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ARTICLE

Repairing Historic Injustice: The Return of Indigenous Peoples' Ancestral Human Remains Through Transitional Justice

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Abstract

This article focuses on the ancestral human remains of Indigenous peoples that were taken by European invaders during the colonial era. It begins by considering the notion of human remains. It then describes the two types of heritage that result from the removal of human remains: the tangible heritage made of the remains exhibited or stored in the museums or universities of former colonial States, and the intangible heritage made of the collective memories of the surviving communities and their descendants about the removal (and the absence) of the stolen remains. The article next examines the role of national and international laws with respect to the restitution of human remains by exploring the concept of transitional justice. This article argues that transitional justice can facilitate the meaningful repatriation of ancestral human remains and hence the healing of past injustice.

Keywords: human remains; Indigenous peoples; international cultural heritage law; international law; transitional justice; colonialism

Introduction

The question of the return[1] of the cultural objects removed from Africa, America, Asia, and Oceania by former imperial powers during the colonial era (hereinafter "colonial objects") is increasingly debated. This is one of the effects of the 2017 speech of French President Emmanuel Macron at the University of Ouagadougou in Burkina Faso where he pledged to facilitate the return of colonial objects to former French colonies in Africa.[2] President Macron's declaration was followed by the publication of the Savoy-Sarr Report,[3] the restitution of a number of artifacts to Senegal and Benin by French museums,[4] and various initiatives by museums and State authorities across Europe.[5]

[1] The terms "return," "restitution," and "repatriation" are used interchangeably in this article.

[2] The speech is available at: https://www.elysee.fr/emmanuel-macron/2017/11/28/discours-demmanuel-macron-a-luniversite-de-ouagadougou.

[3] Sarr and Savoy 2018.

[4] Hannah, McGivern. 'French Senate Votes Unanimously for Restitution to Benin and Senegal in "Act of Friendship and Trust".' *The Art Newspaper* 5 November 2020.

[5] Barnaby, Phillips. "Western Museums Are Starting to Return Colonial-Era Treasures." *The Economist* 8 November 2021.

All of this indicates that the colonial plunder left a far-reaching emotional scar on former subjugated peoples and their descendants that has not healed despite the passage of time. The reason is that the importance of cultural objects does not derive from their aesthetic value, historical origin, or uniqueness, which serves to differentiate them from ordinary, fungible, merchandise. Rather, the importance of cultural objects springs from the symbolic or spiritual values embodied in such objects – which are independent of aesthetic or monetary significance – given to them by the individuals, communities, and/or nations who created them, or for whom they were created, or whose identity and history they are connected with.[6] Put differently, the importance of cultural objects does not *inhere* in such things but is *accorded* to them by people for the reason that such things are recognized by them as part of their identity and history. The value of cultural objects therefore stems from the "relation" established by individuals, communities, and/or nations with them.[7]

Crucially, this intrinsic link between cultural objects and human beings explains why the claims of individuals, communities, and nations for the return of colonial objects survive despite the passage of time. The perseverance of claimants also derives from the fact that colonial objects were taken away in connection with different forms of injustice, such as genocide, mass killings, slavery, and discrimination.[8]

Notably, colonial invaders did not limit themselves to looting colonial objects, they also stole human remains, namely bodies or parts of the bodies of dead persons. These include skeletons; individual bones or fragments of bones; and soft tissues, including organs, skin, nails, and hair. The human remains of Indigenous peoples[9] ended up in Western institutions – especially natural or medical history museums and universities – not only for public display but also for medical and other scientific research.[10]

This article focuses on the human remains that were taken by the European invaders during colonialism and aims to examine the special problems that are connected to them. It starts by explaining how ancestral remains are perceived by the communities from which they originated (Section B) and why and how they were removed and spirited to Europe (Section C). Furthermore, it addresses the question of the return of human remains (Section D). Next, it critically discusses transitional justice to demonstrate that it can facilitate the return of human remains to claimant States and Indigenous peoples (Section E). The final section sets out the conclusions (Section F).

