application of that law is necessary in order to protect a party who dealt with the thing in good faith after its removal to that state; and
 - b. Until the owner knew or should have known of facts that would enable a diligent owner to take effective legal action to protect those rights.

Supra note 2, at 1183.

¹⁰⁸ [1980] 2 W.L.R. 937 at 949 (Eng.).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 953. In a cultural heritage context such public policy considerations should include the ratification of relevant international treaties, for example UNESCO's Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, *opened for signature* Nov. 14, 1970, 823 U.N.T.S. 231.

¹¹¹ Rogerson *supra* note 87, at 249.

¹¹² *Id.*

controversial circumstance in which public policy should be considered. Slade J's judgment shows that it is at least possible for the *lex originis* rule to arise as a public policy exception to the generally applied *lex situs* in cultural property disputes.

The preferable position is, however, that the *lex originis* rule be implemented as a general choice of law rule and not as an exception to the *lex situs* rule. Such an approach has been taken by several members of the European community. At its 1991 session in Basel the Institut de Droit International argued for the adoption of the *lex originis* rule as a result of "every country [having] the right and duty to take measures to preserve its cultural heritage."¹¹³ In 1993 the Council of European Communities adopted a *lex originis* approach to cultural objects that have been unlawfully removed from the territory of Member States.¹¹⁴ Belgium, however, stands alone as the sole jurisdiction that has explicitly rejected the *lex situs* rule in favor of the *lex originis*.¹¹⁵

Adoption of the *lex originis* rule in cultural property disputes does not necessarily need to be done by legislative change. It is possible for the *lex originis* rule to be implemented in a jurisdiction by an individual judge unilaterally without intervention by the legislature.¹¹⁶ However given how deeply embedded the *lex situs* rule is in choice of law litigation in the vast majority of jurisdictions, the adoption of the *lex originis* rule in cultural property disputes by courts alone is, unfortunately, unlikely. The need for the current *lex situs* rule to be changed by legislation has been argued by scholars and judges alike. In *Berend*, for example, Justice Eady acknowledged the general desirability of a *lex originis*-type rule in

¹¹³ *La vente internationale d'objets d'art sous l'angle de la protection du patrimoine culturel [The International Sale of Works of Art from the Angle of the Protection of the Cultural Heritage]*, 64 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 402, 402 (1992).

¹¹⁴ Council Directive 93/7/EEC of 15 March 1993 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, art 2, 1993 O.J. L 74/74.

¹¹⁵ Loi portant le Code de droit international privé [Code of Private International Law] of July 16, 2004, Moniteur Belge [M.B.] [Official Gazette of Belgium], July 27, 2004, 57344.

¹¹⁶ Fincham, *Adopting the Lex Originis*, *supra* note 80, at 149.

cases involving “national treasure or monuments” but held that it was a matter for governments to decide and to implement as they saw fit.¹¹⁷ It is unfortunate and potentially destructive to our collective cultural heritage that in many non-European jurisdictions this legislation does not appear to be forthcoming.

VI OTHER MATTERS FOR CONSIDERATION

A *The Role of International Treaties*

There are two major international treaties that govern cultural property disputes. Opened for signature in 1970, the United Nations Educational, Scientific and Cultural Organisation’s *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*¹¹⁸ (‘*UNESCO Convention*’) allows States party to the Convention to request that stolen or illegally exported cultural property be restored to them.¹¹⁹ The *UNESCO Convention* was followed in 1995 by the International Institute for the Unification of Private Law’s *Convention on Stolen or Illegally Exported Cultural Objects*¹²⁰ (‘*UNIDROIT Convention*’). Whilst the *UNIDROIT Convention* takes a broader approach than the *UNESCO Convention*, allowing private parties as well as member states to initiate proceedings,¹²¹ the two Conventions generally complement each other. The *UNESCO Convention* operates on a State to State level¹²² and approaches the problem of illicit trafficking by means of administrative procedures,¹²³ whereas the *UNIDROIT Convention*

¹¹⁷ [2007] EWHC (QB) 132, [30] (Eng.).

¹¹⁸ *Opened for signature* Nov. 14 1970, 823 U.N.T.S. 231.

¹¹⁹ *Id.* art. 7(a)(ii).

¹²⁰ *Opened for signature* June 24, 1995, 34 I.L.M. 1326.

