



**Repatriation of Cultural Objects as a Human  
right:  
Challenges relating to the Right to Culture  
and the Protection of Indigenous Peoples'  
Cultural Heritage**

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I am thankful to have participated in an internship offered by UNIDROIT from February to April 2020. As an intern in the Cultural Property Protection Section, I had the opportunity to work on various projects. In addition to this present personal work, I was able to participate in the maintenance of the Institute's UCAP website, analysing the implementation of the 1995 UNIDROIT Convention into the national law of some Member States. After extensive research on general themes such as the protection of cultural property and the restitution and return of stolen or illegally exported cultural objects, I contributed to the creation of a Frequently Asked Questions about the 1995 UNIDROIT Convention. I have also had the opportunity to study the national legislation of specific Caribbean countries concerning their laws on excavation, ownership of subsoil and regulations dealing with the export of cultural objects to assist the Secretariat in preparing a workshop in Jamaica aiming at accession to the 1995 UNIDROIT Convention. The bilingualism of the Institute allowed me to conduct researches in both French and English.

*“If you desecrate a white grave, you wind up sitting in prison.  
But desecrate an Indian grave, and you get a Ph.D.”*

*Gerald Vizenor<sup>1</sup>*

For several years, the art world has been turned upside down by quite a large number of requests for the repatriation of cultural objects, from peoples, tribes or states, victims of looting during the nineteenth and twentieth centuries. This new heritage war pits the looted society against public and private collections, which are mainly found in the countries of the northern hemisphere. Because they have been acquired all around the world, cultural objects have often been presented out of context and traditions, transforming them into exhibits that symbolize exoticism.<sup>2</sup> Indeed, those objects collected before for their aesthetics, are today claimed by their land of origin as major elements of their heritage.<sup>3</sup>

Therefore, we can ask ourselves how we should balance the notion of universality of heritage, often advocated by the ex-colonizers, and the ethical question that repatriation raises. It seems that the idea of the universality of cultural property creates a danger for the exercise of repatriation and the cultural sovereignty of States.<sup>4</sup>

We have also seen in recent years an international awareness which has led to the creation of numerous international treaties concerning the rights of indigenous peoples. In my opinion, the promotion and protection of the rights of indigenous peoples also involves a right to the repatriation of cultural objects, which is founded on the right to culture.

This contribution will focus on the repatriation of cultural objects that have belonged to indigenous peoples, on the one hand because the UNIDROIT Convention of 1995 devotes articles to this issue in its convention, and on the other hand because since the 1970s, the art market has

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<sup>1</sup> This sentence is most often attributed to Gerald Vizenor, an American author born in 1934. Some say that it could also be the work of Walter Echo-Hawk, a famous native American speaker.

<sup>2</sup> Anni GUTTORM, « *Les objets sami retournent au Pays sami* », Institut Finlandais, 7 October 2019, available at :

<https://www.institut-finlandais.fr/2019/10/les-objets-samis-retournent-au-pays-sami-conservatrice-anni-guttorm/>.

<sup>3</sup> Patrice BEGHAIN, « *Chapitre 7. Identité nationale et restitution des biens culturels* », in : *Patrimoine, politique et société* sous la direction de Béghain Patrice. Paris, Presses de Sciences Po, « La Bibliothèque du citoyen », 2012, p. 121-134. Available at: <https://www.cairn.info/patrimoine-politique-et-societe--9782724612288-page-121.htm>.

<sup>4</sup> Andréane GUILLE, « *L'application du Droit International et l'avènement des biens culturels universels comme obstacle à l'exercice de la souveraineté culturelle 5/5* », in La Fabrique Juridique du Patrimoine Culturel, 14 April 2015, available at : <https://lafabriquejpc.wordpress.com/2015/04/14/lapplication-du-droit-international-et-lavenement-des-biens-culturels-universels-comme-obstacle-a-l'exercice-de-la-souverainete-culturelle-55/>.

been overwhelmed by the growing interest in indigenous cultural objects.<sup>5</sup> Therefore, can we explicitly derive from the right to culture a right to repatriation of cultural objects and consider this as a possible human right ?