Human remains as a special category of cultural heritage

Indigenous peoples espouse a holistic conceptualization of cultural heritage that covers tangible and intangible elements. As such, the heritage of Indigenous peoples includes land, colonial objects, and human remains.[11] Therefore it should come as no surprise that various legal instruments contain definitions confirming that human remains constitute one of the categories of cultural objects. In this sense, the most authoritative source is the Declaration on the Rights of Indigenous Peoples adopted by the UN General Assembly in 2007

[6] Lenzerini 2023, 285; Donders 2020, 385; Gillman 2006, 44.

[7] Stahn 2020b, 834; Lixinski 2013, 3.

[8] Stahn 2020a, 796; Renzo 2019.

[9] Although there is no universal definition of Indigenous peoples, it is useful to keep in mind the definition given by the Special-Rapporteur José Martinez Cobo in 1986: Indigenous peoples 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." UN Commission on Human Rights 1986, para. 379.

[10] Marin 2006, 338–40.

[11] ECOSOC 2000, Annex I, paras. 12–13.

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(hereinafter, the "2007 Declaration").[12] This indicates that "Indigenous peoples have 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" (Article 12(1)). This provision is important in that it emphasizes that Indigenous peoples cannot enjoy their rights if they do not have access to the human remains of their ancestors.

Furthermore, it is worth mentioning the UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects of 2011.[13] This instrument is intended to assist domestic legislative bodies in establishing (or revising) a domestic legislative framework for heritage protection, which provides that the ownership of unexcavated, undiscovered antiquities is vested in the State. Notably, the Explanatory Report to the Model Provisions specifies that States are free to extend the definition of cultural property to include human remains. Another confirmation that Indigenous peoples' cultural heritage encompasses ancestral human remains comes from the report on "Promotion and Protection of the Rights of Indigenous Peoples with respect to their Cultural Heritage" that the Expert Mechanism on the Rights of Indigenous Peoples presented to the UN Human Rights Council in 2015.[14] According to this report, "'Indigenous peoples' cultural heritage includes tangible and intangible manifestations of their ways of life, world views, achievements, and creativity ..., including ... ancestral human remains ...."[15] The Code of Ethics for Museums of the International Council of Museums (ICOM) is also worth mentioning. This instrument distinguishes human remains, which are called "culturally sensitive material," from ordinary cultural objects and confirms that human remains can be acquired, studied, and exhibited by museums and similar collecting scientific institutions, provided they are treated securely and respectfully in a manner consistent with the interests and beliefs of the community from which they originate.[16] The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property of 1970 ("1970 Convention")[17] is not decisive with respect to the question under consideration.[18] On the one hand, it provides a definition of "cultural property" that includes "specimen of anatomy."[19] This category could be understood as encompassing human remains. However, the Operational Guidelines for the Implementation of the 1970 Convention affirm that human remains are not covered under this treaty. The reason is that most Indigenous peoples do not accept that human remains can be regarded as "cultural property." Not only that, the concept of property and proprietary interests might be at odds with Indigenous peoples' systems of beliefs.[20] There is also the fact that the preservation and exhibition of ancestral remains in remote institutions according to museological standards for the benefit of science or museum-goers might be irreconcilable with their spiritual and religious beliefs and customs.[21] Nevertheless, the Operational Guidelines for the implementation of the 1970 Convention encourage States Parties to establish legislation, where

[12] Adopted on 13 September 2007.

[13] UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects, available at: https://www.unidroit.org/instruments/cultural-property/2012-model-provisions/.

[14] Established in 2007, this body provides the UN Human Rights Council with expertise and advice on the realisation of the rights of Indigenous peoples as set out in the 2007 Declaration.

[15] Expert Mechanism on the Rights of Indigenous Peoples 2015, para. 6.

[16] Articles 2.5, 3.7, 4.3 and 4.4.

[17] Adopted on 14 November 1970.

[18] The present analysis also applies to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 ("1995 Convention"), as this shares the same definition of the 1970 Convention.