¹²¹ *Id.* art. 3(2).

¹²² LYNDEL V. PROTT, COMMENTARY ON THE UNIDROIT CONVENTION 26 (1997).

¹²³ *Id.* at 15.

operates on the basis of private law¹²⁴ and allows an original owner (be it an individual or a state) direct access to the courts of the state to which the property has been removed.¹²⁵

The difficulties faced by parties seeking to define terms such as ‘cultural heritage’ in an international setting have been commented on.¹²⁶ Both the *UNESCO Convention* and the *UNIDROIT Convention* do, however, include “products of archaeological excavations (including regular or clandestine) or of archaeological discoveries” in their definitions of ‘cultural property’ and ‘cultural object’ (respectively).¹²⁷ On this basis archaeological human remains almost certainly fall under the purview of both treaties. It would certainly be within the spirit of the Conventions to include human remains within their protective ambit.

The importance of these treaties in international cultural property disputes are undeniable. The *UNIDROIT Convention* for example, if it is ever universally adopted, will eradicate the differences between common and civil law jurisdictions regarding the protection of good faith purchasers that currently create so much uncertainty. This Convention favors the original owner and provides a limited right of return of stolen cultural objects,¹²⁸ whilst also allowing the good faith purchaser to seek “fair and reasonable compensation” from the party seeking the return of the property.¹²⁹

¹²⁴ *Id.* at 26.

¹²⁵ *Id.* at 15.

¹²⁶ PATRICK J. O’KEEFE, COMMENTARY ON THE UNESCO 1970 CONVENTION 34 (2d ed., 2006).

¹²⁷ See *UNESCO Convention*, *supra* note 118, art. 1(c); *UNIDROIT Convention*, *supra* note 120, art. 2. See also Prott, *supra* note 122, at 25.

¹²⁸ *UNIDROIT Convention*, *supra* note 120, art. 5(3). Under this article the requesting state must show that the removal of the object has significantly impaired an interest, for example the object’s physical preservation (art. 5(3)(a)) or the its traditional or ritual use by indigenous communities (art. 5(3)(d)).

¹²⁹ *Id.* art. 4.

Somewhat inexplicably, however, in addition to this limited right of return the *UNIDROIT Convention* contains an additional right of return that is almost universal.¹³⁰ This broader provision has made many states reluctant to become party to the Convention.¹³¹ A further weakness of the *UNIDROIT Convention* is its refusal to allow reservations other than those expressly authorized, meaning that states that are uncertain or uncomfortable about any number of provisions cannot become signatories.¹³²

Whilst the *UNIDROIT Convention* has been criticized as being too forceful, provisions in the earlier *UNESCO Convention* have been labeled “discretionary and ambiguous,” with many articles ensuring that states party to the Convention are not required to take action that is at odds with their existing domestic law.¹³³ Thus one convention is so weakly worded that under it signatory States are required to take very little action, and the other is so strongly worded that States are reluctant to become signatories at all.

The ineffectiveness of these international conventions has been noted by numerous commentators,¹³⁴ but perhaps the clearest indication of their lack of success, particularly in the case of the *UNIDROIT Convention* is the small number of states that have become member parties.¹³⁵ Whilst the efficacy of these conventions is questionable, as the court noted in *Barakat*, “these instruments ... illustrate the international acceptance of the desirability of

¹³⁰ *Id.* art. 3(2). This article reads: “For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.” Under article 3(1) the possessor of a stolen cultural object must return it to the original owners.

¹³¹ Both the United States and the United Kingdom, the two largest market states in the cultural heritage trade, have declined to sign on to the treaty.

¹³² *UNIDROIT Convention*, *supra* note 120, art. 18.

¹³³ Burke, *supra* note 81, at 436.

¹³⁴ See, e.g., Fincham, Preventing and Repairing These Losses, *supra* note 7, at 140-141; Burke, *supra* note 81, at 434-439.

¹³⁵ As of June 25, 2016 the *UNIDROIT Convention* has only 37 contracting states.

protection of the national heritage.”¹³⁶ It is unfortunate then that this is likely to be their only legacy.