Similarly, this paper will analyse the legislation in place and current questions challenging the repatriation of cultural objects. It will be divided in three parts: first, the definitions of the terms “indigenous people”, “cultural objects” and “repatriation”. The second part will focus on the legal instruments that underlie international standards on the right to culture and repatriation. Last but not least, we will consider the challenges facing the repatriation of cultural objects.

## *Definitions*

As I have chosen to delve into the subject of the repatriation of cultural goods that have belonged to indigenous people, it is important to specify what is meant by those terms.

According to dictionaries, such as the *Oxford Dictionary*, the term “indigenous” means “belonging to a particular place rather than coming to it from somewhere else”<sup>6</sup> and has synonyms such as “native, original, aboriginal, home-grown”. Coming to the term “**indigenous people**”, there is no universal definition in the *United Nations Declaration on the Rights of Indigenous Peoples* of 2007, mainly because of the diversity of indigenous cultures.<sup>7</sup> Since the aim of this paper is not the identification of a criterion for indigenous peoples, I will refer to the definition and principles given by the Special-Rapporteur José Martínez Cobo in his *Study on the Problem of Discrimination against Indigenous Populations*, reported to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities. According to the study, indigenous people are

*“those which, having a **historical continuity with pre-invasion and precolonial societies that developed on their territories**, consider themselves **distinct** from other sectors of the societies now prevailing in those territories, or parts of them. They form at present **non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems**”<sup>8</sup>*

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<sup>5</sup> Karolina KUPRECHT, “*Human Rights Aspects of Indigenous Cultural Property Repatriation*”, in *Kulturgüterschutz - Kunstrecht - Kulturrecht. Festschrift für Kurt Siehr zum 75. Geburtstag aus dem Kreise des Doktoranden- und Habilitandenseminars "Kunst und Recht"*, Baden-Baden, 2010, p. 194.

<sup>6</sup> Oxford Learner’s Dictionaries, available at: <https://www.oxfordlearnersdictionaries.com/definition/english/indigenous?q=indigenous>, accessed on 25 March 2020.

<sup>7</sup> Marta KANIA, “*Indigenous People’s Rights and Cultural Heritage: Threats and Challenges for a New Model of Heritage Policy*”, *Latino américa, Revista de Estudios Latino americanos*, Mexico, 2019/1, p. 123, available at: [https://www.researchgate.net/publication/331213187\\_Indigenous\\_Peoples'\\_Rights\\_and\\_Cultural\\_Heritage\\_Threats\\_and\\_Challenges\\_for\\_a\\_New\\_Model\\_of\\_Heritage\\_Policy/fulltext/5c6cc4db4585156b570aa0b5/Indigenous-Peoples-Rights-and-Cultural-Heritage-Threats-and-Challenges-for-a-New-Model-of-Heritage-Policy.pdf](https://www.researchgate.net/publication/331213187_Indigenous_Peoples'_Rights_and_Cultural_Heritage_Threats_and_Challenges_for_a_New_Model_of_Heritage_Policy/fulltext/5c6cc4db4585156b570aa0b5/Indigenous-Peoples-Rights-and-Cultural-Heritage-Threats-and-Challenges-for-a-New-Model-of-Heritage-Policy.pdf).

<sup>8</sup> UN Commission on Human Rights, *Study of the problem of discrimination against indigenous populations*, 11 March 1986, E/CN.4/RES/1986/35.

According to the *United Nations Permanent Forum on Indigenous Issues*, it is also important to take the following criterion into consideration: **a strong link to territories and surrounding natural resources; distinct social, economic or political systems; and distinct language, culture and beliefs.**<sup>9</sup> With regard to the UNIDROIT Convention, its explanatory report refers to the definition of "indigenous and tribal communities" contained in Article 1 of *ILO Convention No. 169 of 1989* concerning Indigenous and Tribal Peoples. This definition, given long before the one of the *United Nations Declaration on the Rights of Indigenous Peoples* of 2007 uses similar criteria, while referring to the terms "tribal peoples". The authors of the UNIDROIT Convention had for a while thought of using this definition, but in the end did not consider necessary to define these terms in the Convention.

