

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

Report of the Expert Mechanism on the Rights of Indigenous Peoples

I. Introduction

1. Established by the United Nations 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 (the Declaration).
2. In September 2016, in its resolution 33/25, the Human Rights Council amended the mandate of the Expert Mechanism on the Rights of Indigenous Peoples. Among other things, the Council decided 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. Human Rights Council resolution 42/19, adopted on September 26, 2019, “encourages 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, 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 study addresses efforts to implement the Declaration, including the rights of indigenous peoples to self-determination and non-discrimination, as well as to practice their cultural, spiritual, and religious traditions, customs and ceremonies. Articles 11 and 12 recognize rights to the use, control and repatriation of ceremonial objects and human remains, while Article 31 recognizes rights to cultural heritage, traditional knowledge, and other resources. The Declaration further recognizes that States shall seek to enable access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with the indigenous peoples concerned. States shall also provide redress for the taking of cultural, intellectual, religious and spiritual properties taken without indigenous peoples’ free, prior, and informed consent.
5. The Expert Mechanism held a seminar on Repatriation of ceremonial objects and human remains under the United Nations Declaration on the Rights of Indigenous Peoples in Vancouver, Canada, on 4 and 5 March 2020. Indigenous peoples, museums, human rights institutions, academics and others, made presentations that informed this study. The Expert Mechanism would like to acknowledge the support of the University of British Columbia in the organization and sponsoring of this 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 Expert Mechanism’s website.¹

¹ All submissions are available at:
<https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/CallforSubmissionsRepatriation.aspx>

6. Consistent with the Declaration on the Rights of Indigenous Peoples, the Expert Mechanism recommends that stakeholders undertake a human rights approach to the repatriation of indigenous peoples' ceremonial objects, human remains, and intangible resources. 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, customs, and traditions, which often instill both rights and responsibilities toward ceremonial objects, human remains, and intangible resources.

7. This Report further notes that reliance on the Declaration, including articles 11, 12, 31, and others can help indigenous peoples, States, museums, and other stakeholders to properly apply the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO 1970 Convention), as well as national laws, to the specific context of indigenous peoples.² 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 and protect rights, towards healing and cooperation among indigenous peoples, States, museums, universities, scientific institutions, UN agencies, and other stakeholders going forward.

II. Background

8. Indigenous peoples have their own laws, customs, and traditions on the treatment of ceremonial objects, human remains, and intangible resources. In many instances, ceremonial objects are considered inalienable meaning they cannot be transferred outside of the indigenous community, either because they have a spiritual quality or because the community has a duty to care for them. These items may be treated as living beings, provided food, shelter, and prayers by their caretakers. With respect to human remains, indigenous peoples (like others) typically honor their dead with funerals and then expect them to remain at rest in burial grounds as a matter of dignity, privacy, and intergenerational respect. Intangible resources, such as religious songs, plant knowledge, and human DNA, are similarly important for the individual and collective rights of indigenous peoples.

9. Notwithstanding these traditions, indigenous peoples' ceremonial objects, human remains, and intangible resources have often been taken from indigenous communities.³ For hundreds of years, both State and private actors financed and licensed expeditions to acquire these items and then asserted ownership over them. Sometimes the acquisition of indigenous human remains has been for ostensible scientific purposes. For example, in the 1860s, British and Scottish institutions supported the collection of the remains of Australian Aboriginal people, 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 1860's, the surgeon general of the United States army ordered that Indian remains be seized from battle sites, resulting in the transfer of 3000-4000 Indian "osteological specimens" to what would become the National Museum.⁵

² An example is found in the agreement of the Yaqui People and Swedish museum to recommend repatriation of a sacred ceremonial item consistent with Article 15 of the UNESCO Convention and Article 12 of the Declaration.

³ <https://returnreconcilerenew.info/>

⁴ See for example <https://www.theguardian.com/world/2009/jun/28/aborigines-reclaim-ancestors-remains>

⁵ D.S. Lamb. The Army Medical Museum in American Anthropology, 625-26, XIX Congress of Americanists, Washington, D.C. (1917).

Studies in the field of “phrenology,” now discredited, used the measurements of these skulls as evidence to suggest that American Indians were the intellectual inferiors of Europeans. From 1904-1908, indigenous peoples in Southern Tanzania fought the Majimaji War of resistance against German colonialism, only to have their heads amputated from bodies that were buried in mass graves or taken to Germany.⁶

11. Some acquisitions that may have appeared “legal” or “voluntary” were neither. Consider, the case of Hopi “kachinas” that surfaced in French auction houses. 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 to Hopi these are described as “friends” who are fed cornmeal, given shelter in villages, and brought out to dance at certain times. The Hopi asked for the French to halt these sales 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 In another case, Danish anthropologists acquired a sacred Yaqui “Maaso Kova” or deer head from Yaquis living in a Mexican army garrison, after having been driven 1000 km away from their homes during the Yaqui wars. Any acquisition made during such circumstances was likely tainted by duress.

