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**Promotion and protection of all human rights, civil,
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including the right to development**

Human rights bodies and mechanisms

Repatriation of ceremonial objects, human remains and intangible cultural heritage under the United Nations Declaration on the Rights of Indigenous Peoples

Report of the Expert Mechanism on the Rights of Indigenous Peoples

Summary

In the present report, the Expert Mechanism on the Rights of Indigenous Peoples examines good practices and lessons learned regarding efforts to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, focusing on the repatriation of ceremonial objects, human remains and intangible cultural heritage.



I. Introduction

1. Established by the Human Rights Council in 2007, the Expert Mechanism on the Rights of Indigenous Peoples provides the Council with expertise and advice on the rights of indigenous peoples as set out in the United Nations Declaration on the Rights of Indigenous Peoples.
2. In September 2016, in its resolution 33/25, the Human Rights Council amended the mandate of the Expert Mechanism, deciding, among other things, that the Expert Mechanism should identify, disseminate and promote good practices and lessons learned regarding efforts to achieve the ends of the Declaration on the Rights of Indigenous Peoples, including through reports to the Council.
3. In its resolution 42/19, adopted in September 2019, the Human Rights Council encouraged the development of a process to facilitate the international repatriation of indigenous peoples' sacred items and human remains through the continued engagement of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Intellectual Property Organization, the Expert Mechanism, the Special Rapporteur on the rights of indigenous peoples, the Permanent Forum on Indigenous Issues, States, indigenous peoples and all other relevant parties in accordance with their mandates.
4. The present report addresses efforts to implement the Declaration, including the rights of indigenous peoples to self-determination and non-discrimination, as well as to practise their cultural, spiritual and religious traditions, customs and ceremonies. In article 12 of the Declaration, the General Assembly recognized that indigenous peoples have the right to the use and control of their ceremonial objects and the right to the repatriation of their human remains, while in article 31, it recognized their rights to maintain, control, protect and develop their cultural heritage, traditional knowledge and other resources. In the Declaration, the Assembly also recognized that States should seek to enable the access to and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned, and provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent.
5. On 4 and 5 March 2020, the Expert Mechanism held a seminar in Vancouver, Canada, on the repatriation of ceremonial objects and human remains under the Declaration. Indigenous peoples, representatives of museums and of human rights institutions, academics and others made presentations that informed the present report.¹ The Expert Mechanism would like to acknowledge the support of the University of British Columbia in the organization and sponsoring of the seminar. The Expert Mechanism also called for submissions from States, indigenous peoples, national human rights institutions and other stakeholders. Where permission was granted, the submissions have been made publicly available on the website of the Expert Mechanism.²
6. In accordance with the Declaration, the Expert Mechanism recommends that stakeholders take a human rights-based approach to the repatriation of indigenous peoples' ceremonial objects, human remains and intangible cultural heritage. This approach requires recognition of indigenous peoples' rights to self-determination, culture, property, spirituality, religion, language and traditional knowledge. The Declaration also recognizes the applicability of indigenous peoples' own laws, traditions and customs, which entail both rights and responsibilities towards ceremonial objects, human remains and intangible cultural heritage.

¹ The seminar came about, in part, after the International Indian Treaty Council requested the Expert Mechanism to facilitate dialogue with Sweden regarding the repatriation of a particular ceremonial object (discussed later in the report) and more broadly, to provide advice on the repatriation of indigenous peoples' human remains and ceremonial objects under the Declaration. The presentations made at the seminar are available from www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/CallforSubmissionsRepatriation.aspx.

² Submissions are available from www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/CallforSubmissionsRepatriation.aspx.

7. In the present report, the Expert Mechanism notes that reliance on the Declaration, particularly articles 11, 12 and 31, among others, can help indigenous peoples, States, museums and other stakeholders to apply the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by UNESCO in 1970, as well as other international instruments and national laws, to the specific context of indigenous peoples. The Declaration should be the main instrument guiding the assessment of indigenous peoples' claims and the development of transparent mechanisms for repatriation at the national and international levels. These mechanisms are necessary to redress past harms, protect rights and foster healing and cooperation among indigenous peoples, States, museums, universities, scientific institutions, United Nations agencies and others in the future.

II. Background

8. Indigenous peoples have their own laws, customs and traditions concerning the treatment of ceremonial objects, human remains and intangible cultural resources. In many instances, ceremonial objects are considered inalienable, meaning they cannot be transferred outside of the indigenous community or cultural society or away from the spiritual leader responsible for caring for them. These items may be treated as living beings, provided with food, shelter, songs and prayers by their caretakers. With respect to human remains, indigenous peoples, like many others, typically honour their dead with funerals and other ceremonies. Indigenous spiritual teachings require that the dead must remain at rest and undisturbed in their burial places; intergenerational respect for these places is often maintained through ceremonial practices honouring those who have passed. Intangible resources, such as religious songs, plant knowledge and human, plant and animal DNA, are similarly important for the individual and collective cultural rights and responsibilities of indigenous peoples.

9. Notwithstanding these traditions, indigenous peoples' ceremonial objects, human remains and intangible cultural heritage have often been taken from them throughout a long history of dispossession and appropriation.³ For hundreds of years, both State and private actors financed and licensed expeditions to acquire these items and then asserted ownership over them. Historically, the acquisition of indigenous human remains was ostensibly for scientific purposes. For example, in the 1860s, British institutions supported the collection of the remains of Aboriginal people from Australia as relics of dying cultures, artefacts or art, or raw materials for research.⁴

10. In other instances, looting was an aspect of conquest and colonization. In the 1860s, the army of the United States of America facilitated the removal of Indian remains from battle sites, resulting in the transfer of between 3,000 and 4,000 American Indian "osteological specimens" to what would become the Army Medical Museum.⁵ Studies in the now discredited field of phrenology used the measurements of the skulls as evidence to suggest that American Indians were the intellectual inferiors of Europeans. From 1904 to 1908, indigenous peoples in the south of what is now the United Republic of Tanzania fought the Majimaji War of resistance against German colonialism, after which their human remains were buried in mass graves or taken to Germany.⁶

11. Even when conflict ends, the ongoing failure to respect indigenous peoples' land rights and territorial boundaries makes it difficult for indigenous peoples to protect human remains, ceremonial objects and intangible cultural heritage. As a result, some acquisitions that may have appeared "legal" or "voluntary" were neither. Consider the case of Hopi "kachinas" that were acquired in the 1900s, during a period when many missionaries and others were entering Hopi villages. The kachinas are ceremonial beings who come to Hopi villages each spring to bring the rain; they are embodied in items that may look like masks to outsiders, but the Hopi describe them as sacred friends who are fed cornmeal, given shelter

³ See <https://returnreconcilerenew.info/>.

⁴ See, e.g., Claire Scobie, "The long road home", *The Guardian*, 28 June 2009.

⁵ D.S. Lamb, *The Army Medical Museum in American Anthropology* (Washington, D.C., XIX Congress of Americanists, 1917).

⁶ Cressida Fforde, C. Timothy McKeown and Honor Keeler, eds., *The Routledge Companion to Indigenous Repatriation: Return, Reconcile, Renew* (London, Routledge, 2020).

in villages, and brought out to dance at certain times. A number of kachinas were put up for auction in France in the 2000s. The Hopi asked for the sales to be halted because the kachinas “are considered sacred objects and objects of cultural patrimony and cannot be transferred, sold, conveyed and removed from the jurisdiction without permission or the free, prior and informed consent of the Hopi Tribe. These facts are pursuant to Hopi customary law and tradition (Hopi Ordinance #26, Hopi Cultural Preservation Code, and the Native American Graves Protection and Repatriation Act)”.⁷ The auction houses, claiming the provenance was good and these were items of art under French law, sold the kachinas anyway.