To sum up, there can be no doubt that indigenous peoples all over the world are holders and heirs of a unique culture, embodied in beliefs, knowledge and attachment to land.<sup>10</sup> But since we are talking about cultural heritage, cultural objects and sacred objects that are displayed in foreign museums, how do we define them?

The term cultural heritage will be mostly discussed in the last part of this paper, which explores the challenges that the repatriation of cultural objects raise in relation to the protection of indigenous peoples' culture.

**Cultural heritage**, according to the concept of heritage as proposed in the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972 (hereinafter "World Heritage Convention of 1972"), includes different categories of heritage, such as the cultural (tangible and intangible) and the natural.<sup>11</sup> However, it is important to be aware that the traditional categorization of cultural heritage might be inappropriate in the case of indigenous people.<sup>12</sup>

"Indigenous peoples' cultural heritage includes tangible and intangible manifestations of their ways of life, world views, achievements and creativity, and should be considered an expression of their self-determination and their spiritual and physical relationships with their lands, territories and resources. While the notion of heritage encompasses traditional practices in a broad sense, including language, art, music, dance, song, stories, sports and traditional games, sacred sites, and ancestral human remains, for indigenous peoples the preservation of heritage is deeply embedded and linked to the protection of traditional territories. Indigenous cultural heritage is a holistic and inter-generational concept based on common material and spiritual values influenced by the environment"<sup>13</sup>.

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<sup>9</sup> United Nations Permanent Forum on Indigenous Issues, "*Who are indigenous peoples?*", Factsheet, Indigenous peoples, indigenous voices, available at: [https://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf).

<sup>10</sup> Marta KANIA, (note 7), p. 125.

<sup>11</sup> UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, available at: <https://whc.unesco.org/en/conventiontext/>.

<sup>12</sup> Human Rights Council, *Promotion and protection of the rights of indigenous people with respect to their cultural heritage – Study by the Expert Mechanism on the Rights of Indigenous Peoples*, 19 August 2015, A/HRC/30/53, p. 4 § 8, available at: <https://undocs.org/A/HRC/30/53>.

<sup>13</sup> Human Rights Council, (note 12).

This article deals with the repatriation of cultural objects, so only the tangible/material objects are concerned. However, I wanted to give a full definition of the cultural heritage and of course the intangible idea is included, although it does not fall within the repatriation mechanism.

The definition of **cultural objects** is also important in the light of repatriation. Again, there is no international consensus about this term, but it has to be interpreted relying on the definitions adopted by the UNESCO Convention on the Means of Prohibiting and Preventing the Illegal Import, Export, and Transfer of Ownership of Cultural Property of 14 November 1970 (hereinafter “UNESCO Convention of 1970”) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995 (hereinafter “UNIDROIT Convention”).

Both conventions consider cultural objects “as being of importance for archaeology, prehistory, history, literature, art, or science” and part of a category listed in the article or in the annex<sup>14</sup>. This definition seems, at first, not “indigenous-ideal”, as it does not appear to include explicitly human remains, funerary and sacred objects of indigenous peoples. However, we may note that the UNIDROIT Convention deals with sacred objects in its Article 3(8), allowing for the restitution of stolen sacred objects. I find, however, that indigenous objects could be included directly in the definition of cultural objects (or rather in the Annex), as, for example, it is explicitly stated in The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)<sup>15</sup>. This last category is a key focus in the repatriation cases brought by indigenous peoples’, as it is “an inseparable part of the indigenous cultural property notion”<sup>16</sup>.

Nevertheless, we can interpret the definition given by the two Conventions of 1970 and 1995 as including human remains. Depending on how human remains are displayed, they could be considered as a “specimen of anatomy”<sup>17</sup> or as “objects of ethnological interest”<sup>18</sup>, according to the conventions. The UNESCO-UNIDROIT Model Legislative Provisions on State Ownership of Undiscovered Cultural Objects of 2011 specify in the guidelines of its Provision 2, that States are free to go further than the definition *stricto sensu* given for cultural objects and therefore can apply it to human remains.

