



The Human Rights Framework and Protocols for Exhibiting, Cataloguing and Repatriating Indigenous Peoples' sacred items and human remains by Museums and Recommendations for the Development of a New Mechanism for International Repatriation

Submitted by Andrea Carmen, Executive Director, International Indian Treaty Council for the Expert Seminar on Repatriation of Sacred Items and Human Remains under the United Nations Declaration on the Rights of Indigenous Peoples organized by the University of British Columbia in support of the UN Expert Mechanism on the Rights of Indigenous Peoples, Vancouver Canada, March 4 - 5, 2020



“There are thousands of Mayan cultural and ceremonial items being held and displayed in US and European Museums, Universities and private collections. We look forward to the implementation of an international mechanism to achieve the restoration of these sacred ceremonial items that are essential for the healing of our Peoples.”

--- Francisco Cali Tzay, Mayan Kaqchikel, Tecpan Guatemala, Chair of the United Nations Committee on the Elimination of Racial Discrimination, March 19, 2015.

“These sacred items are part of the Yaqui religion. They are used in ceremonies and need to be treated appropriately, and in the hands of Yaqui cultural leaders. The Yaqui People can suffer if they are not treated as they were meant to be.”

--- Letter to the Swedish Museum of Ethnography regarding the Yaqui Maaso Kova from Rogelio Valencia, Tropa Captain [Cultural Soldiers' Society leader], Pascua Pueblo, Tucson Arizona, September 11, 2003

I. Introduction

The International Indian Treaty Council (IITC) welcomes the opportunity to engage with museums and other repositories of Indigenous Peoples' sacred items and human remains in order to develop new frameworks, processes and protocols for respectful dialogue and rights-based, culturally appropriate outcomes. IITC will continue to work with museums, relevant United Nations bodies and agencies, and Indigenous Peoples from around the world to develop protocols for exhibiting, cataloguing and repatriating Indigenous Peoples' sacred and culturally sensitive items. This will necessarily include processes established by museums for Indigenous Peoples to be informed as to the current locations of their sacred items and human remains, and to have access to them in order to confirm their identities and carry out necessary cultural protocols. This will enable Indigenous Peoples to correctly identify items that are currently uncatalogued/miscatalogued, and to initiate dialogue with museums regarding items that are not appropriate for public display and/or which require repatriation in accordance with their respective laws, traditions and customs.

A new, international mechanism based on participatory development of protocols for informing Indigenous Peoples, facilitating direct dialogue with state and private museums and other repositories, and



implementing new regulations to prohibit illicit sale and transport of sacred items has not been established despite numerous commitments by States and the United Nations to do so. The continued lack of an effective global process or mechanism continues to present a major obstacle in resolving a great many situations which constitute ongoing human rights violations for Indigenous Peoples. IITC thanks the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and the University of British Columbia for organizing this Seminar with participation of UN bodies, museums and Indigenous Peoples. We also express our sincere appreciation to EMRIP for undertaking a current country engagement, bringing together Sweden, IITC and the Yaqui Nation to discuss repatriation of the sacred Yaqui Maaso Kova as an internationally known example of the situations confronting so many Indigenous Peoples around the world.

It is our intention that this paper will contribute to the implementation of good practices based on recognized rights, respectful dialogue and true partnerships between museums and Indigenous Peoples, while also presenting a rights-based framework for the development of a new mechanism or processes for international repatriation in accordance with the standards presented below.

II. The Normative Framework

1. The foundation of the human rights framework for this critical issue is the UN Declaration on the Rights of Indigenous Peoples and the inherent rights it recognizes as the internationally accepted minimum standard. Article 11 affirms that *“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 further affirms that *“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”*. Other relevant articles are, *inter alia*, Articles 3 (Self-determination including cultural development); 25 (Spiritual relationships with traditional lands, territories, waters and other resources); and 31 (Cultural heritage).

2. Paragraph 27 of the World Conference on Indigenous Peoples Outcome Document adopted by consensus of the United Nations General Assembly on September 22, 2014 included the following commitment: *“We commit ourselves 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”*.

3. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property also contains provisions of direct relevance. Article 6 calls on the States Parties *“To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized.”* Article 13 calls on the Parties *“to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner.”*



4. At its 14th session in 2015, the UN Permanent Forum on Indigenous Issues (UNPFII) recommended that States and Indigenous Peoples “establish a working group to prepare a manual of good practices with regard to the repatriation of ceremonial objects and human remains, with the support of the United Nations Educational, Scientific and Cultural Organization and other relevant UN entities, and submit a progress report to the Forum at its fifteenth session”.