12. Once removed from indigenous peoples, cultural objects and human remains were often transferred to museums, universities, or private collections, and displayed as art or artefacts. In other instances, they were used in scientific studies. For example, in 1993, the mummified remains of a woman who lived in the 5th century BC were found in the Republic of Altai, Russia. For 19 years after the discovery, the remains were kept at the scientific institute in Novosibirsk, a decision protested 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 However, in 2014 the Council of Elders of the Republic of Altai claimed she should be buried. Additionally, the Shor and Khakas peoples in Russia have faced desecration of cemeteries caused by coal excavation and these cases are also unremedied.⁹

13. In the instances where looted human remains and ceremonial objects were later repatriated to countries of origin, it was often for the “national” interest instead of “indigenous” rights. For example, when Yale University finally repatriated 4849 cultural artefacts and human remains to Peru in 2019, items that had been excavated from Machu Picchu in the 1910’s, they were declared “national” cultural heritage,¹⁰ even while the indigenous inhabitants of the local community have concerns about human remains associated with the site.¹¹

⁶ Cressida Fforde, C. Timothy McKeown, and Honor Keeler, *The Routledge Companion to Indigenous Repatriation: Return, Reconcile, Renew* 277-292 (2020).

⁷ Fforde et al. 353-53 (2020) (quoting submission of Hopi Tribe to EMRIP).

⁸ See [Gertjan Plets, Nikita Konstantinov, Vasilii Soenov](#) and Erick Robinson, *The Return of the Altai Princess in an International Perspective*, in *Repatriation, Doxa, and Contested Heritages*, 73-98 (2014)

⁹ Submission from ADC Memorial.

¹⁰ Ministerio de Cultura, Peru, 2019. See <https://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>

¹¹ <http://www.yachaywasi-ngo.org/tourism.htm>

14. The disruption of burial sites and taking of human remains and ceremonial objects, and ongoing possession by others, all cause severe harm to indigenous peoples. Injuries include loss of human dignity, difficulty practicing spirituality without necessary religious items, and inability to carry out cultural obligations to care for the dead and ceremonial objects. Indigenous peoples suffer violations of their rights to religion, culture, spirituality, education, and traditional knowledge when their cultural items, human remains, and intangible resources are improperly acquired, used, and kept by others. As Edward Halealoha Ayau, a leading advocate for the repatriation of human remains to Hawaii points 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 the heavy emotional burden of trying to heal these wounds today. Yet they undertake this 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 resources, 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 cultural and spiritual significance. They often encounter institutional resistance and legal impediments. Museums, in general, 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 training with respect to human rights instruments or the contemporary aspirations of indigenous peoples – and indigenous peoples may lack familiarity with the institutional and professional norms binding 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 resources on a global scale can be daunting in terms of information, cost, and other 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 are issues that can be remedied to some extent with better information and resources, as well as supportive intermediaries.

III. Legal, ethical, and political framework on the repatriation of Ceremonial Objects and Human Remains

17. Indigenous peoples have had their own laws, customs, and traditions on cultural objects, human remains, and intangible resources for dozens, hundreds, or even thousands of years.¹⁵ Many of these indigenous laws are held and transmitted in the oral tradition of the people. For example, Native Hawaiian tradition sets forth the appropriate treatment of human remains and intergenerational obligations of the

¹² Presentation at Expert Seminar on Repatriation of ceremonial objects and human remains. Vancouver, Canada, 4-5 March 2020.

¹³ Fforde et al. 745-809 (2020).

¹⁴ *Onondaga Nation v. Thacher*, 189 U.S. 306 (1903).

¹⁵ A. Riley, “*Straight Stealing*”: *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005).

living to ancestors, calling for burial and protection of ancestors.¹⁶ In other instances, indigenous governments have codified and published their laws. For example, the Pawnee Tribal Code provides, “It shall be unlawful to ...purposely desecrate a place of worship or burial, or other sacred place.”¹⁷ In some instances, indigenous peoples have their own governance structures or programmes for repatriation. In all instances, indigenous peoples’ own laws, customs, and traditions must be followed by all stakeholders with respect to ceremonial objects and human remains.

18. Stakeholders must assess national laws which, in many cases, limit deaccessioning. The British Museums Act of 1963 provides that the museum can only sell, exchange, or transfer if: “(a) the object is a duplicate of another such object, or (b) 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 (c) 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.”

19. National governments and museums often assert that such laws prohibit them from repatriating items to indigenous peoples. Yet many laws have some room for interpretation. For example, while Swedish law emphasizes the duty of care held by national museums toward 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 indigenous peoples’ matters. While a Russian Federal Law stipulates that museum objects and museum collections included in the Museum Fund may be dispossessed or transferred from one person to another only by virtue of universal succession, it also contains a provision for special permission of the authorized federal executive body.¹⁸

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

21. In many instances, indigenous peoples are motivated by their experiences domestically to seek international repatriation as well. There are a number of international instruments dealing with illicit acquisition, trafficking, and repatriation of cultural property that may be helpful to indigenous peoples, museums, and other stakeholders seeking to address international repatriation. These instruments should be read in conjunction with relevant provisions from international human rights treaties, including article 27 of the International Covenant on Civil and Political Rights. The Hague 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 Hague Convention does not apply retroactively but may be helpful to indigenous peoples who have been dispossessed of cultural property in conflicts since 1954 or who find themselves in conflict situations going forward.