Moreover, we can consider in a sense the UNIDROIT Convention and the United Nations Declaration on the Rights of Indigenous Peoples of 2007<sup>19</sup> (hereinafter “Declaration on the Rights of Indigenous Peoples”) complementary. The Article 12 of this last one deals with the right of repatriation of human remains and, since the Declaration on the Rights of Indigenous Peoples does not provide a mechanism for the repatriation, the UNIDROIT Convention may apply.

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<sup>14</sup> Art. 1 UNESCO Convention of 1970 and art. 2 UNIDROIT Convention of 1995.

<sup>15</sup> United States Congress, *The Native American Graves Protection and Repatriation Act (NAGPRA)*, 25 U.S.C 3001-3013 (PL 101-601), 16 November 1990.

<sup>16</sup> Karolina KUPRECHT, (note 5), p. 196.

<sup>17</sup> Art. 1(a) of the UNESCO Convention of 1970 and let. a of the Annex of the UNIDROIT Convention of 1995.

<sup>18</sup> Art. 1(f) of the UNESCO Convention of 1970 and let. f of the Annex of the UNIDROIT Convention of 1995.

<sup>19</sup> UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295*, available at: [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf).

For this essay, and to facilitate understanding, the term cultural objects will be used without differentiation for moveable objects with a special cultural value to indigenous peoples.

Finally, the term **repatriation** should be defined. In recent years, indigenous peoples have started to ask for the repatriation of their cultural heritage, as it is the ultimate way to resolve cultural property conflicts.<sup>20</sup> In this context, “repatriation”, “return” or “restitution” means the transfer of cultural objects to their country or community of origin.<sup>21</sup> To facilitate matters, I have chosen to emphasize the term repatriation and use it throughout this paper. Moreover, the term repatriation is currently used in the Declaration on the Rights of Indigenous Peoples and “reflects the reintegration process of objects into their place of origin”.<sup>22</sup>

However, and with a view to dealing with repatriation in accordance with the UNIDROIT Convention, it is necessary to dwell on the specificities of the terms “return” and “restitution”. It is important to note that the UNESCO Convention of 1970 does not use the terms restitution and return in the same way. The UNIDROIT Convention deals with two different situations relating to cultural objects; stolen on the one hand, and illegally exported on the other, corresponding to two separate procedures.

In the event of stolen cultural goods, there will be a “restitution” procedure according to Chapter II of the UNIDROIT Convention. In the case of illegally exported cultural objects, there will be a “return” procedure according to Chapter III of the UNIDROIT Convention,

## **Cultural rights**

Some argue that culture is the essence of humanity and without it, no rights could exist since it is the matrix that generates everything.<sup>23</sup> However, cultural rights have a broad definition and can mean a right to a particular culture, a right to choose a culture, a right to one's culture or a right to cultural difference.<sup>24</sup> Moreover, the right to culture also encompasses all the rights that enable everyone to have access to the resources necessary for their identification process, the rights that allow them to give and receive.<sup>25</sup>

The Universal Declaration of Human Rights, already in 1948, dedicated several passages to cultural rights. As it states in article 27(1), “Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”. However, the Universal Declaration of Human Rights provides a very individualistic vision of Human rights and its relationship to culture. On the other hand, the Fribourg Declaration on Cultural Rights of 2007 is original compared to the Universal Declaration in that it chooses to promote Human rights for “everyone, alone or in community”<sup>26</sup>: “Everyone, alone or in community with others, has the right: To know and to have one’s own culture

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<sup>20</sup> Karolina KUPRECHT, (note 5), p. 197.

<sup>21</sup> Anni GUTTORM (note 2), [online].

<sup>22</sup> Karolina KUPRECHT, (note 5), p. 198.

<sup>23</sup> Organisation des Nations Unies pour l'éducation, la science et la culture, « *Les Droits culturels en tant que droits de l'homme* », Politiques culturelles : études et développement, UNESCO, Bellinzona, 1970, p. 12.