12. Once removed from indigenous peoples, cultural objects and human remains have often been transferred to museums, universities or private collections, displayed as art or artefacts, or studied as specimens. For example, in 1993, the mummified remains of a woman who lived in the fifth century B.C. were found in the Republic of Altai, in the Russian Federation. For 19 years after the discovery, the remains were kept at the scientific institute in Novosibirsk, a decision contested by indigenous peoples in Altai. In 2012, the woman’s remains were returned to Altai and preserved in a mausoleum at the Republican National Museum.⁸ Nevertheless, in 2014 the Council of Elders of the Republic of Altai claimed that she should be buried. In addition, cemeteries of the Shor and the Khakas peoples in the Russian Federation have been desecrated as a result of coal excavation, and these cases have also not been remedied.⁹

13. In instances where looted human remains and ceremonial objects were later repatriated to countries of origin, it was often in the “national” interest, instead of to respect indigenous rights. For example, in 2019, when Yale University finally repatriated to Peru 4,849 cultural artefacts and human remains that had been excavated from Machu Picchu in the 1910s, they were declared national cultural heritage.¹⁰ Indigenous peoples still living in that community have concerns about Inca human remains associated with the site.¹¹

14. Indigenous peoples suffer violations of their rights to religion, culture, spirituality, education and traditional knowledge when their cultural items, human remains and intangible cultural heritage are improperly acquired, used and kept by others. The damages incurred include loss of human dignity, difficulty carrying out spiritual practices without the necessary religious items, and the inability to honour their cultural obligations to care for the dead and for ceremonial objects. As Edward Halealoha Ayau, a leading advocate for the repatriation of human remains to Hawaii pointed out, refusal to repatriate human remains leads to spiritual, psychological and intellectual harm, on top of the *kaumaha* (trauma) caused by the realization that the ancestors were stolen.¹² Often, indigenous people who work on repatriation matters experience intergenerational trauma and a heavy emotional burden. Yet they undertake that work because they have customary obligations to their cultures and to facilitate the healing of entire communities.¹³

15. In the decades that indigenous peoples have sought repatriation of their human remains and ceremonial objects, as well as intangible cultural heritage, they have faced many challenges.¹⁴ First, they must locate their items and educate the current possessors about the history of dispossession, as well as their cultural and spiritual significance. They often encounter institutional resistance and legal impediments, including a general lack of knowledge regarding the relevant rights and obligations affirmed in the United Nations Declaration on the Rights of Indigenous Peoples. Museums operate pursuant to a duty of care towards their collections that requires retention and preservation. They may also have duties to donors or the public to provide access to these collections. In many instances, experts in the fields of museology, archaeology or anthropology may not have received training on human rights instruments or the contemporary aspirations of indigenous peoples, and

⁷ Fforde, McKeown and Keeler, *The Routledge Companion to Indigenous Repatriation*.

⁸ Gertjan Plets and others, “Repatriation, doxa, and contested heritages: the return of the Altai Princess in an international perspective”, *Anthropology and Archeology of Eurasia*, vol. 52, No. 2 (2013).

⁹ Submission from ADC Memorial.

¹⁰ See www.gob.pe/institucion/cultura/noticias/68536-ministerio-de-cultura-declara-patrimonio-cultural-de-la-nacion-4-mil-849-bienes-culturales-muebles-repatriados-de-la-universidad-de-yale (in Spanish).

¹¹ See www.yachaywasi-ngo.org/tourism.htm.

¹² Presentation at the expert seminar.

¹³ Fforde, McKeown and Keeler, *The Routledge Companion to Indigenous Repatriation*.

¹⁴ United States Supreme Court, *Onondaga Nation v. Thacher*, 189 U.S. 306 (1903).

indigenous peoples may lack familiarity with the institutional and professional norms guiding museum professionals.

16. International repatriation requires the navigation of complex legal, jurisdictional, political and diplomatic challenges. For indigenous peoples, determining the whereabouts of their ceremonial items, human remains and intangible cultural heritage on a global scale can be a daunting task in terms of information, costs and human resources. While national museums or other institutions may already have working relationships with indigenous peoples in their own countries, they may not be familiar with State agencies working on indigenous issues or have contact information for indigenous peoples in other countries. These issues can be remedied with better information, as well as supportive intermediaries.

III. Legal, ethical and political framework on the repatriation of ceremonial objects and human remains

17. Indigenous peoples have their own laws on and customs and traditions concerning cultural objects, human remains and cultural heritage.¹⁵ Many indigenous laws are held and transmitted in the oral tradition of the people. For example, Native Hawaiian tradition establishes the appropriate treatment of human remains and the intergenerational obligations of the living to their ancestors, calling for ancestors to be buried and protected. In some instances, indigenous governments have codified and published their laws. For example, the Tribal Criminal Code of the Pawnee Tribe of Oklahoma provides that it is unlawful to purposely desecrate a place of worship or burial, or other sacred place (sect. 516).¹⁶ In all instances, indigenous peoples' own laws, customs and traditions must be followed by all participants with respect to treatment of ceremonial objects, human remains and cultural heritage.

18. Stakeholders must also assess national laws which, in many cases, limit deaccessioning. The British Museum Act of 1963 provides that the Museum can sell, exchange, give away or otherwise dispose of an object only if the object is a duplicate of another such object; if the object appears to the Trustees to have been made not earlier than the year 1850, and substantially consists of printed matter of which a copy made by photography or a process akin to photography is held by the Trustees; or if, in the opinion of the Trustees, the object is unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students (sect. 5 (1)).

19. While governments and museums often assert that such laws prohibit them from repatriating items to indigenous peoples, many laws have room for interpretation. For example, while Swedish law emphasizes the duty of care held by national museums towards collections, it allows for restitution not only in the case of illicit acquisition but also for special ethical reasons, a provision that has been used to allow repatriation in some cases. While the law of the Russian Federation stipulates that museum objects and museum collections in the Museum Fund may be dispossessed or transferred from one person to another by virtue of universal succession only, it also contains a provision for special permission of the authorized federal executive body.¹⁷

20. Moreover, as discussed in section V below, some national laws already require repatriation of human remains and ceremonial items to indigenous peoples.

21. With regard to international repatriation, a number of instruments dealing with illicit acquisition, trafficking and repatriation of cultural property may be helpful. The Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 calls on States to take special measures to protect cultural property and to avoid misappropriating or damaging such property during times of armed conflict or occupation. The Convention recognizes the vulnerability of cultural property during wartime and the principle that damage to the cultural property of any people means "damage to the cultural heritage of all mankind". The Convention does not apply retroactively, but may be helpful to indigenous peoples who

¹⁵ Angela Riley, "Straight stealing: towards an indigenous system of cultural property protection", *Washington Law Review*, vol. 80, No. 69 (2005).

¹⁶ See <https://narf.org/nill/codes/pawneecode/crimoffense.html>.

¹⁷ Submission from the Russian Federation (in Russian).

have been dispossessed of cultural property in conflicts since 1954 or who find themselves in conflict situations in the future.