22. The UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property extends protection for cultural property beyond wartime. The Convention has provisions on certification, anti-trafficking, and repatriation. Article 1

¹⁷ <https://narf.org/nill/codes/pawneecode/crimoffense.html>

¹⁸ Submission from the Russian Federation

defines cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” that follow in numerous enumerated categories.” Article 2 recognizes international co-operation as one of the most efficient means of protecting cultural property. Article 3 considers illicit the import, export or transfer of ownership of cultural property effected contrary to the provisions of the convention.

23. Several of the UNESCO 1970 Convention’s provisions are preventative in nature. For example Article 5 calls on States Parties to enact laws protecting cultural property, while Article 6 calls for a certification program with respect to authorized transfers. Article 7 calls for States Parties to take the necessary measures to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported. Article 9 provides that “Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected.” Indigenous peoples may seek to work with States under these provisions.

24. The UNESCO Convention has remedial provisions for restitution or repatriation of items acquired after 1970, and calling for State Parties to take appropriate steps to recover and return cultural property imported after the entry into force of the Convention (article 7) and cooperate in facilitating the restitution of illicitly exported cultural property (article 13).

25. While the UNESCO 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.

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. These parties have often been protected by industry customs relying on the reputation of market players to ensure provenance and the absence of national laws. The UNIDROIT Convention provides in Article 3 that “The possessor of a cultural object which has been stolen shall return it.” Emphasizing the duty of purchasers and others to inquire into provenance, the UNIDROIT Convention further provides in Article 4 that possessors who did not know, or have reason to know, that a cultural object was stolen may be entitled to compensation.

27. Unlike the Hague or UNESCO Conventions, the UNIDROIT Convention makes specific reference to tribal and indigenous peoples. Article 5 provides that “A Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State.” The “impairment of traditional or ritual use of the 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. In the indigenous peoples’ context, both national and international laws should be applied consistent with the Declaration on the Rights of Indigenous Peoples. Indigenous peoples’ have rights to self-determination (articles 3 and 4); culture (articles 5, 8, 11, 12, 13, 15 and 31); lands, territories and resources (articles 10, 25-30 and 32); and languages (articles 13, 14 and 16), all of which are inextricably linked to ceremonial objects, human remains and intangible resources.

29. Of particular relevance in the repatriation context, the Expert Mechanism notes that all parties should take care to construe international legal instruments consistent with the following Articles of the Declaration:

Article 11

- (1) Indigenous peoples have the right to practice 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.
- (2) 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

- (1) Indigenous peoples have the right to manifest, practice, 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.
- (2) 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

- (1) 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.
- (2) In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

30. With respect to intangible resources article 13(1) of the Declaration provides:

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

31. In 2014, the international community reaffirmed its support for the United Nations Declaration on the Rights of Indigenous Peoples at the World Conference on Indigenous Peoples. The outcome document of the World Conference explicitly addresses the issue of repatriation in paragraph 27 (A/RES/96/2).

32. At its 17th session (2018), the United Nations Permanent Forum on Indigenous Issues encouraged States, indigenous peoples and other stakeholders to continue to engage in dialogue aimed at achieving the recognition of indigenous peoples' right to repatriation of their human remains and sacred items and called for the establishment of a UN mechanism for international repatriation (E/2018/43, para. 57).

33. The Expert Mechanism also addressed this 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 national and international level (see A/HRC/30/53, paras 69-73 and Annex, paras 8, 19 and 20).

34. UNESCO's 2015 Recommendation concerning the protection and promotion of museums and collections, their diversity and their role in society sets out global guidelines for the protection and promotion of museums and collections, and outlines their responsibilities in protecting heritage in all its forms. Article 18 deals specifically with the cultural heritage of indigenous peoples and relationship-building between museums and indigenous peoples.

35. UNESCO's 2018 Policy on engaging with indigenous peoples 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.

36. The International Council of Museums' Code of Ethics provides in paragraph 6.2 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".

37. In 2018 the European Parliament adopted a wide-ranging resolution calling on the European Union and its member states to address indigenous people's 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 & Human Rights (EIDHR)."¹⁹

IV. Repatriation and Intangible Resources

38. An emerging issue in repatriation concerns the intangible resources of indigenous peoples, including their languages, ceremonies, scientific information, and other expressions of knowledge, identity, and culture.

39. Indigenous peoples have suffered myriad human rights violations in the realm of intangible property, including scientists' unauthorized use of blood samples and DNA for scientific research; corporate exploitation of indigenous peoples' traditional ecological knowledge for patents on pharmaceuticals; fashion designers' appropriation of textile designs; musical entertainers' sampling of

¹⁹ https://www.europarl.europa.eu/doceo/document/TA-8-2018-0279_EN.html.

indigenous spiritual songs; and many others. Harms are dignity, spiritual, cultural, religions, and in some cases economic.²⁰

40. As with ceremonial objects and human remains, indigenous peoples have their own laws, customs, and traditions for the treatment of intangible resources. But 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, biodiversity, as well as the injustice of others profiting off of their inventions and knowledge. It is also difficult for indigenous peoples to trace taking of their intangible resources.