[19] Article 1(a).

[20] Blake 2024, 64.

[21] Stoll and von Hahn 2004, 14–15.

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necessary, for the return of ancestral remains. Admittedly, this is aimed at respecting the wishes of Indigenous communities in accordance with principles set out in relevant international instruments such as the 2007 Declaration.[22]

While acknowledging the *sui generis* nature of human remains, characterized by their quality of being spiritually "alive" and deeply connected with the collective soul of the community to which they belong,[23] this article will treat them as one of the categories of cultural heritage. The primary reason is that international cultural heritage law can facilitate the return of items residing in museums, universities, and national collections. As will be demonstrated, international cultural heritage law has become concerned with Indigenous peoples' claims for the repatriation of such heritage.[24] That said, the present author adheres to the perspective of Indigenous repatriation practitioners, asserting that human remains are the ancestors of Indigenous peoples rather than mere objects destined for museums.

Against this background, it can be argued that the removal of ancestral remains during colonialism has brought about two types of heritage. On the one hand, there are the human remains exhibited (or stored) in the museums and universities of settler States and former imperial States. Accordingly, these ancestral remains are regarded as forming part of the tangible cultural heritage of those States. For instance, the return of *toi moko* (mummified heads of Māori peoples decorated with tattoos) held in French museums to New Zealand was opposed by the French Government on the grounds that they belonged to the national patrimony and were subject to the principle of inalienability – hence their deaccessioning was not possible.[25] Clearly, this tangible cultural heritage can be considered evidence of the appropriation of sacred and ceremonial objects belonging to Indigenous peoples during the colonial era by European invaders. The nefarious effects of this practice persist to this day despite the end of colonial occupation and the subsequent attainment of independence.[26] On the other hand, the removal of human remains (and their protracted absence) has given rise to an intangible heritage in former colonized States. This is made up of the memories and stories about the looting and heinous violence that led to it, which the surviving communities passed to their descendants, as well as the sorrow and anger perceived by the living that derives from the knowledge that such remains cannot be buried according to their beliefs and traditions. To most Indigenous peoples the storage of ancestors' remains in drawers or showcases located thousands of miles from their burial place is the height of disrespect.[27]

This double heritage – with the second being the negative of the first – reinforces the idea that injustice must be undone.[28] The repatriation of ancestral human remains is of utmost importance to address injustice as this allows the community to which they culturally belong to fulfill their obligations to the deceased. Many Indigenous peoples believe that spirits assume bodily form at the time of conception and continue to do so until they are returned to an ancestral spiritual realm after death by the performance of ceremonies dictated by their customs. The removal of the dead – which leaves the spirits in torment and affects the life of the living – is a wound that cannot be cured by the passage of time.[29]

[22] Operational Guidelines for the implementation of the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 2015, para. 12, p. 7.

[23] Lenzerini 2024, 794.

[24] Lenzerini 2024, 785; Anderson and Geismar 2017, 21.

[25] On the return of *toi moko* from France to New Zealand see Stahn 2023, 401.

[26] Vrdoljak 2006, 235; Watt 1995, 78–79.

[27] Pullar 1995, 127; Watt 1995, 78–79.

[28] Van Beurden 2017, 71.

[29] Charlier 2021, 293, 299; Ayau 2020, 63, 78–79; Fforde, Knapman, and Walsh 2020, 750–57.

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Noticeably, the religious and cultural rights of Indigenous communities to bury their dead in accordance with their customs and traditions have been recognized by domestic courts and international tribunals.[30]

Colonialism, international law, and the loss of colonial objects and ancestral human remains

The occupation of the lands of Africa, America, Asia, and Oceania by European imperial States between the sixteenth and the twentieth centuries not only brought about the development of global trade but also the exploitation of such territories and their inhabitants.[31] Colonizers perpetrated all sorts of violence against non-European peoples, ranging from deprivation of rights (genocide, mass killings, summary executions, physical abuse, and land-taking); exploitation (slavery); identity-taking; and political, social, or cultural imposition[32] to racial discrimination.[33] Hanna Arendt and Aime Césaire have forcefully argued that the rise of fascism and totalitarianism in the twentieth century was the reproduction in Europe of the colonial evils that, hitherto, had only been applied against non-European peoples.[34]