22. The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 extends protection for cultural property beyond wartime. It has provisions on certification, anti-trafficking and repatriation. Cultural property is defined in article 1 as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” and which belongs to one of several categories. International cooperation is recognized in article 2 as one of the most efficient means of protecting cultural property. Article 3 provides that the import, export or transfer of ownership of cultural property effected contrary to the provisions of the Convention are illicit.

23. Several of the provisions of that Convention, including those in articles 5, 6 and 7, are preventative in nature, calling for States to take measures to prevent illicit trafficking of their own and others’ cultural property. Article 9 provides that any State party to the Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials can call upon other States parties who are affected. Indigenous peoples may seek to work with States under those provisions.

24. That Convention also contains remedial provisions for restitution or repatriation of items acquired after 1970, calling for States parties to take appropriate steps to recover and return cultural property imported after the entry into force of the Convention (art. 7) and to cooperate in facilitating the restitution of illicitly exported cultural property (art. 13).

25. While that Convention does not apply retroactively, article 15 permits special agreements for restitution between parties regarding cultural property removed from their territories before the entry into force of the Convention. Article 15 is thus of particular importance for indigenous peoples who may seek repatriation of cultural property acquired before 1970. Another relevant UNESCO mechanism is the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, which is tasked with cultural property matters that fall outside the scope of the 1970 Convention. Since the Intergovernmental Committee is not associated with a specific convention, its services, including mediation, are available to all UNESCO Member States.

26. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 applies not only to States and national museums, but also to other possessors of stolen cultural objects, potentially including auction houses, collectors and dealers. The UNIDROIT Convention provides in article 3 that “the possessor of a cultural object which has been stolen shall return it”. It also emphasizes the duty of purchasers and others to inquire into provenance.

27. Unlike the Convention for the Protection of Cultural Property in the Event of Armed Conflict or the two UNESCO Conventions, the UNIDROIT Convention makes specific reference to tribal and indigenous peoples. Pursuant to article 5, the impairment of the traditional or ritual use of an object by a tribal or indigenous community is one of the reasons that the Convention recognizes for courts to order return of an illegally exported cultural object. While article 7 contains certain exceptions for items transferred during their creator’s lifetime, return is still required “where a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community”.

28. These instruments should be read in conjunction with relevant provisions from international human rights treaties relating to equality, non-discrimination, freedom of religion and cultural rights, including article 27 of the International Covenant on Civil and Political Rights. They should also be applied in accordance with the United Nations Declaration on the Rights of Indigenous Peoples. Indigenous peoples have the right to self-determination (arts. 3–4); to culture (arts. 5, 8, 11–15 and 31); to lands, territories and resources (arts. 10, 25–30 and 32); and to languages (arts. 13–14 and 16), all of which are inextricably linked to ceremonial objects, human remains and intangible cultural heritage.

29. Of particular relevance in the repatriation context, are articles 11, 12 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples:

Article 11

(i) Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

(ii) States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

(i) Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

(ii) States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 31

(i) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

(ii) In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

30. In 2014, the international community reaffirmed its support for the Declaration at the World Conference on Indigenous Peoples. In the outcome document of that Conference, the General Assembly explicitly addressed the issue of repatriation (General Assembly resolution 69/2, para. 27).

31. At its seventeenth session, held in 2018, the Permanent Forum on Indigenous Issues encouraged States, indigenous peoples and other stakeholders to continue to engage in active dialogue aimed at achieving recognition of the rights of indigenous peoples to repatriation of their human remains and sacred items, and reiterated its call for a new United Nations mechanism for international repatriation (E/2018/43-E.C/19/2018/11, para. 57).

32. The Expert Mechanism also addressed that issue in its 2015 study on indigenous peoples and the right to cultural heritage, identifying some of the challenges inherent in the repatriation of ceremonial items and human remains, as well as some promising developments at the national and international levels (A/HRC/30/53, paras. 69–73 and annex, paras. 8 and 19–20).

33. The Recommendation concerning the Protection and Promotion of Museums and Collections, their Diversity and their Role in Society, adopted by UNESCO in 2015, sets out global guidelines for the protection and promotion of museums and collections, and outlines their responsibilities in protecting heritage in all its forms. In paragraph 18, it deals specifically with the cultural heritage of indigenous peoples and relationship-building between museums and indigenous peoples.

34. The UNESCO policy on engaging with indigenous peoples, published in 2018, includes the right to repatriation of human remains and ceremonial objects as one of the policy provisions emanating from the Declaration that UNESCO commits to respect, protect and promote.

35. The Code of Ethics of the International Council of Museums provides that “museums should be prepared to initiate dialogue for the return of cultural property to a country or

people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level” (para. 6.2).

36. In 2018, the European Parliament adopted a wide-ranging resolution calling on the European Union and its member States to address indigenous peoples’ rights. It specifically expressed support for indigenous peoples’ requests for international repatriation and the establishment of an international mechanism to fight the sale of indigenous artefacts taken from them illegally, including through financial assistance under the European Instrument for Democracy and Human Rights.¹⁸

IV. Repatriation and intangible cultural heritage

37. An emerging issue in repatriation concerns the intangible cultural heritage of indigenous peoples, such as their languages, ceremonies, songs, scientific information, and other expressions of knowledge, identity and culture. As with ceremonial objects and human remains, indigenous peoples have their own laws and customs and traditions for the treatment of those resources. While many property law systems classify aspects of cultural heritage as “intellectual” or “intangible” properties, those distinctions are not necessarily meaningful for indigenous peoples, to whom these are all interconnected aspects of the living world.¹⁹ In the case of genetic resources, human blood and tissue are often used to extract valuable information leading to patents, illustrating the linkages between the tangible and intangible realms.

38. Indigenous peoples have suffered myriad human rights violations in the realm of intangible cultural heritage, including corporate exploitation of indigenous peoples’ traditional ecological knowledge for patents on pharmaceuticals; fashion designers’ appropriation of textile designs; and musical entertainers’ sampling of indigenous spiritual songs. The appropriation of indigenous peoples’ cultural heritage causes a range of spiritual, cultural, religious and economic harm caused by others’ appropriation. The same is true of unauthorized use of blood samples and DNA for scientific research.²⁰

39. Most national legal systems fail to recognize indigenous peoples’ laws and treat such resources either as part of the public domain or – perhaps even worse – subject to the intellectual property ownership of non-indigenous parties who file claims for them. Indigenous peoples are concerned about loss of knowledge, privacy, sustainability and biodiversity, as well as the injustice of others profiting from their inventions and knowledge. It is also difficult for indigenous peoples to trace the taking of their intangible cultural heritage.

40. Claims for repatriation in this context are complicated by the ways that the law of property disaggregates interests among tangible and intangible aspects. When it comes to DNA or traditional ecological knowledge, researchers who acquired various raw materials or know-how from indigenous peoples may have subsequently obtained patents, research grants and product lines. Claims to return the blood or seeds originally taken are legally distinguishable from claims for participation in patent benefits. By the same token, even if a museum possesses and considers repatriating a ceremonial object such as a drum, recordings of the drum music may be owned and have been copyrighted by another party.²¹ This is true even if the relevant indigenous people consider the drum and its sound, along with the traditional knowledge used to make the drum from the wood and sinew of the local landscape, and the voices of those who carried and sang with it, all to embody and express the eternal heartbeat of the people.

¹⁸ See www.europarl.europa.eu/doceo/document/TA-8-2018-0279_EN.html.

¹⁹ Angela A. Riley and Kristen A. Carpenter, “Owning red: a theory of Indian (cultural) appropriation”, *Texas Law Review*, vol. 94, No. 5 (2016); and Kristen A. Carpenter, Sonia Katyal and Angela Riley, “In defense of property”, *Yale Law Journal*, vol. 118, No. 6 (April 2009).