41. Claims for repatriation in this context are complicated by the intangible quality of the resource and the fact that it has often been copied electronically by others. Furthermore, there are intangible elements and intellectual property issues closely linked to ceremonial objects and human remains. While a ceremonial object such as a musical instrument may be physically repatriated, the related intellectual property and copyrights are often fragmented. For example, a researcher may own the copyright of research publications or photographs and a museum may own copyright to video footage of the instrument in use.²¹ 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.

42. Approaches to these problems must include pro-active measures for preventing the misappropriation of indigenous peoples' intangible resources, 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. 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.²²

43. Remedial measures are necessary when intangible resources have been appropriated in violation of these rights and norms. In one example, the Khoi and 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.²³ In other instances of appropriation, repatriation may be an element of remedial measures.

²⁰ See, e.g., Angela R. Riley and Kristen A. Carpenter *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859-931 (2016); Kristen A. Carpenter, Sonia K. Katyal, and Angela R. Riley, *In Defense of Property*, 118 YALE L. J. 1022-1125 (2009).

²¹ Presentation by Harriet Deacon at the Expert Seminar on Repatriation of ceremonial objects and human remains. Vancouver, Canada, 4-5 March 2020.

²² See <https://jan.ucc.nau.edu/hcpc-p/ResProto.pdf>; <https://umaine.edu/news/blog/2018/05/04/umaine-penobscot-nation-sign-mou-focused-managing-tribes-cultural-heritage/>

²³ <https://www.culturalsurvival.org/news/sharing-secrets-hoodia-san-reap-financial-benefits-traditional-knowledge>

44. One international body devoted to these issues is the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. In accordance with its mandate, the IGC is undertaking negotiations with the objective of reaching agreement on the text(s) of an international legal instrument(s), which will ensure the balanced and effective protection of traditional knowledge, traditional cultural expressions and genetic resources.²⁴ An indigenous caucus participates actively in the negotiations and a voluntary fund exists to support indigenous peoples' participation in the sessions of the Intergovernmental Committee.

45. WIPO supports national policy development in the area of traditional knowledge, traditional cultural expressions and genetic resources, and conducts training for indigenous entrepreneurs. WIPO has also issued guidance for indigenous peoples and local community on the strategic use of their rights to protect their intellectual property.²⁵

V. Good practices and lessons learned

A. Repatriations

46. There are a wealth of examples of repatriations from which valuable lessons can be drawn. Although the following examples are all unique, given the specificities of the indigenous peoples and State institutions involved, differing experiences of colonization, and diverse understandings of cultural and spiritual dimensions of the ceremonial objects or human remains involved, they all share the key element of efforts to advance recognition and respect for human dignity across cultures and societies, as well as a commitment to understand others' worldviews, heal past injuries, and build relationships for the future.

Repatriations at the national level

47. 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 private collections), were returned to the indigenous peoples concerned. There are several examples of repatriation to the Sámi in Norway, Sweden and Finland. In Norway, for example, through the Baastede Repatriation Project "approximately half of the collections of Sámi objects that are now 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 *siidas* in local Sámi communities."²⁶ 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."²⁷

48. 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. In Sweden, 25 Sámi individuals were reburied in Liksjoe (Lycksele) on the International Day of the World's Indigenous Peoples, 9 August 2019, through joint efforts between the local Sámi organization, the Sámi Parliament, regional museums and the municipality. These human remains were previously kept in the

²⁴ <https://www.wipo.int/tk/en/igc/>

²⁵ See <https://www.wipo.int/publications/en/details.jsp?id=4195>

²⁶ Submission from Norway.

²⁷ Submission from the Sámi Parliament in Norway

archives of the Swedish History Museum.²⁸ In Finland, 95 Sámi ancestors, previously held at the University of Helsinki were reburied in Amsalem, 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. However, the University of Helsinki maintained ownership of the collection and the Sámi are not entitled to a reburial.²⁹

49. As lessons learned from these experiences, the Sámi Parliament of Norway points out that reburials are a labour-intensive processes involving identifying descendants and giving them a say in how to organize funeral ceremonies. However, 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 has been receptive to these differences of opinion within the community in order to adopt decisions based on a broad range of input.³⁰

50. 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 good of the Ainu people held by universities "with the understanding and cooperation of the people concerned."³¹ 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 Hokkaido University's requirement for next of kin identification for the repatriation of human remains to communities, "which does not match with the indigenous collective/communal notion of property."³²

51. 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 Sebastian Englert Anthropological Museum of Rapa Nui.³³ 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 meets the Declaration's provisions not only on cultural rights, but also self-determination, participation, consultation, and free, prior and informed consent.

International repatriations

²⁸ Submission from the Sámi Parliament in Sweden. See also <https://www.loc.gov/law/foreign-news/article/sweden-government-announces-truth-commission-at-sami-repatriation-ceremony-following-official-sami-request/>

²⁹ Presentation by Aile Aikio at the Expert Seminar.