Furthermore, colonialism was about the extraction of cultural objects and human remains. In their quest to secure the bodily remains of Indigenous peoples, scientists pursued all avenues. Ancestral remains were taken from burial places, hospital morgues, execution sites, battlefields, massacre sites, and from where people had died of disease or famine without the consent of the relatives of the deceased or the community to which the deceased belonged. Moreover, it cannot be excluded that Indigenous peoples had been murdered to obtain bodies for scientific study.[35]

A mix of motives explains the pillage of colonial objects and human remains, varying from greed and professional and personal gain[36] to the "salvage" paradigm; that is, the "racialized" construction of Indigenous peoples as inferior human beings, as opposed to European peoples and their immeasurably superior Christian and scientific legacy.[37] Notably, the taking of ancestral remains – which began in earnest in the eighteenth century but increased in the nineteenth with the rise of comparative anatomy – served European scientists' interest in describing the – assumed – natural, racial inferiority of Indigenous peoples and, hence, the superiority of the European civilization.[38] By investigating bodily remains through seemingly impartial, objective craniometric, and other comparative metrical assessments, anatomists and anthropologists endorsed European self-perception of civilizational supremacy and Indigenous people's evolutionary primitivity.[39] In turn, the

[30] See, for instance, Inter-American Court of Human Rights, *Moiwana Village v. Suriname*, Judgment of 15 June 2005, Series C No. 124. The Court found that, though the event had occurred two decades before the hearing (a massacre of Indigenous peoples), the community continued to suffer a significant injury because of the intergenerational nature of the customary obligations that the survivors owed towards the deceased.

[31] European colonization started at different moments in various places and invaders used different degrees of violence against Indigenous peoples. Van Beurden 2017, 53–54.

[32] Indigenous peoples were also subject to regimes bent on achieving the obliteration of languages, ways of life, religions, traditions, customs and societal structures. Turnbull 2020, 453.

[33] Stahn 2020a, 796; Renzo 2019.

[34] Arendt 2004, 267–68; Césaire 2000, 36–37.

[35] Turnbull 2020, 453–54.

[36] Van Beurden 2017, 63; Masurovsky 2020, 503.

[37] Cunneen 2016, 193; Lowenthal 1997, 240–41.

[38] Turnbull 2020, 464; Kühnast 2020, 486–89.

[39] Turnbull 2020, 459; Aranu 2020, 402–7. See also Expert Mechanism on the Rights of Indigenous Peoples 2020, para. 10.

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demonstration of the inferiority of Indigenous peoples served as an intellectual resource to justify their enslavement and the expropriation of their lands and resources and to validate the obligation of metropolitan powers to facilitate the development of non-Europeans.[40]

It follows that science was complicit in colonial mass injustice and exploitation.[41] The same is true of the law – including international law.[42]