²⁰ Kim Tallbear, *Native American DNA: Tribal Belonging and the False Promise of Genetic Science* (Minneapolis, University of Minnesota Press, 2013).

²¹ Presentation by Harriet Deacon at the expert seminar.

41. Approaches to these problems must include better awareness of the world views of indigenous peoples, so that all parties can respect indigenous peoples' own approaches to so-called intangible resources, knowledge and expressions. In addition, they must also include proactive measures for preventing the misappropriation of indigenous peoples' cultural heritage, such as recognition of their ownership or stewardship pursuant to their laws, customs and traditions; requirements of consultation; and use of free, prior and informed consent by researchers, companies and others who seek to work with indigenous peoples' resources.²² Pursuant to indigenous traditions and practices, there may be multiple, overlapping owners or stewards of such resources, whose use is regulated customarily among them. Some indigenous peoples have developed their own protocols for regulating claims by outsiders, which may include requirements of permission to enter the indigenous territory, submission to the jurisdiction of the indigenous governance system, written consent of participants, labelling measures, benefit-sharing and other elements.²³

42. Remedial measures are necessary when cultural heritage has been appropriated in violation of these rights and norms. In one example, the San people of South Africa, after finding out that their traditional knowledge had been used without their permission to secure a patent on the appetite-suppressing qualities of the Hoodia plant, successfully negotiated for a benefit-sharing agreement.²⁴ In other instances of appropriation, repatriation may be an element of remedial measures.

43. One international body devoted to these issues is the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, of the World Intellectual Property Organization (WIPO). In accordance with its mandate, the Intergovernmental Committee is undertaking negotiations with the objective of reaching agreement on the text of an international legal instrument that will ensure the balanced and effective protection of traditional knowledge, traditional cultural expressions and genetic resources.²⁵ An indigenous caucus participates in the negotiations and a voluntary fund supports participation by indigenous peoples.

44. WIPO supports national policy development in the area of traditional knowledge, traditional cultural expressions and genetic resources, and conducts training for multiple stakeholders. It has also developed a practical guide for indigenous peoples and local communities on the strategic use of the intellectual property system to protect their rights.²⁶ Nevertheless, because the Intergovernmental Committee has not yet fully embraced the rights enshrined in the United Nations Declaration on the Rights of Indigenous Peoples, the process risks perpetuating intellectual property concepts harmful to indigenous peoples' intangible cultural heritage. One example is the insistence that once a cultural resource is in the "public domain", the indigenous owners or stewards cannot reclaim it, even if it was taken without their free, prior and informed consent.

V. Good practices and lessons learned

A. Repatriations

45. There is a wealth of examples of repatriations from which valuable lessons can be learned. The following examples are all unique, given the specificities of the indigenous peoples and State institutions involved, the differing experiences of colonization, and the diverse understandings of cultural and spiritual dimensions of the ceremonial objects or human remains involved. Nonetheless, they all share the key element of efforts to advance recognition and respect for human dignity across cultures and societies, as well as a

²² See A/HRC/39/62.

²³ See <https://jan.ucc.nau.edu/hcpo-p/ResProto.pdf>; and <https://umaine.edu/news/blog/2018/05/04/umaine-penobscot-nation-sign-mou-focused-managing-tribes-cultural-heritage/>.

²⁴ Cultural Survival, "Sharing the secrets of the Hoodia: San to reap financial benefits of traditional knowledge" (accessed on 10 July 2020).

²⁵ See www.wipo.int/tk/en/igc/.

²⁶ See www.wipo.int/publications/en/details.jsp?id=4195.

commitment to understand others' world views, heal past injuries, promote reconciliation and build relationships and partnerships based on mutual respect.

1. Repatriations at the national level

46. Several examples of repatriations at the national level were brought to the attention of the Expert Mechanism. In some cases, ceremonial objects or human remains held by museums, universities and other institutions, and sometimes in private collections, were returned to the indigenous peoples concerned. In Norway, for example, through the Bååstede Repatriation Project, approximately half of the collections of Sámi objects that are currently in the custody of the Norwegian Museum of Cultural History and the Museum of Cultural History of the University of Oslo are scheduled to be returned to six consolidated Sámi museums in local Sámi communities.²⁷ In terms of human remains, the Sámi Parliament in Norway has also made progress on custody and reburials. While Sámi skeletal materials remain in the Faculty of Medicine of the University of Oslo, the collection is under the Sámi Parliament's management and administrative authority.²⁸

47. The Sámi Parliament has also supervised several burials of returned human remains, including the reburial of 94 skulls in Neiden in 2011, and the skeletons of named individuals in Kautokeino and Alta.²⁹ In Sweden, in 2019, 25 Sámi individuals were reburied in Liksjoe (Lycksele) on the International Day of the World's Indigenous Peoples, 9 August, thanks to the joint efforts of the local Sámi organization, the Sámi Parliament, regional museums and the municipality. Those human remains had previously been kept in the archives of the Swedish History Museum.³⁰ In Finland, 95 Sámi ancestors, previously held at the University of Helsinki, were reburied in Jaamišsuálu, representing about half of the University's collection of human remains. The remaining Sámi ancestors were subsequently repatriated to the Sámi Museum, Siida, in Inari, where they are currently held in a special storeroom. These remains are managed jointly by the Museum and the Sámi Parliament. Nevertheless, the University of Helsinki maintained ownership of the collection and the Sámi are not entitled to a reburial.³¹

48. The Sámi Parliament in Norway notes that reburials are a labour-intensive process involving identifying descendants and giving them a say in how to organize funeral ceremonies. Nevertheless, this helps facilitate a healing process for descendants and communities. The Sámi Parliament also acknowledges that in the case of unidentified individuals there are often differences of opinion, with some favouring reburial, while others prefer for the material to remain in museum collections to be a source for future knowledge about Sámi cultural history. The Sámi Parliament recognizes the importance of being receptive to these differences of opinion within the community in order to be able to adopt decisions based on a broad range of input.³²

49. The Ainu people of Japan have also been involved in a decades-long struggle to recover the human remains of their ancestors held by several Japanese universities. In 2014 and 2018, the Government of Japan formulated guidelines regarding the repatriation of human remains and grave goods of the Ainu people held by universities. With the understanding and cooperation of the people concerned, the Government encouraged the universities to repatriate the human remains and grave goods to the Ainu people in accordance with those guidelines.³³ While human remains from several universities have been returned, many of them remain in a newly built repository, the Ainu Symbolic Space in Hokkaido, and this has divided opinion among the Ainu community. One challenge is the requirement by Hokkaido University for next of kin identification for the repatriation of

²⁷ Submission from Norway.

²⁸ Submission from the Sámi Parliament in Norway.

²⁹ Ibid.

³⁰ Submission from the Sámi Parliament in Sweden. See also www.loc.gov/law/foreign-news/article/sweden-government-announces-truth-commission-at-sami-repatriation-ceremony-following-official-sami-request/.

³¹ Presentation by Áile Aikio at the expert seminar.

³² Submission from the Sámi Parliament in Norway.