³⁰ Submission from the Sámi Parliament in Norway.

³¹ Submission from Japan.

³² Presentation by Kunihiro Yoshida at the Expert Seminar. See also submissions from the Centre for Environmental and Minority Policy Studies and Shimin Gaikou Centre.

³³ Submission from Chile.

52. International repatriations are particularly complex and frequently face many challenges. These include differing legal and policy frameworks at international, national and sub-national level; higher financial costs; and importantly, the lack of a legal framework or mechanism for the repatriation of ceremonial objects and human remains directly to the indigenous peoples involved.

53. The Museum of New Zealand Te Papa Tongarewa has taken an active approach, working together with Māori communities to facilitate the repatriation of human remains. Established in 2003, the Karanga Aotearoa Repatriation Programme has repatriated over 600 ancestors and has reunified ancestors to 17 different tribal groups. The Programme has also established positive relationships with over 70 overseas institutions. The programme has drawn several key learnings from its nearly two decades of experience in the repatriation of human remains. At the heart of its success is the partnership between indigenous peoples, governments, and collecting institutions, and the fact that it has been an indigenous-led process. Also, the programme's success is linked to the fact that it is underpinned by Māori principles such as tikanga Māori, (deep Māori philosophy and customary practice), mātauranga Māori (traditional knowledge), and mahitahi (co-operation).³⁴

54. There are also several lessons to be drawn from the experience of the repatriation of human remains to Hawaii over the last 30 years from museums in Germany, the United Kingdom and the continental United States of America, among others. As Edward Halealoha Ayau points 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; by advocating family responsibilities and duties as the primary source of authority supported by legal rights; and by 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.”³⁵ In addition to the successful repatriations of human remains, this approach has also led to strong, durable partnerships with museums based on respect and a common humanity.

55. 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 19th century. They were received with presidential honours, and subsequently reburied in a traditional Kawésqar ceremony on the island of Karukinká in Tierra del Fuego.³⁶

56. In a similar case in Uruguay, the repatriation of the remains of Charrúa Cacique (Chief) Vaimaca Perú from France and his subsequent burial at the National Pantheon in 2008 served to strengthen Charrúa identity.³⁷ 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.

³⁴ Presentation by Te Herekiele Herewini at the Expert Seminar

³⁵ Presentation by Edward Halealoha Ayau at the Expert Seminar. See also submission from the Nation of Hawaii.

³⁶ Ministerio de Relaciones Exteriores de Chile, Memoria año 2009, page 135 (available at https://minrel.gob.cl/biblioarchivo/site/artic/20131015/asocfile/20131015154606/memoria_2009_rev_abril_2014.pdf). See also https://www.bbc.com/mundo/america_latina/2010/01/100114_1626_chile_indigenas_gtg

³⁷ Presentation by Myrna Cunningham at the Expert Seminar. See also <http://archivo.presidencia.gub.uy/web/noticias/2008/03/2008030404.htm>

57. In terms of ceremonial objects, one notable example is the return of 48 Aymara textiles to the village of Coroma in 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). These textiles had been removed from the community in the 1970s and ended up in the hands of private collectors. Thanks to the efforts of the community, together with law enforcement agencies in the United States and Canada, and the diplomatic efforts of the Bolivian government, they were returned in 2002.³⁸

58. 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 already negotiated the return of 85 culturally significant objects and has created relationships with collecting institutions that are eager to collaborate on subsequent returns. The concerned communities are involved in all stages of the repatriation process. The significance of these repatriations is summarized by Murrandoo Yanner, Chairperson of the Gangalidda Garawa Native Title Aboriginal Corporation: "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."³⁹

59. In 2018, the President of France announced his intention to initiate repatriation of cultural objects collected in Africa from the 19th Century through 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 favor of full repatriation of items taken during the era of "colonial violence" unless the current possessors can show affirmative evidence of rightful acquisition including consent.⁴⁰ It will be important for indigenous peoples of 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.

60. In 2019, Finland and the United States agreed to repatriate ceremonial objects and human remains to multiple tribes in the American Southwest, an example of States facilitating indigenous peoples' cultural rights.⁴¹ Yet, the involvement of State institutions may not always be necessary. In 2006, the Swedish Museum of Ethnography returned the 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 government involvement.

B. Positive 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

³⁸ See Cultural Survival, *The Fabric of Life* (available at <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/fabric-life-repatriating-sacred-coroma-textiles>) and Donna Yates, *Coroma Textiles* (available at <https://traffickingculture.org/encyclopedia/case-studies/coroma-textiles/>).

³⁹ Presentation by Craig Ritchie at the Expert Seminar.