<sup>24</sup> Hubert FAES, “*Droit de l'Homme et Droits Culturels*”, Institut Catholique de Paris, « Transversalités », 2008/4 N° 108, p. 88, available at : <https://www.cairn.info/revue-transversalites-2008-4-page-85.htm>.

<sup>25</sup> Patrice MEYER-BISCH, “Analyse des droits culturels”, Droits fondamentaux, n° 7, January 2008 – December, Fribourg, p. 5.

<sup>26</sup> Huber FAES, p. 95.

respected as well as those cultures that, in their diversity, make up the common heritage of humanity. This implies in particular the right to knowledge about human rights and fundamental freedoms, as these are values essential to this heritage”<sup>27</sup>.

As already discussed, culture is one of the pillars of indigenous societies and is referred to in the Declaration on the Rights of Indigenous Peoples which says in its article 3<sup>28</sup>:

“Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and **cultural development.**”

The first symbolic text which recognized the right of indigenous peoples to control their cultural property is the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples. It was adopted at the first international meeting on the cultural and intellectual property rights of indigenous peoples in June 1993. Members recognizing the rights of indigenous peoples to control their intellectual cultural property and to be the inherent beneficiary thereof.

The Convention for the Safeguarding of the Intangible Cultural Heritage of 2003 places great emphasis on indigenous peoples, recognizing that they “play an important role in the production, safeguarding, maintenance, and recreation of intangible cultural heritage, thus helping to enrich cultural diversity and human creativity”<sup>29</sup>.

Moreover, in 2007, the General Assembly of the United Nations adopted the Declaration on the Rights of Indigenous Peoples, which recognizes the right of indigenous peoples to the protection, conservation, development and transmission of their history, cultural heritage and traditional knowledge, according to articles 11, 12, 13 and 31.<sup>30</sup>

The purpose of this section is not to demonstrate whether or not there is a fundamental right to culture and in what form it should be heard. In this section, we have been able to demonstrate that many international texts have recognized the importance of the cultural heritage of indigenous peoples and have laid down conventions to protect their right to culture, both to repair mistakes of the past and to preserve it for future generations.

## **Right to repatriation**

As we have seen in the previous international human rights texts, the notion of respect for indigenous cultural rights is widely entrenched, although it does not deal with repatriation per se.<sup>31</sup>

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<sup>27</sup> Art. 3(b) of the Fribourg Declaration on Cultural Rights of 2007.

<sup>28</sup> Human Rights Council, *Promotion and protection of the rights of indigenous people with respect to their cultural heritage – Study by the Expert Mechanism on the Rights of Indigenous Peoples*, p. 5 § 10.

<sup>29</sup> United Nations Educational, Scientific and Cultural Organization, “*Convention for the Safeguarding of the Intangible Cultural Heritage*”, Paris, 17 October 2003, MISC/2003/CLT/CH/14, p. 1, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000132540>.

<sup>30</sup> Melissa VERNIER, «*Réappropriation du patrimoine autochtone : défis et nouvelles pratiques muséales et archivistiques*», Partnership: The Canadian Journal of Library and Information Practice and Research, vol. 11, no. 2 (2016), p. 4.

<sup>31</sup> Lynda KNOWLES, “*National and international legislation*”, The Future of Natural History Museums, edited by Eric DORFMAN, excerpt available at: <https://icom.museum/fr/news/rapatriement-international-des-restes-humains-des-peuples-autochtones/>.



With regard to the legislation for the right to repatriation, the most well-known one is the Declaration on the Rights of Indigenous Peoples that includes some principles about repatriation of cultural objects and human remains. This Declaration focuses on the symbolism of repatriation as a human right, whereas the 1970 UNESCO Convention and the UNIDROIT Convention deal more with Western standards of property rights.<sup>32</sup> Article 12 of the Declaration states that “indigenous people have the right to the repatriation of their human remains” and 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.” Moreover, article 11 of the Declaration explain that States “shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples”. This mechanism could be, for instance, the UNIDROIT Convention.