³³ Submission from Japan.

human remains to communities, “which does not match with the indigenous collective/communal notion of property”.³⁴

50. In some cases, ceremonial objects and human remains were kept under State ownership, but moved to museums closer to the indigenous peoples involved. For example, the Ministry of Culture of Chile approved and oversaw an indefinite loan of human remains and ceremonial objects from the National Museum of Natural History to the Father Sebastián Englert Anthropological Museum of Rapa Nui.³⁵ While it is laudable to see indigenous peoples given a more active role in the stewardship of these collections, it is also important to ensure this arrangement is in accordance with the provisions of the Declaration not only with regard to cultural rights, but also self-determination, participation, consultation and free, prior and informed consent.

2. International repatriations

51. International repatriations are complex and involve many challenges. These include differing legal and policy frameworks at the international, national and subnational levels; high financial costs; and importantly, the lack of a legal framework or mechanism for the repatriation of ceremonial objects, human remains and cultural heritage directly to the indigenous peoples involved.

52. The Museum of New Zealand Te Papa Tongarewa works with Māori communities to facilitate the repatriation of human remains. The Karanga Aotearoa Repatriation Programme was established in 2003. Under the Programme, over 600 ancestors have been repatriated and ancestors have been reunited with 17 different tribal groups. In addition, under the Programme, positive relationships have been established with over 70 overseas institutions. At the heart of the Programme’s success is the partnership between indigenous peoples, the Government and collecting institutions, and the fact that it has been an indigenous-led process. Also, the Programme is underpinned by Māori principles such as tikanga Māori, (deep Māori philosophy and customary practice), mātauranga Māori (traditional knowledge) and mahi tahi (cooperation).³⁶

53. There are several lessons to be learned from the repatriation of human remains to Hawaii over the last 30 years from museums in Germany, the United Kingdom of Great Britain and Northern Ireland and continental United States of America, among others. As Edward Halealoha Ayau pointed out, it is crucial for indigenous peoples to “control the narrative” by taking the position that there are no limitations, statutory or otherwise, to asserting cultural values anywhere in the world; advocating family responsibilities and duties as the primary source of authority supported by legal rights; and advocating cultural values over scientific ones. In his experience, success in international repatriations is “forged by time, experience and the pursuit and establishment of principles of humanity”.³⁷ This approach has fostered repatriations and enduring partnerships with museums based on respect and a common humanity.

54. In 2010, the remains of five Kawésqar ancestors held at the University of Zurich, Switzerland were repatriated to Chile. These five individuals had a tragic history of abduction and forced exhibit in “human zoos” throughout Europe in the nineteenth century. They were received with presidential honours, and subsequently reburied in a traditional Kawésqar ceremony on the island of Karukinká in Tierra del Fuego.³⁸

55. In a similar case in Uruguay, the repatriation of the remains of the Charrúa cacique (chief) Vaimaca Perú from France and his subsequent burial at the National Pantheon in 2008

³⁴ Presentation by Kunihiko Yoshida at the expert seminar. See also submissions from the Centre for Environmental and Minority Policy Studies (CEMIPOS) and Shimin Gaikou Centre.

³⁵ Submission from Chile (in Spanish).

³⁶ Presentation by Te Herekiele Herewini at the expert seminar.

³⁷ Presentation by Edward Halealoha Ayau at the expert seminar. See also submission from the Nation of Hawaii.

³⁸ Chile, Memoria del Ministerio de Relaciones Exteriores: Año 2009, p. 135. Available at https://minrel.gob.cl/biblioarchivo/site/artic/20131015/asocfile/20131015154606/memoria_2009_re_v_abril_2014_.pdf (in Spanish). See also Rodrigo Bustamante, “130 años después regresan los kawésqar”, BBC News, 14 January 2010 (in Spanish).

strengthened Charrúa identity.³⁹ Vaimaca Perú was one of four Charrúa individuals who were forcibly removed from their lands following the Salsipuedes massacre and ended their lives in France exhibited as human curiosities. The return of his remains to Uruguay and the national honours that were rendered restored dignity to the Charrúa people.

56. One example of the return of ceremonial objects is the return of 48 Aymara textiles to the village of Coroma in the Plurinational State of Bolivia. These ancient textiles, known as *q'epis*, are revered due to their links with the ancestors and are deemed essential for the well-being of the *ayllus* (lineage-based descent groups). Removed from the community in the 1970s, these textiles ended up in the hands of private collectors. Thanks to the efforts of the community and the diplomatic endeavours of the national Government, together with law enforcement agencies in the United States of America and Canada, they were returned in 2002.⁴⁰

57. The Australian Institute of Aboriginal and Torres Strait Islanders Studies has been implementing its Return of Cultural Heritage Project since 2019. Directed by Aboriginal and Torres Strait Islander custodians, the project has identified over 95,000 Aboriginal or Torres Strait Islander objects scattered in over 200 overseas collecting institutions. The project has negotiated the return of 85 culturally significant objects and has created relationships with collecting institutions. The concerned communities are involved in all stages of the repatriation process. Murrandoo Yanner, Chairperson of the Gangalidda Garawa Native Title Aboriginal Corporation, has explained that “it’s not just the items, it’s the spirit attached, they were taken. The people who once owned them, their spirit went with them and they returned today. It’s a very, very powerful event and it helps in the cultural revival that’s going on”.⁴¹

58. In 2018, the President of France announced his intention to repatriate cultural objects collected in Africa from the nineteenth century through to the 1960s, notwithstanding prohibitions under French law on permanently transferring ownership to countries of origin. A report commissioned by President Macron called for a presumption in favour of full repatriation of items taken during the era of “colonial violence”, unless the current possessors could show affirmative evidence of rightful acquisition, including consent.⁴² It will be important for indigenous peoples in Africa to have their own interests acknowledged in this process that seems presently designed to repatriate to national Governments, such as Benin, and for all stakeholders to assist in capacity-building for the return of cultural objects.

59. In 2019, Finland and the United States of America agreed to repatriate ceremonial objects and human remains to multiple tribes in the American Southwest, an example of States facilitating indigenous peoples’ cultural rights.⁴³ Yet, the involvement of State institutions may not always be necessary. In 2006, the Museum of Ethnography in Sweden returned the G’psgolox totem pole to the Haisla people of British Columbia, Canada. To the extent possible, indigenous peoples may prefer repatriation directly to them, without State involvement.

60. While still an ongoing process, the repatriation request for the Yaqui Maaso Kova from the National Museums of World Culture in Sweden illustrates how the Declaration can be used together with the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, national laws and policies, and indigenous peoples’ own laws and customs in order to facilitate repatriations under special agreements or for special ethical reasons. In particular, article 15 of that Convention can be understood and applied to recognize indigenous peoples’ rights to repatriation under

³⁹ See http://archivo.presidencia.gub.uy/_web/noticias/2008/03/2008030404.htm (in Spanish).

⁴⁰ Susan Lobo, “The fabric of life: repatriating the sacred Coroma textiles”, *Cultural Survival*, September 1991; and Donna Yates, “Coroma textiles”, *Trafficking Culture*, 11 August 2012.

⁴¹ Presentation by Craig Ritchie at the expert seminar.

⁴² See Brigit Katz, “French report recommends the full restitution of looted African artworks”, *Smithsonian Magazine*, 21 November 2018; and Vincent Noce, “‘Give Africa its art back’, Macron’s report says”, *The Art Newspaper*, 20 November 2018.