B *State Ownership of Human Remains*

Some jurisdictions have attempted to vest ownership of their cultural heritage (including archaeological human remains) in the state.¹³⁷ These vesting laws are, however, of uncertain international status. In *Peru v Johnson*¹³⁸ for example, Peru’s vesting laws were described as having no more effect than export restrictions. Export restrictions are public laws and will not be enforced by a foreign state unless that state is required to give effect to them pursuant to a treaty or other agreement. As Derek Fincham has argued, characterizing vesting legislation in this way creates a significant barrier to recovery for nations of origin.¹³⁹

It has also been noted that statutes allowing for the automatic seizure of illegally exported cultural goods are unlikely to have any effect as forum courts often refuse to give effect to foreign legislation that is penal in nature.¹⁴⁰ As has been discussed above,¹⁴¹ the decision in *Barakat* has opened the door for judges to characterize legislation vesting ownership in the State as something other than a public law (hence allowing for its enforcement by forum courts), however this approach creates both undesirable arbitrary distinctions and uncertainty in the law.

C *Letters of Administration*

¹³⁶ [2008] 3 W.L.R. 486 at 525 (Eng.).

¹³⁷ In Egypt, for example, all movable antiquities are property of the state: Law No. 117 of 1983 (Law on the Protection of Antiquities), *Al-Jarida Al-Rasmiyya*, 11 Aug. 1983, art. 6.

¹³⁸ 720 F.Supp. 810 (C.D. Cal. 1989).

¹³⁹ Fincham, *Adopting the Lex Originis*, *supra* note 80, at 118.

¹⁴⁰ Nott, *supra* note 67, at 206.

¹⁴¹ *See supra* pp. 19-20.

Some academics make the case for ownership of archaeological human remains in equity.¹⁴² It is argued that in common law jurisdictions the immediate cultural descendants of the deceased (or other persons of judicially-recognized proximity) can apply for Letters of Administration over the estates of individuals whose remains are being held by a museum or other institution, ensuring their right to deal with the remains and inter or dispose of them as they deem appropriate.¹⁴³

In the recent Australian case *In Re Tasmanian Aboriginal Centre Inc.*¹⁴⁴ Letters of Administration were granted to the Tasmanian Aboriginal Centre over the estates of seventeen Aboriginal persons who had died over 150 years before the application was made. The remains of the individuals were in the possession of the Natural History Museum in London, who had evinced an intention of subjecting the remains to a series of invasive scientific tests. The fact that the estates were only comprised of the physical remains of the deceased was considered immaterial to the granting of the application.¹⁴⁵ The High Court of New Zealand had reached a similar decision nearly two decades prior to the *In Re Tasmanian Aboriginal Centre Inc.* application in *In Re Estate of Tupuna Maori*.¹⁴⁶ In both cases, however, the Letters of Administration were limited to the right to commence legal proceedings seeking the return of the remains, taking possession of the remains, and burying the remains.¹⁴⁷

¹⁴² See, e.g., Gallagher, *supra* note 5. It is important to note that equitable remedies are discretionary and so are uncertain by their very nature.

¹⁴³ *Id.* at 66.

¹⁴⁴ [2007] TASSC 5.

¹⁴⁵ *Id.* ¶ 10.

¹⁴⁶ (Unreported), High Court, Wellington, P580/88, 19 May 1988, Greig J. ‘Tupuna Maori’ means Maori ancestor in the Maori language.

¹⁴⁷ *In Re Tasmanian Aboriginal Centre Inc.* [2007] TASSC [12]; *Re Estate of Tupuna Maori* (Unreported), 4.

It would appear that the granting of Letters of Administration in these particular circumstances goes against the view expounded in the majority of Australian case law. In *Leeburn v Derndorfer* for example, the ashes of the deceased were expressly excluded from being part of the deceased's estate and therefore passing under his will.¹⁴⁸ This suggests that courts are open to more creative legal solutions to ensure archaeological human remains, and particularly those of indigenous peoples, are returned to their communities.