⁴⁰ <https://www.smithsonianmag.com/smart-news/french-report-recommends-full-restitution-looted-african-artworks-180970872/>; <https://www.theartnewspaper.com/news/give-africa-its-art-back-macron-s-report-says>

⁴¹ <https://www.doi.gov/pressreleases/secretary-bernhardt-commends-president-trump-president-niinisto-finland-agreement>

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 approach thus may 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.⁴²

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 pieces were obtained directly from indigenous peoples through donations and purchases since 1947. The Museum's mission is to provide services to indigenous peoples whose ethnographic references are gathered in the museum, including systematizing information relevant to 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 people in linguistic and cultural documentation through a partnership with UNESCO.⁴³

63. In an example from Russia, the Sheltozero Veps Ethnography Museum operates as a state museum, but is 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.⁴⁴

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.”⁴⁵ In addition to taking a proactive role in a repatriation process of Māori human remains, the Museum has also sought to build relationships with indigenous peoples. One example is the Museum’s ongoing project with the Yan-nhanu People of Mooronga, in the North of Australia. In 2017, the Museum signed a collaboration agreement with a research project of the Australian National University and Museums Victoria in order to work with the Museum’s collection of objects from Mooronga. In September 2018 the Museum received a visit from Ellen Gallamirwou and Ruth Namakana two Aboriginal women artists from the Malginbe Art and Culture Centre in Mooronga, under the framework of this agreement. In addition to examining and interpreting the collection, the Mooronga representatives also gave a workshop to Museum staff. The visit also led to the Museum obtaining consent for the study of two skulls in the Museum’s possession in order to research its exact origin with a view to a possible repatriation. The Museum’s curator for Oceania collections also visited the Malginbe Art Centre, sharing documentation and photos of the Museum’s entire Mooronga collection.

⁴² <https://blogs.kent.ac.uk/bts/2020/02/17/repatriation-collaboration-and-beyond-the-spectacle/> (U.K.); <https://www.arts.gov.au/what-we-do/cultural-heritage/indigenous-repatriation> (Australia); (Sweden)

⁴³ <http://museudoindio.tainacan.org/>

⁴⁴

http://www.visitpetrozavodsk.ru/en/travel_guide1/around_the_city/sights/sheltozero_veps_ethnography_museum_of_lonin/

⁴⁵ Presentation by Carine Ayéle Durand at the Expert Seminar

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

- Changing ancestral remains from an Museum’s object back to a human being
- Giving back human dignity
- Treating the ancestral remains with respect
- Finding the individual history and biography
- Finding out where they were at home
- Talking to their people and finding out local histories related to the human remains
- Finding out the best and most respectful way to hand them over to their people
- Caring for ceremonies and mourning and providing appropriate places
- Repatriating the ancestors back to their country and people and if possible to the family⁴⁶

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”.⁴⁷

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 not only into repatriations from the Royal British Columbia Museum to indigenous communities, but also in support for the international repatriation of ceremonial objects and human remains to their rightful places. The Museum collaborated with the Haida Gwaii Museum to produce an Indigenous Repatriation Handbook, which provides policy and technical guidance on repatriation and shares their specific experiences.⁴⁸

68. The National Museum of Australia follows a “corporate philosophy of repatriation,” which is expressed through the Museum’s four detailed repatriation policies, which deal with 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.⁴⁹ The Indigenous cultural rights and engagement policy draws from articles 12 and 31 of the Declaration and lays the groundwork for a respectful partnership between indigenous peoples and the Museum, addressing issues such as consultation, consent, acknowledgment and respect of cultural and customary laws, and access to the collections.

69. Museums established and managed by indigenous peoples themselves also play a key 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.⁵⁰ These Museums have been instrumental in the return and safekeeping of both ancestors and ceremonial objects to Sápmi, the

⁴⁶ Presentation by Birgit Scheps-Bretschneider at the Expert Seminar.

⁴⁷ <https://anthrosource.onlinelibrary.wiley.com/doi/full/10.1111/muan.12201>

⁴⁸ https://royalbcmuseum.bc.ca/sites/default/files/indigenous_repatriation_handbook_rbcm_2019.pdf

⁴⁹ Submission from the National Museum of Australia. See also: <https://www.nma.gov.au/about/corporate/plans-policies/policies>

⁵⁰ Submissions from the Sámi museums in Norway and the Sámi Parliament in Sweden.

Sámi homeland. Similarly, the Haida Gwaii Museum in Canada has facilitated the return of ancestors to their places of rest, as well as ceremonial objects, both from within Canada and internationally.⁵¹

70. In addition to operating museums themselves, indigenous peoples have a central role to play in identifying the location of their items in museums around the world and conveying their significance. The Republic of Sakha (Yakutia) 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 aims 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.⁵²

C. Repatriations of intangible resources

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

72. In the 1960's by U.S. researchers took blood samples from the Yanomami people in Brazil without their free, prior and informed consent. The Yanomami were encouraged by missionaries to comply with the requests and were not fully informed of the purpose. They 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 was quoted as saying, "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. Nobody thought that the blood would be kept in their refrigerators, as if it were food!"⁵³ In 2015, the Yanomami successfully fought for repatriation and the blood was buried at home in a ceremony presided over by spiritual leaders.⁵⁴

73. Another example concerns historic recordings of indigenous language speakers made by anthropologists, ethnomusicologists, and others. Decades later, indigenous peoples discover that their ancestors' voices are being kept in universities and other archives. Indigenous peoples may seek to ensure spiritual recordings are not played inappropriately and 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. For example, Columbia University holds copies of and rights to songs from Inupiaq, Navajo, and Hopi communities recorded in the 1900's. The Center for Ethnomusicology has said it is committed to repatriating the recordings, with an initiative to bring the songs "back home" to the tribe, through a "community-partnered repatriation"⁵⁵ Repatriation could range from digitization to return of the original wax cylinders and allocation of attribution, copying, performance, and other rights.