⁴³ See www.doi.gov/pressreleases/secretary-bernhardt-commends-president-trump-president-niinisto-finland-agreement.

articles 11 and 12 of the Declaration, in this case of a ceremonial object that Danish anthropologists had long ago acquired from the Yaqui people.⁴⁴

B. Relationships between museums and indigenous peoples

61. Many museums have developed a practice of meeting their legal and ethical obligations as museums consistent with norms regarding indigenous peoples' rights. Historically, museums were geared to house and showcase items of "exotic" cultures for the viewing pleasure of dominant societies, and the concept of indigenous peoples as visitors or partners was unfamiliar. Moving towards a human rights-based approach may therefore require a dramatic shift. In many instances, this transition begins with museums exploring cooperation with indigenous peoples as constituents, employees and stakeholders. As museums increasingly embrace indigenous peoples' cultural rights, along with repatriation, they are also able to develop more extensive relationships, better information about collections, and collaborative programming consistent with museums' current goals to be inclusive, diverse and relevant to today's societies.⁴⁵

62. In Brazil, the collection of the Museu do Índio includes 19,918 contemporary objects considered as expressions of the material culture of approximately 150 indigenous peoples. The Museum's mission is to provide services to indigenous peoples whose ethnographic references are gathered in the Museum, including systematizing information relevant to demarcation and protection of territorial rights. The Museum has worked with indigenous peoples to develop protocols for the access, display and return of materials, including digital collections. Indigenous representatives have participated in the identification of photographs, restoration of pieces, identification of objects and raw materials and qualification of collections. The Museum has also trained indigenous peoples in linguistic and cultural documentation through a partnership with UNESCO.⁴⁶ The initiative was discontinued in 2019, but a collaborative platform is available.

63. In the Russian Federation, the Sheltozero Veps Ethnography Museum is a State institution, effectively governed by the Veps people in whose territory it is located. The Museum operates in a traditional Veps house and is managed by Veps individuals who are able to interpret and care for their objects and intangible culture.⁴⁷

64. The Ethnographical Museum of Geneva has a strategic plan seeking new relational ethics between those that have long been described as, and opposed to each other as, collectors and collected.⁴⁸ In addition to taking a proactive role in a repatriation process of Māori human remains, the Museum has sought to build relationships with indigenous peoples. One example is the Museum's ongoing project with the Yan-nhanu people of Mooronga, in northern Australia.

65. At the State Art Collections of Saxony, Ethnographical Collections (Germany), Birgit Scheps-Bretschneider has advocated for the "rehumanization" of ancestral remains originating in Hawaii and Australia. She describes the process as:

- (a) Changing ancestral remains from a museum object back to a human being;
- (b) Giving back human dignity;
- (c) Treating the ancestral remains with respect;
- (d) Finding the individual history and biography;
- (e) Finding out where they were at home;

⁴⁴ Expert Mechanism on the Rights of Indigenous People, "Technical advisory note on the repatriation request for the Yaqui Maaso Kova". Available at www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session12/MaasoKova.pdf.

⁴⁵ See <https://blogs.kent.ac.uk/bts/2020/02/17/repatriation-collaboration-and-beyond-the-spectacle/>; and www.arts.gov.au/what-we-do/cultural-heritage/indigenous-repatriation.

⁴⁶ See <http://museudoindio.tainacan.org/> (in Portuguese).

⁴⁷ See www.visitpetrozavodsk.ru/en/travel_guide1/around_the_city/sights/sheltozero_veps_ethnography_museum_of_lonin/.

⁴⁸ Presentation by Carine Ayélé Durand at the expert seminar.

- (f) Talking to their people and finding out local histories related to the human remains;
- (g) Finding out the best and most respectful way to hand them over to their people;
- (h) Caring for ceremonies and mourning and providing appropriate places;
- (i) Repatriating the ancestors to their country and people and, if possible, to the family.⁴⁹

66. This approach has fostered meaningful relationships with indigenous peoples and a series of exchanges, most recently with the Nyamba Buru Yawurru people in Broome, Australia. Similarly, other museums refer to human remains as “ancestors” and consult with indigenous peoples about appropriate treatment of the ancestors in their care. Museum staff also refer to specific remains using personal pronouns such as he, she and they, instead of the objectifying “it”.⁵⁰

67. The Royal British Columbia Museum in Victoria, Canada, has established a strong relationship with the First Nations of the Pacific Northwest of Canada. This has translated into repatriations from the Museum to indigenous communities, and support for the international repatriation of ceremonial objects and human remains to their rightful places. The Museum collaborated with the Haida Gwaii Museum on the Indigenous Repatriation Handbook, which provides policy and technical guidance on repatriation and shares the specific experiences of the two Museums.⁵¹

68. The National Museum of Australia follows a “corporate philosophy of repatriation” regarding Aboriginal and Torres Strait Islander ancestral human remains; Aboriginal and Torres Strait Islander secret/sacred, sensitive and private material; Non-Australian indigenous human remains; and indigenous cultural rights and engagement.⁵² The Museum’s Indigenous cultural rights and engagement policy lays the groundwork for a respectful partnership between indigenous peoples and the Museum, addressing issues such as consultation, consent, respect of cultural and customary laws, and access to the collections.

69. Museums established and managed by indigenous peoples themselves also play a leadership role in repatriation processes. Examples include the Sámi Museum Siida in Inari, Finland, several Sámi museums and cultural centres in Norway, and the Ajtte Sámi Museum in Jokkmokk, Sweden.⁵³ These museums have been instrumental in the return and safekeeping of both ancestors and ceremonial objects to Sápmi, the Sámi homeland. Similarly, the Haida Gwaii Museum in Canada has facilitated the return of ancestors and ceremonial objects, both from within Canada and internationally.⁵⁴

70. Indigenous peoples have a central role to play in identifying the location of their items in museums around the world and conveying their significance. Sakha (Yakutia) Republic in the Russian Federation has created a catalogue of the material and spiritual culture of the peoples of Yakutia held in museums around the world. The project is aimed at describing the collections of material culture objects, including ceremonial objects that the indigenous peoples of Yakutia have located in various museums around the world.⁵⁵

⁴⁹ Presentation by Birgit Scheps-Bretschneider at the expert seminar.

⁵⁰ See <https://anthrosource.onlinelibrary.wiley.com/doi/full/10.1111/muan.12201>.

⁵¹ See https://royalbcmuseum.bc.ca/sites/default/files/indigenous_repatriation_handbook_rbcm_2019.pdf.

⁵² Submission from the National Museum of Australia. See also www.nma.gov.au/about/corporate/plans-policies/policies.

⁵³ Submissions from the Sámi Museums in Norway and the Sámi Parliament in Sweden.

⁵⁴ Jisgang Nika Collison, Sdaahl K’awaas Lucy Bell and Lou-ann Neel, *Indigenous Repatriation Handbook* (prepared by the Royal BC Museum and the Haida Gwaii Museum at Kay Llnagaay) (Victoria, Canada, Royal British Columbia Museum, 2019).

⁵⁵ Submission from the Russian Federation.

C. Repatriations of intangible cultural heritage

71. While it is an emerging field, there are notable examples of repatriations of intangible cultural heritage and capacity-building for indigenous peoples to better protect their intellectual property and traditional cultural knowledge.