On the one hand, colonial injustice was created or justified by the law then in force.[43] First, the laws enacted by the settlers in the colonies served as an instrument of social transformation and coercion.[44] Indeed, the expansion of settlements was commonly accompanied by repressive laws applied to Indigenous peoples alone, ranging from exemplary executions to martial laws. These domestic laws and procedures facilitated dispossession in the face of Indigenous peoples' resistance.[45] In particular, the exportation of Locke's understanding of property by European and North American invaders through lawmaking was crucial for the colonial appropriation of territory and resources.[46] Second, the international law rules in force at the time of colonialism, which prohibited the removal of cultural property in the event of armed conflict and occupation and provided for its return, did not apply to non-European territories. This is not only due to the non-retroactivity of legal norms; in effect, such rules were only established in the nineteenth century. At the Congress of Vienna of 1815, the Allies decided after protracted debate that all the items looted during Napoleon's campaigns of 1796 and 1797 had to be returned. The rule was established that national cultural property was not a trophy of war, and if they had a home they should be returned to it for the sake of the integrity of the cultural heritage of every nation. Subsequently, the rules regulating the wartime treatment of cultural property were codified in the Hague Conventions of 1899 and 1907.[47] Another reason for the differential treatment of non-European territories was that, once colonial rule was established, the subjugated territory became part of the territory of the colonial power. This means that the international law rules regulating the wartime treatment of cultural property could not apply to the conquered territory. More importantly, the rules under consideration did not apply to non-European territories because these were not deemed to fulfill the European standards of civilization and sovereignty. In other words, the tribes, chiefdoms, and kingdoms of Africa, America, Asia, and Oceania could not have rights and obligations under existing international law. It is for this reason that, for instance, in 1815, European States compelled France to return the loot of Napoleon to European countries but not to Egypt. Similarly, in the aftermath of the First World War, British politicians talked about liberty but they were not thinking about the non-Western people of their worldwide empire. This is demonstrated by the fact that Indian demands for self-determination were answered by the Amritsar massacre in 1919, in which the British army killed hundreds of unarmed demonstrators. In the same way, in 1945, when the Dutch State emerged from five years of brutal Nazi occupation, one of the first things the government did was to raise an army and send it to reoccupy their former colony of Indonesia. These examples indicate that the dominant

[40] Vrdoljak 2006, 8.

[41] Turnbull 2020, 459, 464.

[42] Many international law scholars and theorists justified colonialism on various grounds, from Francisco de Vitoria (1483–546) to Emer de Vattel (1714–67). See Gozzi 2019, 3–71.

[43] Stahn 2020b, 829.

[44] Stahn 2020b, 826.

[45] Balint, Evansy, and McMillan 2014, 204.

[46] Anderson and Geismar 2017, 3, 5.

[47] See Articles 27 and 56 of the Regulations annexed to the Hague Convention (II) with respect to the Laws and Customs of War on Land, 29 July 1899; Articles 27 and 56 of the Regulations annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907; and Article 5 of the Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War, 18 October 1907.

legal discourse made invisible Indigenous entities (tribes, chiefdoms, kingdoms, etc.), their legal personality, and their rights (including their rights to cultural heritage)[48] – even if they had forms of self-government and rules organizing society.[49]

On the other hand, contemporary international law does not apply to the injustices committed by the settlers. First, claims are barred by the non-retroactivity of legal norms and limitation statutes. Second, colonialism is not defined as a crime according to contemporary international criminal law. This is due to a lack of political will.[50]

With respect to the issue of non-retroactivity, it is worth mentioning that former colonies have sought to adopt an international treaty providing for the return of colonial objects. The high point of demands for the restitution of colonial objects by newly independent States was in the 1960s. However, the principal international treaties in matters of return and restitution of cultural objects are not retroactive. These include the 1970 Convention and the 1995 Convention.[51] The efforts of former colonies to include a retroactive clause in these instruments failed due to the firm opposition of former colonizing powers. Needless to say, they were anxious to protect the collections in their museums.[52] However, neither UNESCO nor UNIDROIT ignored the fears of the States that the non-retroactive application of these conventions could be understood as an implicit approval of the spoliations that occurred during colonialism. Accordingly, both the 1970 Convention and the 1995 Convention allowed States Parties to conclude bilateral agreements on the return of the cultural objects that had been removed before these treaties entered into force.[53] Moreover, the 1995 Convention provides that the absence of a retroactivity provision does not mean that the illegal transactions that occurred prior to its entry into force are condoned.[54] Additionally, UNESCO established the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation (ICPRCP) in 1978. The ICPRCP was entrusted with the mandate to assist UNESCO Member States in dealing with cases falling outside the scope of application of the 1970 Convention, notably the disputes concerning colonial objects. The ICPRCP's initial objective was, therefore, to facilitate the reconstruction of the cultural heritage of former colonies through the repatriation of cultural materials from the museums of former colonial powers. However, to the knowledge of the present author, the ICPRCP has only been called on to solve a few cases – and none of them concerned human remains.