Contrary to the UNESCO Convention of 1970, the UNIDROIT Convention directly binds its Member States. The 1995 UNIDROIT Convention is self-executing and therefore does not need to be embodied in implementing legislation. The norms of the Convention supersede national law and, indirectly, the provisions of private international law in relations between Contracting States. They permit, for example, to seize the competent national authorities or courts of a State Party to order the return of an illegally exported cultural object or the restitution of a stolen cultural object.

The advantage of this Convention is that it offers to an owner of a stolen object a direct access to the courts of a Member States, without the need for support from the home country state.<sup>33</sup> The UNIDROIT Convention could be applied by indigenous peoples to bring legal actions in their own rights in accordance with article 3(1).

The UNIDROIT Convention is of great interest in the preservation of indigenous culture, and to this end has excluded, for the repatriation claim, the absolute time limitation of 50 years for “sacred or communally important cultural objects, belonging to and used by a tribal or indigenous community”.<sup>34</sup> The only deadline for bringing an action in restitution for an indigenous cultural object is the relative period of 3 years; the limitation period begins to run from the moment of the discovery of the place where the object is held and of the identity of the possessor.<sup>35</sup>

In a case of illegally exported cultural objects, the request for return can only be explicitly requested by a State Party.<sup>36</sup> This is a matter of public law and the basis of the request for return is the violation of a state’s law (and therefore only the State bringing the action can act). However, if an indigenous population wishes to revendicate an object because it has been illegally exported, they can convince their government to act on their behalf; the “traditional or

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<sup>32</sup> *Ibid.*

<sup>33</sup> Lyndel V. PROTT, “*Commentary on the Unidroit Convention*”, Leicester: Institute of Art and Law, 1997, p. 15.

<sup>34</sup> Articles 3(3), 3(4) and 3(8).

<sup>35</sup> Articles 3(3), 3(4) and 3(8).

<sup>36</sup> Article 5(1).

ritual use of the object by a tribal or indigenous community”<sup>37</sup> is considered as a specific interest “on which States Parties may base their repatriation claims against another State Party”.<sup>38</sup>

To conclude, and on the regional front, some countries have enacted legislation providing repatriation opportunities for indigenous peoples. This is the case, for example, of the United States with the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, which has led to many returns and restitutions of human remains. Australia, Canada, South Africa and New Zealand have adopted similar measures.

## **Challenges**

Repatriation can create a lot of problems and challenges. Three of them will be examined in this section.

### **The importance and dilemma of repatriation**

As already discussed, repatriation looks like the appropriate solution for most of the indigenous peoples to redress past injustice and to help their culture be reborn from the ashes and revitalize it.<sup>39</sup> Repatriation also means a recognition of the right to their own culture and to preserve a group identity.<sup>40</sup> Moreover, it is also an opportunity to put cultural objects into context instead of seeing them only as museum curiosities. Repatriation provides greater access for peoples of indigenous descent, allows them to tell their stories, reinforces their role as “keepers of memories” and to re-appropriate traditions that have been completely or partially forgotten.<sup>41</sup> Following the example of the Sami communities who have created museums about their culture and ancestors using repatriated objects, it is important to ensure that the knowledge and history of culture will endure for future generations.

However, it would be overly optimistic and too simple to think that all indigenous peoples desire the return of their cultural objects. In some cases, objections to the repatriation were raised by indigenous peoples, both practically and spiritually, in a sense that the repatriation brings also a fear of the wrath of the spirits.<sup>42</sup>

As Karolina Kuprecht sums up brilliantly: “on the one hand, this shows that there are major differences in indigenous peoples’ perspectives on repatriation, which become even more challenging in view of the cultural diversity of indigenous peoples worldwide. On the other hand, the significance of cultural property for indigenous peoples seems to be similar worldwide, leading to unanimous international claim for repatriation”<sup>43</sup>.

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<sup>37</sup> Article 5(3d).