⁵¹ See the Indigenous Repatriation Handbook published by the Royal British Columbia Museum and the Haida Gwaii Museum, available at:

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

⁵² Submission from the Russian Federation.

⁵³ <https://www.survivalinternational.org/news/10727>

⁵⁴ <https://www.bbc.com/news/world-latin-america-32178286>

⁵⁵ <https://music.columbia.edu/news/center-for-ethnomusicology-announces-hopi-music-repatriation-project>.

Trevor Reed, Reclaiming Ownership of the Indigenous Voice: The Hopi Music Repatriation Project, *The Oxford Handbook of Musical Repatriation* (Frank Gunderson, Robert C. Lancefield, and Bret Woods, eds.) 2019.

74. In the Russian Federation, a register of Intangible Cultural Heritage of the Peoples of Ugra is being maintained. As of the beginning of 2020, 61 objects 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 also an important resource and channel for the transmission of ritual traditions to younger generations. In 2016, the project "Ritual system of northern khants Bear Games was recognized as intangible heritage of the Russian Federation and enrolled into the federal catalogue of intangible cultural heritage of the peoples of Russia.⁵⁶

75. Capacity building is crucial for indigenous peoples to better protect their intangible resources and navigate the complex national and international intellectual property regimes. In this regard, WIPO has been working with the Maasai in Kenya since 2008 in order to strengthen their capacity to protect their intangible heritage. Thanks to this training programme, the Maasai have developed practical skills and technical knowledge in cultural documentation, archiving and intellectual property management. They record, archive and manage access to their own cultural heritage, develop their own intellectual property policies, protocols, and use technology based tools to record their intangible heritage.⁵⁷

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

76. One vital area of good practices is the development, adoption and implementation of national legal and policy frameworks for the repatriation of ceremonial objects and human remains, and more broadly the protection of cultural heritage. Examples under this area are diverse, and range from national/federal laws and policies to frameworks adopted by indigenous peoples themselves.

77. One of the most salient examples in this regard is the Native American Graves Protection and Repatriation Act (NAGPRA), 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. NAGPRA "establishes a mechanism for the U.S. government to work in consultation with Native Americans to repatriate human remains and ceremonial objects" and 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; 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 repatriate items to tribes that have a cultural affiliation with those items.⁵⁸

78. NAGPRA is in many ways a laudable legislative example for other States that wish to adopt repatriation legislation. The thirty years of experience under NAGPRA suggest some lessons learned. First, NAGPRA 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 NAGPRA is ambiguous, leaving the door open for narrow construction by courts.⁵⁹

⁵⁶ Submission from the Russian Federation. See also www.rusfolkknasledie.ru

⁵⁷ See https://www.wipo.int/tk/en/folklore/digitizing_traditional_culture.html

⁵⁸ Submission from the United States of America.

⁵⁹ *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004).

79. Stakeholders have also struggled to determine “cultural affiliation” under NAGPRA.⁶⁰ 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 to relatives and ancestors in their territories when other methodologies do not reveal affiliation.

80. New Zealand adopted a repatriation policy in 2003 which stipulates that the New Zealand Government’s role is mainly one of facilitation and 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 to determine the final resting place, where possible. Crucially, the New Zealand Government 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.⁶¹ Since July 2013, Te Papa Tongarewa has repatriated 612 Māori and Moriori ancestral remains from over 70 institutions in eight countries.

81. Switzerland has a federal law on the international transfer of cultural property, which is a reflection in national law of the UNESCO 1970 Convention. This law seeks to protect world heritage and regulates the import to Switzerland of cultural property, its transit and export, the return of cultural property located in Switzerland, 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.⁶²

82. Australia has supported repatriation for over 30 years, and since 2011 is guided by the Australian Government Policy on Indigenous Repatriation, which covers both ancestral remains held overseas (both institutionally and privately) and ancestral remains and secret/sacred objects from collections in Australia. The policy’s objectives include addressing the injustice of Australia’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 Australian Government highlights five lessons learned from its experiences with repatriation:

- Partnerships are key – between Indigenous communities, collecting institutions and governments – to support the return of cultural heritage material;
- Indigenous communities must be at the heart of the repatriation process;
- Returning cultural heritage material supports cultural maintenance, restoration and revitalisation;
- Returning cultural heritage material is an important mechanism for reconciliation and healing; and
- Partnerships between Indigenous communities and overseas collecting institutions are key to ensure the ongoing access to and appropriate presentation of cultural heritage material.⁶³

83. There are also examples of indigenous peoples themselves adopting policies or frameworks for the protection and repatriation of ceremonial objects and human remains. The Grand Council of the

⁶⁰ See *Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F. Supp. 2d 1207, 1224 (D. Nev. 2006).