5. At its 15th Session in May 2016, the UNPFII further called for ongoing coordination between the UN EMRIP and UNESCO to carry out next steps towards establishing a new process or mechanism for international repatriation as called for by the World Conference on Indigenous Peoples in 2014:

46. The Permanent Forum recognizes the recent formation of an ad hoc working group on international repatriation, with the participation of States, indigenous peoples and specialized agencies of the United Nations system, including the Expert Mechanism on the Rights of Indigenous Peoples, UNESCO, and the Special Rapporteur in the field of cultural rights.... as another positive step forward in the implementation of recommendation No. 8 of the Forum at its fourteenth session.

47. The Permanent Forum requests UNESCO to host a joint seminar with the Expert Mechanism on the Rights of Indigenous Peoples and other relevant United Nations mechanisms for the purpose of exploring the development of a new international mechanism on the repatriation of ceremonial objects and human remains. Furthermore, the Forum calls upon all States with national repositories of indigenous cultural items and ancestral remains, including museums and universities, to work with UNESCO to create an international database and inventory of these items accessible to indigenous peoples as a basis for initiating dialogue.

6. Then EMRIP addressed this issue in its 2015 Study on the Promotion and protection of the rights of Indigenous Peoples with respect to their cultural heritage. This Study concluded that “*the right to redress and restitution where violations of the rights of indigenous peoples have occurred is a foundational element to ensuring reconciliation and the future commitment to protecting the rights of indigenous peoples...*” (para. 69) and that “*the repatriation of the cultural heritage of indigenous peoples is an important aspect of such restitution...*” (para 71). It submitted the following advice to States: “*States should take effective measures to assess, redress and remedy the effects of past injustices and violations of the rights of indigenous peoples by ensuring the restitution and repatriation of their cultural heritage.*” [A/HRC/30/53, August 9, 2015]

7. On November 17, 2015 the 38th Session of the UNESCO General Conference in Paris adopted the “Recommendations Concerning the Protection and Promotion of Museums and Collections, their Diversity and their Role in Society”, with thanks to the International Council of Museums (ICOM) for their assistance in the drafting process. They include the following paragraphs which are, *inter alia* of direct relevance to the rights of Indigenous Peoples in this regard:

“In instances where the cultural heritage of indigenous peoples is represented in museum collections, Member States should take appropriate measures to encourage and facilitate dialogue



and the building of constructive relationships between those museums and indigenous peoples concerning the management of those collections, and, where appropriate, return or restitution in accordance with applicable laws and policies” (paragraph 18); and

“Member States should ensure that museums implement principles of applicable international instruments. Museums are committed to observe the principles of international instruments for the protection and promotion of cultural and natural heritage, both tangible and intangible. They also should adhere to the principles of the international instruments for the fight against illicit trafficking of cultural property and should coordinate their efforts in this matter...” (paragraph 21)

The UN Declaration on the Rights of Indigenous Peoples is also included in the “List of the International Instruments Directly and Indirectly Relating to Museums and Collections” contained at the end of the document.

8. On July 15, 2016, the Organization of America States General Assembly adopted the American Declaration on the Rights of Indigenous Peoples. Paragraph 2 of Article XIII, the “Right to cultural identity and integrity” uses the same language as the UN Declaration Article 11 to affirm that *“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.*

The American Declaration further affirms in Paragraph 3 of Article XVI, “Indigenous Spirituality” that *“Indigenous Peoples have the rights to preserve, protect, and access their sacred sites, including their burial grounds, to use and control their sacred objects and relics, and to recover their human remains”.*

9. On August 9th, 2017 the UNESCO Executive Committee provisionally adopted a new Draft Policy on Engaging with Indigenous Peoples. The final draft affirmed the UN Declaration on the Rights of Indigenous Peoples and included a paragraph on repatriation of human remains and cultural items as follows: *“Indigenous peoples have the right to repatriation of their human remains and States should seek to enable access and/or repatriation of ceremonial objects and human remains in states’ possession through fair, transparent and effective mechanisms developed in conjunction with the indigenous peoples concerned” [para. 77]r.*

10. On October 17th, 2017, at the 202nd session of the UNESCO Executive Board, UNESCO’s Programme and External Relations Commission recommended the adoption of a draft decision taking note “with satisfaction” of the new policy as a “living document”, calling on “the Secretariat to produce a document detailing its implementation of application of the UNDRIP to the Organization’s mandated areas”, and calling on “Member States to make voluntary financial and in-kind contributions to support the implementation of UNESCO’s programmes and activities in line with the UNESCO policy on engaging with indigenous peoples” [(202 EX/9) 19].