If granted, the Letters of Administration would arguably allow the holder to fall within the first exception of the 'no property in a corpse' rule previously discussed. As the rights afforded by the 'lawful application of care and skill' exception are enforceable against all except persons entitled to the delivery of the body for burial,¹⁴⁹ it has been argued that the first exception to the no-property rule 'trumps' the second.¹⁵⁰ As executors of the deceased's estate, the claims of the parties granted the Letters of Administration would be stronger than a party relying on the 'lawful application' exception. Further, the 'lawful application' exception only applies to human remains that have been lawfully obtained, and such remains that were obtained through dubious means (as many of the remains held by museums and other institutions are claimed to be – for example the bones at the center of the dispute in *In Re Tasmanian Aboriginal Centre* were allegedly stolen from an established Aboriginal burial site)¹⁵¹ can never become property.¹⁵² As such, the only remains that could be validly retained on the basis of the second exception (and not overcome by a personal representative

¹⁴⁸ (2004) 14 VR 100, ¶ 28. The ashes were, however, explicitly described as being capable of being property: *id.* ¶ 27.

¹⁴⁹ C. Woodhead, 'A Debate Which Crosses All Borders' – *The Repatriation of Human Remains: More Than Just a Legal Question*, 7 ART, ANTIQUITY & L. 317, 319, 320 (2002).

¹⁵⁰ Gallagher, *supra* note 5, at 72.

¹⁵¹ See HELEN MACDONALD, HUMAN REMAINS: DISSECTION AND ITS HISTORIES 94 (2006).

¹⁵² After all, the legal principle *nemo dat quod non habet* (no one may give what he does not have) hardly needs stating.

having been granted Letters of Administration) would be human remains that could be shown to have been validly obtained through a consent-based donation scheme.¹⁵³

In the United States there is some state authority to suggest that the right to burial of the deceased is the property of that deceased individual's estate.¹⁵⁴ Further, early case law appears to indicate that a claim in equity for the return of archaeological human remains would be successful. In *Pierce v Proprietors of Swan Point Cemetery*¹⁵⁵ Potter J rejected a claim that equity would not apply as there was no question of property involved (there being no property in the corpse that had been disinterred from its original plot and reburied in another). Potter J held that, as the rights in the remains of the deceased were quasi-proprietary in nature, the common law could not provide an adequate remedy and therefore equity must intervene.¹⁵⁶

Equity, therefore, appears to provide a strong basis for groups and individuals seeking the return of human remains from institutions. From a legal perspective it is unfortunate, then, that the archaeological human remains in question in both *In Re Tasmanian Aboriginal Centre* and *Re Estate of Tupuna Maori* were returned to the applicants by the institutions holding them before legal proceedings against them were heard. Thus the case for Letters of

¹⁵³ Gallagher, *supra* note 5, at 72.

¹⁵⁴ See *In Re Waldron*, 58 A. 453 (R.I. 1904).

¹⁵⁵ 10 R.I. 227 (1872).

¹⁵⁶ *Id.* at 242. Potter J went on to state

Although ... the body is not property in the usually recognised sense of the word, yet we may consider it as a sort of quasi property, to which certain persons may have rights, as they have duties to perform toward it, arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it, and we think that a court of equity may well regulate it as such, and change the custody if improperly managed.

Id. at 242-43.

Administration as a means of ensuring ownership of archaeological human remains has not yet had its day in court.

VII CONCLUSION

In the two centuries since Lord Byron angrily denounced the removal of the Elgin Marbles from Athens to England¹⁵⁷ the black market in cultural property has only increased. The international disputes that arise as a result of this illicit trade are almost universally governed by the *lex situs* rule. In many cases this rule results in unfair decisions that fail to adequately reflect the unique value and importance of cultural property. The best available choice of law rule is the *lex originis*, a rule that better reflects the need to protect the endangered resource that is our collective cultural heritage.

This is of particular importance where the cultural property in question includes archaeological human remains. This article has argued that archaeological human remains are progressively more likely to be treated as property for the purposes of private international law, although this conclusion has, to date, remained a theoretical one. As increasing amounts of human skeletal matter and associated remains enters the black market in cultural objects it is almost certainly inevitable, however, that a case will come before the courts that requires a definitive answer to this question. Judges and legislators alike must be ready when this time comes.

¹⁵⁷ Mortal! ('twas thus she spake) that blush of shame
Proclaims thee Briton – once a noble name –
...
Lo! here, despite of war and wasting fire,
I saw successive tyrannies expire;
'Scap'd from the ravage of the Turk and Goth,
Thy country sends a spoiler worse than both!

LORD BYRON, THE CURSE OF MINERVA 9 (4th ed., 1820).