⁶¹ Submission from New Zealand

⁶² Submission from Switzerland.

⁶³ Submission from Australia.

Waban-Aki Nation in Canada has developed a Protocol for the management of human remains and archaeological finds on their territory. It is based on a community participation approach and despite having limited territorial scope and legal force, it is an important reference document for community decision-making on cultural heritage issues.⁶⁴

84. In Australia, the Victorian Aboriginal Heritage Council is a statutory authority mandated under the Victorian Aboriginal Heritage Act of 2006 to oversee the management and protection of cultural heritage for the indigenous peoples of the State of Victoria. It is composed of up to 11 Aboriginal people who are traditional knowledge owners. The Act establishes strong legal protection of Aboriginal human remains and ceremonial objects within the State of Victoria and establishes norms that apply to both individuals and institutions regarding cultural heritage. Among other elements, the Act establishes procedures, timelines and fines and other penalties in connection to the management of cultural heritage. Some of the strengths of this framework are its participatory nature, where indigenous peoples themselves are empowered to oversee repatriation processes; its role in restoring custody to rightful owners; and the strong penalties that it establishes in order to ensure compliance. However, there are territorial limitations, as the Act only applies within the State of Victoria.⁶⁵

VI. Conclusions and recommendations: Developing International Guidance and Processes

85. The Member States of the United Nations, in response to advocacy from indigenous peoples have 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 (General Assembly resolution 69/2 para 27). This Report recommends several approaches that can be undertaken together or independently in the development of such a mechanisms.

86. The Human Rights Council also 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 (resolution 42/19, para 18). The Council emphasized the importance of partnerships, as well as specific roles for UNESCO, WIPO, and the indigenous-specific mechanisms of the United Nations. 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.

87. A framework for the international repatriation of ceremonial objects and human remains should be firmly based on the United Nations Declaration on the Rights of Indigenous Peoples, in particular 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 of indigenous peoples, pursuant to 11, 12 and 31. There are 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 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.

⁶⁴ Submission from Bureau de Ndakina, Grand Conseil de la Nation Waban-Aki

⁶⁵ Submission from the Victorian Aboriginal Heritage Council.

88. States should enact or reform legislation on repatriation consistent 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 of States to comply with their human rights obligations.

89. States must recognize that indigenous peoples have their own cultural heritage concerns and, when making claims for protection or repatriation, consider not only national interests but indigenous peoples' own claims. 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. Relatedly a determination of whether an item is "illicit" or "stolen" property must include analysis not only of State law but the laws of indigenous peoples that set forth standards of alienability, ownership, and custody of ceremonial objects, human remains, spiritual, intellectual, and other properties.

90. As parties seek to comply with the UNESCO and UNIDROIT conventions, they should work in partnership not only with Interpol, national police forces, civil society, and ICOM, but also indigenous peoples' institutions specializing in cultural property and repatriation, such as the Association for American Indian Affairs in the United States and indigenous peoples' mechanisms of the United Nations. Relatedly, when State parties are seeking state-to-state repatriation of human remains, ceremonial objects, and indigenous spiritual, intellectual and other properties, they 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.

91. In this regard, UNESCO should consider ways of providing advice on repatriation to indigenous peoples and promoting opportunities under the 1970 Convention. Some concrete measures that UNESCO could take include capacity building to States parties and other stakeholders on repatriations under the Declaration on the Rights of indigenous peoples; developing databases of indigenous peoples ceremonial objects and human remains held by State museums; 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.

92. 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 resources. WIPO should consider explicitly addressing repatriation in the context of the Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, as well as continue its efforts to facilitate indigenous peoples' meaningful participation in this process. WIPO should also strengthen its efforts to build the capacity of indigenous peoples to better safeguard their intangible resources.

93. 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 have a duty to develop

relationships of collaboration and trust, as well as to seek out and respect indigenous peoples' knowledge about their collections. Stakeholders such as UNESCO, the International Council of Museums, as well as the Expert Mechanism, the Permanent Forum on Indigenous Issues and the Special Rapporteur on the Rights of Indigenous Peoples can assist museums in achieving a better understanding of legal and ethical obligations, as well as indigenous peoples' expectations and worldviews. Partnerships of this type are essential in order to decolonize museums.

94. Indigenous peoples themselves also have a duty to advocate for the repatriation of their ceremonial objects and human remains. Repatriation requires active community advocacy and involvement in order to happen 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 resources.

95. 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 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 re-burial protocols and the establishment and management of indigenous peoples' own museums and cultural centers.

96. Indigenous peoples have shown an exemplary willingness to pursue reconciliation with museums and other cultural institutions, which often involves re-visiting painful histories of colonialism, loss of dignity, and loss of lands, territories and resources. Repatriation processes and the establishment of meaningful relationships with museums contribute to healing of past injustices and the protection and inter-generational transmission of indigenous peoples' living cultures.

97. 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 resources.