The return of ancestral human remains

Following decolonization, newly independent States, Indigenous peoples, and civil society organizations turned to the museums and universities of former metropolitan States to request the return of ancestral human remains.[55] In some cases, these institutions responded favorably to restitution demands. Examples include the return of *toi moko* to

[48] Van Beurden 2017, 60.
[49] Stahn 2020a, 811–12.
[50] Stahn 2020a, 796–99.
[51] These treaties comply with the rule that international law is not retroactive, which is set out in Article 28 of the Vienna Convention on the Law of Treaties of 1969: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."
[52] Vrdoljak 2006, 207.
[53] See Article 15 of the 1970 Convention and Article 9(1) of the 1995 Convention.
[54] See preamble (sixth recital) and Article 10(3).
[55] Vrdoljak 2006, 206.

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New Zealand,[56] the spoils of Sarah Baartman to South Africa,[57] the head of Kanak chief Atai to New Caledonia,[58] the head of King Badu Bonsu II to Ghana,[59] the skull of Chief Mkwawa to Tanzania,[60] and human remains formerly collected from burial sites to Tasmania and the Torres Strait Islands (Australia).[61] However, it must be stressed that in some cases favorable responses to return claims were given after decades of responding negatively, and some cases are still pending.[62] The main reason for this is that the realization of the right of Indigenous peoples to obtain the return of the remains of their ancestors is in practice complicated by the existence of the competing interests of States and private owners.

This fluctuating trend favoring the return of ancestral human remains to the care of their descendants can be rationalized based on the following reasons; restitution movements have emerged in numerous States while legal instruments have been enacted by States and international organizations.

The development of a bottom-up restitution movement

The restitution of human remains is increasingly favored because of the persistent pressure from Indigenous communities, grassroots groups, and researchers.[63] On the one hand, activists have made the general public aware that Indigenous peoples around the world have been dispossessed, marginalized, forcibly assimilated, and abused in a multitude of ways by European invaders, and that human remains have been acquired through illegal means. Moreover, not only have Indigenous peoples and their allies contested that the holding of human remains by museum institutions is a reminder of colonial wrongs but they have also claimed that the display of and research on such remains is at odds with their customs and religious beliefs.[64] On the other hand, campaigners have called on public institutions to acknowledge that their collections have been shaped by looting and racism and to address, expeditiously, respectfully, and sensitively the requests for the return of human remains. One of the results of this campaigning is the adoption of codes of ethics by museums and museum associations in the first decade of the twenty-first century. These codes provide specific guidelines for handling and disposing of human remains, with due respect for the beliefs of the communities of origin.

[56] Raphael Contel, Anne Laure Bandle, Marc-André Renold, "Affaire Tête Maorie de Genève – Ville de Genève et Nouvelle-Zélande," ArThemis (http://unige.ch/art-adr).

[57] Stahn 2023, 268–71.

[58] Patin 2019.

[59] Seth Médiateur Tuyisabe, Alessandro Chechi, Marc-André Renold, "Affaire Tête du roi Badu Bonsu II – Ghana et Pays-Bas," ArThemis (http://unige.ch/art-adr).

[60] McKeown 2020, 29–30.

[61] See the dispute between the Natural History Museum of London and the Tasmanian Aboriginal Centre over the remains of 17 Tasmanian Aboriginals (Prott 2009, 401–04), and the dispute between the Natural History Museum of London and the Traditional Owners of the Torres Strait Islands about 138 human remains (Clegg and David 2020; Campton and Lane 2020).

[62] For instance, the return of *toi moko* by the city of Rouen to New Zealand was initially opposed by the French government on the grounds that items of the national patrimony are inalienable. On the return of the of *toi moko*, see Stahn 2023, 401.

[63] Campaigners and their allies emerged in both settler States and former imperial powers, although at different times. For instance, whereas Australian activists have been at the forefront of the international repatriation movement since its early days, the debate about the return of human remains to former colonies in countries like Germany began only in the 2000s (Förster 2020; Jones and Herewini 2020).