<sup>38</sup> Karolina KUPRECHT, (note 5), p. 210.

<sup>39</sup> Karolina KUPRECHT, (note 5), p. 198.

<sup>40</sup> Karolina KUPRECHT, (note 5), p. 214.

<sup>41</sup> Anni GUTTORM (note 2), [online].

<sup>42</sup> Karolina KUPRECHT, (note 5), p. 200.

<sup>43</sup> Karolina KUPRECHT, (note 5), p. 201.

## **The idea of the universality of the cultural heritage**

In 1982, John Henry Merryman developed two different and opposite concepts: “cultural internationalism”, in line with the thought that cultural goods need protection and are part of a common human heritage; and “cultural nationalism”, which is the interest of states to claim their property on their own national cultural heritage.<sup>44</sup>

This idea of the cultural sovereignty of states and peoples is in opposition to the “world cultural heritage” advocated by the World Heritage Convention of 1972.<sup>45</sup> Moreover, it also raises the question of the legality of this imposed protection in the face of the freedom of cultural rights and the exercise of one's culture.<sup>46</sup>

The Declaration of "Universal Museums" is a Declaration on the importance and value of universal museums, which was signed by 19 of the largest museums in Europe and North America in December 2002.<sup>47</sup> Its publication gave rise to a controversy about the restitution of works in collections that have been built up over the centuries by these major museums.<sup>48</sup> Through this document, the aim is to underline how essential is the role of the cultural objects in fostering a better understanding of different civilizations, as well as to convey to all of humanity the importance of ancient heritage by highlighting it in their public collections, while considering requests for restitution on a case-by-case basis, taking into account the historical context and the legality of the acquisition.<sup>49</sup> One can only cite as an example the famous case of the Parthenon frescoes in Athens brought against the British Museum, although the ICOM recalls the importance of a people presenting its heritage on its own territory and the importance of museum collections in rooting national and cultural identity.<sup>50</sup>

Although the argument of the universal vocation of indigenous peoples' cultural property and their human remains is debatable, it should not be forgotten that the common heritage of humanity is, by vocation, deprived of "appropriation".<sup>51</sup> It must therefore be managed equitably, allowing access to resources for all and without harm to humankind.<sup>52</sup> Unfortunately, and in the case of human remains, they are still too often perceived as ethnological specimens with a universal vocation instead of being seen as the deceased. Would it be shocking to see Western tombs or skulls of your former neighbours in a museum on the other side of the world with the aim of preserving a common heritage? What would we think about it?

## **The lack of powerful legal framework**

We have seen that there is a legal structure dealing with the protection of cultural property belonging to indigenous peoples and repatriation, such as in the UNIDROIT Convention.

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<sup>44</sup> *Ibid.*

<sup>45</sup> Andréane GUILLE, (note 4), [online].

<sup>46</sup> *Ibid.*

<sup>47</sup> Andréane GUILLE, (note 4), [online].

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> Guillaume FONTANIEU, « *La restitution des mémoires : une expérience humaine, une aventure juridique* », Journal de la Société des Océanistes, 136-137, 2013, p. 13, available at : <http://journals.openedition.org/jso/6884>

<sup>52</sup> *Ibid.*

However, in reality, it is difficult for indigenous peoples to receive suitable protection and reparation when it comes to their cultural heritage.<sup>53</sup> Although the UNIDROIT Convention provides, for example, a right for indigenous individuals to bring a claim for repatriation without the assistance of their own State, in practice, public authorities are also needed to coordinate co-operation between the different actors.<sup>54</sup>

However, the right to repatriation is not unconditional, nor is it possible in all cases. For example, it should be noted that most of the conventions are not retroactive, as the international standard is provided by the Vienna Convention of the Law of Treaties of 1969 in its article 28, which means that legal actions are not possible for stolen cultural objects or illegally exported that occurred before the entry into force of the conventions.