72. In the 1960s, researchers in the United States of America took blood samples from the Yanomami people in Brazil without their free, prior and informed consent. The Yanomami later discovered that 2,693 such blood samples were being kept, in violation of Yanomami beliefs and funerary practices, and that in the 1990s, DNA was extracted without consent. Yanomami leader Davi Kopenawa said, “these Americans robbed our blood. They did not say anything in our language about the tests they were going to do. Nobody knew that they were going to use our blood to do research”. In 2015, the Yanomami successfully fought for repatriation and the blood was buried at home in a ceremony presided over by spiritual leaders.⁵⁶

73. Another example concerns historic recordings of indigenous language speakers made by anthropologists and ethnomusicologists. Decades after they were made, indigenous peoples discovered that the recordings of their ancestors’ voices were being kept in universities and other archives. Indigenous peoples may seek to ensure spiritual recordings are not played inappropriately and that they serve as a resource to facilitate language instruction for contemporary members of their communities, an issue of heightened concern when many indigenous languages are endangered. Columbia University holds copies of and rights to songs from Inupiaq, Navajo and Hopi communities recorded in the 1900s. Columbia University’s Center for Ethnomusicology has indicated its commitment to repatriating the recordings, with an initiative to bring the songs “back home” to the tribe, through community-partnered repatriation.⁵⁷ Repatriation could range from digitization to return of the original wax cylinders and allocation of attribution, copying, performance and other rights.

74. In the Russian Federation, a register of intangible cultural heritage of the peoples of Ugra is being maintained. As at the beginning of 2020, 61 items were included in the register, relating to performing arts, techniques and technologies, festive and ceremonial culture, and oral folk art. The register provides high-quality ethnographic material for research and is an important resource and channel for the transmission of ritual traditions to younger generations. In 2016, a project on the “ritual system of northern Khants bear games” was recognized as intangible heritage of the Russian Federation and registered in the federal catalogue of intangible cultural heritage of the peoples of Russia.⁵⁸

75. Capacity-building is crucial for indigenous peoples to protect their intangible cultural heritage and navigate the complex national and international intellectual property regimes. In this regard, WIPO worked with the Maasai in Kenya in 2008 in order to strengthen their capacity to protect their intangible heritage. Thanks to this training programme, the Maasai developed practical skills and technical knowledge in cultural documentation, archiving and intellectual property management. They recorded, archived and managed access to their own cultural heritage, developed their own intellectual property policies and protocols, and used technology to record their intangible heritage.⁵⁹

D. Legal and policy frameworks for repatriation and cultural heritage protection

76. One vital area of good practice is the development, adoption and implementation of national legal and policy frameworks for the repatriation of ceremonial objects and human

⁵⁶ Survival International, “Brazil: blood samples returned to Yanomami after nearly 50 years”, 13 April 2015; and BBC News, “Indigenous tribe’s blood returned to Brazil after decades”, 3 April 2015.

⁵⁷ See <https://music.columbia.edu/news/center-for-ethnomusicology-announces-hopi-music-repatriation-project>; and Trevor Reed, “Reclaiming ownership of the indigenous voice: the Hopi Music Repatriation Project”, in *The Oxford Handbook of Musical Repatriation*, Frank Gunderson, Robert C. Lancefield and Bret Woods, eds. (Oxford, Oxford University Press, 2019).

⁵⁸ Submission from the Russian Federation. See also www.rusfolk.nasledie.ru (in Russian).

⁵⁹ See www.wipo.int/tk/en/folklore/digitizing_traditional_culture.html.

remains, and more broadly the protection of cultural heritage. Examples range from national and federal laws and policies to frameworks adopted by indigenous peoples themselves.

77. One of the most salient national statutes is the Native American Graves Protection and Repatriation Act, which has been part of United States federal law since 1990 and has led to the repatriation of the remains of approximately 79,000 individuals and approximately 2 million items from institutions in the United States of America. The Act establishes a mechanism for the Government to work in consultation with Native Americans to repatriate human remains and ceremonial objects. Specifically, it requires federal agencies and museums receiving federal funds to inventory their holdings of Native American sacred objects, objects of cultural patrimony, human remains and funerary objects; to notify and consult with Indian Tribes and Native Hawaiian organizations to attempt to reach agreements on the repatriation or other disposition of human remains and objects; and to repatriate items to tribes that have a cultural affiliation with those items.⁶⁰

78. The Act is in many ways a laudable example for other States that wish to adopt repatriation legislation. The 30 years of experience under the Act suggest some lessons learned. First, the Act was not fully funded, leaving museums and indigenous peoples to bear the financial burden of inventory, notice, identification, claims and actual return of items to tribes. Some of these issues have been addressed through federal grants. Additionally, some of the language of the Act is ambiguous, leaving the door open for narrow construction by courts.⁶¹ While tribes long struggled to assert “cultural affiliation” under the Act, a new regulation uses a geographic assessment, such that in the cases of culturally unidentifiable human remains, the Government must consult with all Indian tribes and Native Hawaiian organizations from whose tribal or aboriginal lands the remains were removed. This new regulation is thought to reflect indigenous peoples’ sensibilities of stewardship concerning relatives and ancestors in their territories when other methodologies do not reveal affiliation.

79. New Zealand adopted a repatriation policy in 2003 which stipulates that the role of the Government is mainly one of facilitation; it does not claim ownership of human remains. The policy also states that repatriation is by mutual agreement only, that no payment is made to overseas institutions, that the human remains must be identified as originating from New Zealand, and that Māori and Moriori are to be involved in the repatriation of kōiwi/kōimi (Māori and Moriori human remains) and are to determine the final resting place, where possible. Crucially, the Government of New Zealand authorized the Museum of New Zealand Te Papa Tongarewa to be the Crown’s agent in undertaking repatriation work and allocated funding for this purpose of NZ\$ 500,000 annually.⁶² Since July 2013, Te Papa Tongarewa has repatriated 612 Māori and Moriori ancestral remains from over 70 institutions in eight countries.

80. Switzerland has a federal law on the international transfer of cultural property, which reflects the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The law seeks to protect world heritage and regulates the import of cultural property, its transit and export, the return of cultural property, and measures to combat illicit trade. The law also contemplates bilateral agreements, which Switzerland has signed with eight countries. Some of these agreements explicitly address human remains.⁶³

81. Australia has supported repatriation for over 30 years, guided since 2011 by the Australian Government Policy on Indigenous Repatriation, covering ancestral remains held overseas, both institutionally and privately, and ancestral remains and secret/sacred objects from collections in Australia. The policy objectives include addressing the injustice of the country’s shared past and supporting Aboriginal and Torres Strait Islander peoples to develop capacity to maintain their cultural rights, knowledge and practices. The Policy also established an Advisory Committee for Indigenous Repatriation, composed of six indigenous persons appointed by the Minister for the Arts. The Government highlights five lessons learned from its experiences with repatriation:

⁶⁰ Submission from the United States of America.

⁶¹ See, e.g., *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004).

⁶² Submission from New Zealand.

⁶³ Submission from Switzerland.