11. On May 16th, 2018 the European Parliament adopted a “Resolution on Violation of the Rights of Indigenous Peoples in the World, including land grabbing,” which states that the EP *“Supports indigenous*



peoples' requests for international repatriation and the establishment of an international mechanism to fight the sale of indigenous artefacts taken from them illegally; calls on the Commission to support such efforts, including through financial assistance under the European Instrument for Democracy and Human Rights (EIDHR)"; [paragraph 25].

12. In September 2019, at its 42nd session, the UN Human Rights Council adopted an historic resolution on the rights of Indigenous Peoples which contained the following affirmation: The Human Rights Council 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 [A/HRC/42/L.24, para. 18, September 25, 2019].

13. On December 18th, 2019, the 74th Session of the United Nations General Assembly adopted a consensus resolution on the Rights of Indigenous Peoples [74/135] as presented by the Third Committee which contained for the first time two preambular paragraphs addressing the importance of international repatriation and affirming the rights of Indigenous Peoples in this regard, referencing the World Conference Outcome document and the UN Declaration on the Rights of Indigenous Peoples:

Noting that the General Assembly, in the outcome document of the high-level plenary meeting of the Assembly known as the World Conference on Indigenous Peoples, affirmed and recognized the importance of indigenous peoples' religious and cultural sites and of providing access to and repatriation of their ceremonial objects and human remains, as contemplated in the United Nations Declaration on the Rights of Indigenous Peoples,

Commending Member States, cultural and educational institutions, museums, indigenous peoples and civil society for their efforts to combat the illicit trade in indigenous peoples' cultural property, and welcoming all initiatives, whether by States, institutions or private persons, for the voluntary return of indigenous peoples' cultural property that has been illicitly appropriated.

III. Ongoing Challenges faced by Indigenous Peoples in their interactions with Museums

In gatherings and international fora over many years, Indigenous Peoples have shared their frustration about the limited examples of successful repatriation of sacred items and human remains from museums and other repositories outside their countries of origin. Indigenous Peoples have shared the serious challenges they continue to face, beginning with the lack of available information about where such items, taken from their Peoples in the past, are currently being held.

While the process for creating the new international mechanism moves forward, we call upon government and private museums, universities, auction houses and other repositories to initiate pilot programs based on the development of collaborative protocols and respectful working relationships with Indigenous Peoples.



To do so, it will be necessary to recognize, address and overcome the obstacles identified by Indigenous Peoples from around the world in their ongoing interactions with entities currently in possession of sacred items and human remains. These include:

1. The continued lack of an international process or mechanism or consistent protocols in accordance with the existing human rights framework for their effective engagement and dialogue with museums and other repositories regarding the sacred items and remains in their possession. Despite the clear, rights-based commitment to create a new process or mechanism for international repatriation as detailed in section II above, the UN has not provided a home or funding for its development;
2. The lack of a reliable, centralized and accessible mechanism or process for Indigenous Peoples to determine the current location of their sacred items and remains outside of their country of origin;
3. The continued lack of definitions by museums and UN bodies such as UNESCO for “illicit transport” and “legal acquisition” which consider the rights, laws, traditions and customs of Indigenous Peoples;
4. Indigenous Peoples’ sacred items are still considered by many museums as artifacts from past cultures rather than vital elements of still-living cultures, with their own living spirits;
5. Shockingly, Indigenous Peoples’ human remains and burial items are often still considered to be “artifacts” or “collectables”. They continue to be displayed and stored by museums and universities, and are bought and sold by auction houses and private collectors with little or no regard for the religious, spiritual and cultural laws and protocols of the Indigenous Peoples concerned;
6. The lack of regulations prohibiting international transport of Indigenous Peoples’ cultural and sacred heritage without their Free Prior and Informed Consent, recalling Article 6 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property;
7. Even when repatriation is considered, museums and other repositories often place inappropriate and costly conditions, timelines and requirements on the Indigenous Peoples concerned which can constitute further violations of their laws, traditions, and customs governing these sacred items;
8. The intergenerational, collective, cultural and spiritual protocols and laws related to Indigenous Peoples cultural heritage is not well understood by non-Indigenous entities, including museums;
9. The burden of proof for the ownership or identity of sacred items and human remains is placed on Indigenous Peoples rather than on museums or other repositories located far from the item’s place of origin;
10. The recorded “provenance” (source, history, description and circumstances of acquisition) of sacred items and remains is often incorrect, inaccurate or even falsified, creating additional challenges for locating, identifying and presenting claims for repatriation;
11. The brutal colonial history of appropriation, forced removal, occupation and, in many cases, violence and genocide, of Indigenous Peoples is too often disregarded in determining what constituted “legal” or “illicit” acquisitions by anthropologists, settlers and other collectors; and



12. Current human rights standards upholding Free Prior and Informed Consent (FPIC) and recognizing Indigenous Peoples' laws, traditions and customs regarding the use, care and treatment of sacred items and human remains are usually not considered in determining the definition of "illicit" regarding how items were acquired. Instead, acquisitions and continued possession are considered by museums to be acceptable based on discriminatory legal frameworks and doctrines that existed in past eras, including doctrines that justified discovery and conquest.