It should nevertheless be pointed out that the UNIDROIT Convention, although not retroactive, has recognized that it exists alternative ways of allowing the repatriation of cultural objects that do not fall within the scope of the Convention. It is important to underline that the Convention of 1995 makes it clear that the principle of non-retroactivity is in no way intended to legitimize acts contrary to its principles that occurred before the entry into force of the Convention, as stated in the Preamble, paragraph 6, and in Article 10, paragraph 3. One of its purposes is to show to States alternative avenues for claiming cultural objects that would be excluded from the geographical and temporal scope of the Convention. These would include, for example, diplomatic arrangements under a bilateral agreement or ad hoc negotiations. While recognizing the existence of an alternative to States for objects stolen or illegally exported before the entry into force of the Convention, the Convention avoids a flood of claims for restitution or return. However, this requires external assistance for indigenous peoples.

Moreover, it is not an easy task for indigenous peoples to bring evidence, they often find it impossible to materially prove their ownership of stolen cultural objects. Museums today also are required to comply with a certain duty of diligence and evidence to provide concerning the origin of cultural objects.

The ideal would be to create both national and international binding laws. And as the Canadian federal MP Bill Casey said, speaking on the bill introduced to repatriate artefacts from indigenous people in the House of Commons of Canada, "two minutes and 37 seconds in the House was better than 30 years of effort on the part of the indigenous people".<sup>55</sup> Moreover, it will be necessary to create an online platform to catalogue and locate the cultural objects of indigenous peoples abroad in order to compensate for the lack of available information that they may encounter in the course of their research.<sup>56</sup>

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<sup>53</sup> Human Rights Council, A/HRC/30/53, p 17 § 72.

<sup>54</sup> *Ibid.*

<sup>55</sup> Marie-Laure JOSSELIN, "Le rapatriement de biens autochtones ou comment garder sa culture vivante", Radio Canada, 1 december 2018, available at : <https://ici.radio-canada.ca/espaces-autochtones/1138862/rapatriement-art-autochtone-restitution-loi-parlement-culture>.

<sup>56</sup> International Indian Treaty Council, "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", p. 5.

## Conclusion

Is repatriation the answer?

We have seen that for several years the international community has been concerned about the rights of indigenous peoples and has enacted certain legislations to protect them. We have also indicated that those international texts have understood the importance of culture and the protection of cultural heritage for indigenous peoples. Repatriation of cultural objects, as a component of the right to culture, is seen as a resource to repair mistakes of the past and to preserve the culture for future generations.

However, in spite of a beginning of international awareness, it seems that there are still only a few cases of repatriation and indigenous sacred objects are too often found in commercial sales and auctions. Who is to be blamed?

Although repatriation could be at first imagined as THE solution for the major part of the international community, it should not be forgotten that repatriation does not happen by itself and sometimes leads to culture clashes, when indigenous peoples refuse repatriation for spiritual reasons. Moreover, the universality of cultural heritage is all too often invoked by museums to continue to preserve their precious treasures. Finally, even more than the lack of binding legal texts, it is the lack of implementation that prevents indigenous peoples from being independent in their requests for repatriation.

In some situations, closer collaboration between indigenous peoples and museums or States is necessary. Repatriation is one thing, but cultural re-appropriation is essential. For example, while Western museums have traditionally been tasked with reporting on the past and thus treating indigenous peoples as an endangered species, indigenous museums and cultural centers are instead becoming "living places" and spaces for creation and identity enhancement.<sup>57</sup> This is, for example, the case of the Sami Museum in Finland or the National Museum of the American Indian in Washington.

To me, the right to repatriation of the objects of one's culture is a human right. As we have shown in this article, the right to culture is a human right recognized by several international treaties. The right to repatriation as well as the re-appropriation of its highly symbolic cultural objects must be considered as an inherent human right. Moreover, and in view of recent legal and cultural developments, repatriation is likely to be considered as a human rights issue.<sup>58</sup> The idea of human remains displayed in museums need to be rethink and those last ones should be returned to the indigenous peoples concerned, in order to restore the right to human dignity of their ancestors.

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<sup>57</sup> Melissa VERNIER, (note 30), p. 11.

<sup>58</sup> Lynda KNOWLES, (note 31), [online].