- (a) Partnerships between indigenous communities, collecting institutions and governments are key to support the return of cultural heritage;
- (b) Indigenous communities must be at the heart of the repatriation process;
- (c) Returning cultural heritage supports cultural maintenance, restoration and revitalization;
- (d) Returning cultural heritage is an important mechanism for reconciliation and healing;
- (e) Partnerships between indigenous communities and overseas collecting institutions are key to ensure the ongoing access to and appropriate presentation of cultural heritage.⁶⁴

82. Indigenous peoples have adopted policies or frameworks for the protection and repatriation of ceremonial objects and human remains. The Grand Council of the Waban-Aki Nation in Canada has developed a protocol for the management of human remains and archaeological finds on their territory. Based on community participation, the protocol is an important reference document for community decision-making on cultural heritage issues, despite limited territorial scope and legal force.⁶⁵

83. In Australia, the Victorian Aboriginal Heritage Council, consisting of up to 11 traditional knowledge owners, is mandated under the Victorian Aboriginal Heritage Act of 2006 to oversee management and protection of cultural heritage for the indigenous peoples of the State of Victoria. The Act establishes procedures and timelines and provides for fines and other penalties in connection with the management of cultural heritage. The strengths of this framework include the empowerment of indigenous peoples to oversee repatriation processes, its role in restoring custody to rightful owners, and the strong penalties to ensure compliance. Nevertheless, there are territorial limitations, as the Act applies only within the State of Victoria.⁶⁶

VI. Conclusions and recommendations: developing international guidance and processes

84. **The General Assembly, in its resolution 69/2, in response to advocacy from indigenous peoples, committed themselves to developing, in conjunction with the indigenous peoples concerned, fair, transparent and effective mechanisms for access to and repatriation of ceremonial objects and human remains at the national and international levels.**

85. **In addition, in its resolution 42/19, the Human Rights Council encouraged the development of a process to facilitate the international repatriation of indigenous peoples' sacred items and human remains through the continued engagement of all relevant stakeholders in accordance with their mandates. The Council emphasized the importance of partnerships and specific roles for UNESCO, WIPO and the mechanisms of the United Nations that focus on indigenous peoples. The Expert Mechanism calls on Member States and all stakeholders to heed the calls of the General Assembly and the Human Rights Council for the development of such processes and mechanisms.**

86. **A framework for the international repatriation of ceremonial objects, human remains and intangible cultural heritage should be firmly based on the United Nations Declaration on the Rights of Indigenous Peoples, in particular the rights to equality, non-discrimination, self-determination, participation and consultation, pursuant to articles 2, 3, 8, 18 and 19. All stakeholders must take a human rights-based approach to indigenous peoples' repatriation claims in order to effectuate remedies and promote the living cultures, religions, spiritualities, technologies and other rights of indigenous peoples, pursuant to articles 11, 12 and 31. There is a wealth of examples of museums, universities and other institutions and indigenous peoples finding common ground as caretakers of ancestral remains and ceremonial objects and learning about one**

⁶⁴ Submission from Australia.

⁶⁵ Submission from Grand Conseil de la Nation Waban-Aki (in French).

⁶⁶ Submission from the Victorian Aboriginal Heritage Council.

another's worldviews. This has led to meaningful relationships, deep healing on both sides and the start of new collaborations through repatriation processes and cultural exchanges.

87. States should enact or reform legislation on repatriation in accordance with the Declaration on the Rights of Indigenous Peoples, in particular articles 11, 12 and 31, with the full and meaningful participation of indigenous peoples and the safeguard of free, prior and informed consent. This includes statutes, regulations and policies on museum collections, deaccession and repatriation. In case of ambiguities or challenges in implementation, the Declaration can be used as an interpretive tool. All such programmes for repatriation must be fully funded so that museums and indigenous peoples do not bear the burden that States have to comply with their human rights obligations.

88. States must recognize that indigenous peoples have their own concerns about human remains, ceremonial objects and cultural heritage and, when making claims for protection or repatriation, consider not only national interests but indigenous peoples' own rights. Terms like "cultural property", "cultural objects" and "cultural heritage" must be understood to include the ceremonial objects, human remains, spiritual and other properties of indigenous peoples. Similarly, a determination of whether an item is "illicit" or "stolen" property must include analysis not only of State laws, but the laws of indigenous peoples that set out standards of alienability, ownership, treatment and custody of ceremonial objects, human remains and spiritual, intellectual and other properties.

89. As parties seek to comply with the Convention for the Protection of Cultural Property in the Event of Armed Conflict, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, they should work in partnership with not only the International Criminal Police Organization (INTERPOL), national police forces, civil society and the International Council of Museums, but also indigenous peoples' institutions specializing in cultural property and repatriation, such as the Association on American Indian Affairs in the United States of America and indigenous peoples' mechanisms of the United Nations. With regard to repatriation of human remains, ceremonial objects and indigenous spiritual, intellectual and other properties, States must consult and seek the free, prior and informed consent of indigenous peoples, ensuring participation through their own representative institutions. The Expert Mechanism specifically urges States and indigenous peoples to enter into agreements regarding the ultimate return of these items to indigenous peoples' territories, consistent with their own laws, customs and traditions, and/or alternative dispositions affirmatively requested by indigenous peoples.

90. UNESCO should consider ways of providing advice on repatriation to indigenous peoples and promoting opportunities under the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Some concrete measures that UNESCO could take include capacity-building for States parties and other stakeholders on repatriations under the United Nations Declaration on the Rights of Indigenous Peoples; developing databases of indigenous peoples' ceremonial objects and human remains held by State museums, universities and other repositories that are accessible to the indigenous peoples concerned and also maintaining respectful protocols, such as not showing photographs of human remains and sacred items; and considering the establishment of an international indigenous repatriation review committee comprised of indigenous peoples, museum professionals, human rights experts and others to provide advice and assistance on these claims.

91. As the main international organization with a mandate to address issues related to traditional knowledge, traditional cultural expressions and genetic resources, the World Intellectual Property Organization has an essential role in the protection and repatriation of indigenous peoples' intangible cultural heritage. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore should consider explicitly addressing repatriation and continue its efforts to facilitate indigenous peoples' meaningful participation in this process. WIPO should strengthen its efforts to implement the rights articulated in the

Declaration and build the capacity of indigenous peoples to better protect their traditional knowledge and traditional cultural expressions.

92. Museums, universities and other collecting institutions must become partners in ensuring that articles 11, 12 and 31 of the Declaration are respected and upheld. Museums must develop relationships of collaboration and trust, and seek out and respect indigenous peoples' knowledge, protocols, traditional laws and customs regarding items in their collections. Stakeholders such as UNESCO, the International Council of Museums, the Expert Mechanism, the Permanent Forum on Indigenous Issues and the Special Rapporteur on the rights of indigenous peoples can assist museums in advancing a human rights-based approach to these issues, and achieving a better understanding of their legal and ethical obligations, and of indigenous peoples' expectations and worldviews. Partnerships of this type are essential in order to decolonize museums.

93. Indigenous peoples themselves also have a duty to advocate for the repatriation of their ceremonial objects, human remains and cultural heritage. Repatriation requires active community advocacy and involvement if it is to be carried out under indigenous peoples' terms. Indigenous peoples should also consider identifying and, if culturally appropriate, codifying their own laws, customs and traditions on ceremonial items, human remains and intangible cultural heritage in order to assist States and museums to implement article 11 of the Declaration.

94. The Expert Mechanism acknowledges and encourages examples of indigenous peoples working in solidarity with one another on repatriation. Examples include support from the Sámi for the repatriation of Yaqui ceremonial objects from Sweden and the support of Māori for the repatriation of human remains to Rapa Nui. Indigenous peoples should support each other with capacity-building and sharing of experiences, including the development of repatriation and reburial protocols and the establishment and management of indigenous peoples' own museums and cultural centres.

95. Indigenous peoples have shown an exemplary willingness to pursue reconciliation with museums and other cultural institutions, which often involves revisiting painful intergenerational histories of colonialism, loss of dignity, forced relocation, military occupation and loss of lands, territories and resources. Repatriation processes and the establishment of meaningful relationships with museums contribute to the healing of past injustices and the protection and intergenerational transmission of indigenous peoples' living cultures.

96. The Expert Mechanism commits itself to working closely with all stakeholders in order to facilitate the strengthening and development of mechanisms for the repatriation of indigenous peoples' ceremonial objects, human remains and intangible cultural heritage.