IV. Recommendations for Rights-based Museum Protocols regarding Indigenous Peoples' Cultural Heritage

While a new international mechanism or process is under development, museums should establish their own processes and protocols respecting the rights and addressing the obstacles presented above. One current example of a respectful process is the development of an upcoming exhibition pertaining to Indigenous Peoples' Knowledge and Cultural Practices related to Climate Change. This exhibition will take place at the Geneva Museum of Ethnography in 2021 and includes the formation of an Indigenous Peoples' Advisory Committee from all 7 bio-cultural regions of the world. This Committee will identify other Indigenous experts for the development of specific case studies and will reach out to Indigenous Peoples whose cultures are proposed for inclusion. The museum will also use this opportunity to open its collection upon request so that Indigenous Peoples can view items pertaining to their cultures, and can begin discussions regarding respectful display and/or repatriation. This process, if successful, could become a model for collaboration based on Free Prior and Informed Consent and respectful partnership.

Considering the rights-based normative framework outlined above, as well as good examples which exist or may be under development, IITC recommends the following principles and protocols a foundation for good practices by museums pertaining to Indigenous Peoples' sacred items and human remains. We welcome additional recommendations for the respectful treatment of Indigenous Peoples' cultural heritage, sacred items and human remains by others involved in this process as we move forward.

1. All aspects concerning Museum exhibitions involving Indigenous Peoples' cultural heritage, including the planning process for new exhibitions and the display of items currently being exhibited shall be carried out in accordance with the rights affirmed in the UN Declaration of the Rights of Indigenous Peoples including, *inter alia*, Articles 3, 11, 12, 25 and 31.
2. Museum exhibitions will be developed and implemented with the full and effective engagement and Free Prior and Informed Consent of the Indigenous Peoples concerned.
3. Museums and other repositories will inform Indigenous Peoples as to where and under what circumstances their sacred items and human remains are being displayed and/or stored. One option which has been recommended by Indigenous Peoples is for UNESCO to implement an international data base, organized by country, with lists of Indigenous People' items voluntarily provided by museums and other repositories along with a full description and provenance (purported place and history of acquisition) of items they are holding. In the meantime, until this international data base is established, each museum will post such information



on its own web sites and make it available to Indigenous Peoples from all regions. Photographs or drawings of burial items, human remains, or other potentially sensitive cultural items should be not posted or made public and should be transmitted to the specific Indigenous Peoples in question only at their request.

4. Museums will provide private access upon request to the designated representatives of the Indigenous Peoples' concerned so that they can view, identify and carry out cultural/spiritual protocols with their sacred items and human remains as required.

5. Museums will respect the information provided by the Indigenous Peoples concerned, based on their own laws, traditions, and customs, regarding their own sacred items including if and how they should be displayed or stored, and whether the item(s) in question must be considered for repatriation.

6. As an overarching principle, museums should not display human remains or burial items without the Free Prior and Informed Consent of the related Indigenous Peoples. Museums should take immediate steps to identify all human/ancestral remains and burial items in their collections, notify the closest possible descendants and provide recommendations to their governing bodies to expedite repatriation and/or reburial in accordance with the distinct traditional protocols of the Indigenous Peoples concerned. Museums will respect the laws, traditions and customs of the Indigenous Peoples concerned regarding display of human remains and burial items while this process is underway.

7. An evaluation will take place and will be shared with relevant UN Bodies, other museums and Indigenous Peoples when exhibitions, repatriations and related activities are concluded to highlight and document good and/or inadequate practices and outcomes, determine protocols for future engagement, and contribute to the development of international mechanisms, protocols and processes.

“There is an urgent need for a mechanism to be developed collaboratively by States and Indigenous Peoples to address international repatriation. Today this does not exist. Repatriation is left to the good will of individual states on a case by case basis which far too often falls short and provides little security for Indigenous Peoples struggling to ensure that their sacred items are returned to be cared for and healed with the appropriate ceremonies and protocols.”

– IITC submission to the EMRIP Study on the Promotion and protection of the rights of Indigenous Peoples with respect to their cultural heritage, March 10, 2015



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