[64] Watt 1995, 78–79.

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The development of national laws

The return of human remains is compelled by the national laws of the States that have acknowledged Indigenous peoples' rights to ancestral remains. Given the limited space of this study, a comprehensive examination of all national laws is not feasible. This article, therefore, refers only to selected instances that prove useful in clarifying the basic aspects of the issue under discussion.

In Australia, Parliament passed the Aboriginal and Torres Strait Islander Heritage Protection Act in 1984, which makes it an offense for any person to possess, display, or have under control any Aboriginal skeletal remains. The Act also directs the Minister to either return ancestral remains to "an Aboriginal or Aboriginals entitled to [] and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition," or to "deal with the remains in accordance with any reasonable directions" of the Aboriginal individual or group.[65]

New Zealand actively seeks the return of human remains taken from the country during its colonial period through the Protected Objects Act of 1975 (which was amended in 1993). The purpose of the Act is to provide for the return of, record the ownership of, and control the sales of *ngä taonga tüturu.* This term refers to items relating to Māori culture, history, or society, which includes ancestral human remains.[66]

In the United States, the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990 gives Indigenous groups ownership and control of cultural objects and human remains found on federal and tribal lands, provides for the investigation of the provenance and repatriation of cultural materials and human remains[67] and facilitates consultation and mutual agreement among native groups, museums, and federal agencies. As such, NAGPRA favors dispute avoidance and dispute resolution. The basic premise of NAGPRA – which is not constrained by statutes of limitation – is the preeminence of the rights of Native American tribes to their cultural heritage over the interests of the scientific and museum communities.[68]

In the United Kingdom,[69] Section 47 of the Human Tissue Act of 2004 enables nine identified museums[70] to transfer human remains that they reasonably believe to be the remains of a person who died less than one thousand years ago, provided "it appears to them to be appropriate to do so for any reason."[71] Therefore, repatriation decisions depend on

[65] See Section 21 of the Act.

[66] Fforde, Turnbull, Carter, and Aranui 2020, 388. The Treaty of Waitangi, which was signed in 1840 by representatives of the British Crown and of Māori tribal groups, gave little protection to ancestral human remains as theft and export occurred on a grand scale. Fforde, Turnbull, Carter, and Aranui 2020, 386, 388.

[67] This law requires federal agencies and federally funded museums to furnish an inventory of Native American remains and objects. After its completion, the inventory must be notified to Indigenous peoples' groups. In respect of restitution requests, Indigenous peoples' groups must present a *prima facie* case that the institution did not obtain possession of an item with the voluntary consent of the individuals or groups with the authority to alienate it. The burden then shifts to the holding institution to prove that it has a legitimate right to possession. Nafziger 2008, 215–16.

[68] NAGPRA is limited by two significant handicaps: it is exclusively concerned with federally recognized tribes, and its operation is limited to federal agencies and federally funded museums. Therefore, it does not cover cultural objects in private collections or located outside US jurisdiction. Vrdoljak 2006, 278–81.

[69] Hausler 2021, 270–73.

[70] These are the Royal Armouries, the British Museum, the Imperial War Museum, the Museum of London, the National Maritime Museum, the National Museums and Galleries on Merseyside, the Natural History Museum, the Science Museum, and the Victoria and Albert Museum.

[71] Section 47 is the only section dealing with cases of human remains removed during the colonial era, the rest of the Act focuses on human tissues from the last 100 years. This section was inserted following a 2003 report of the Working Group on Human Remains.

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what these few institutions believe appropriate. Yet museums in the United Kingdom are under the ethical obligation to facilitate the restitution of ancestral human remains. This duty derives from several sources, including the "Guidance for the Care of Human Remains in Museums" of 2004,[72] which was issued by the Department of Digital, Culture, Media and Sport to ensure the implementation of Section 47 of the Human Tissue Act.[73]

In Argentina, the recognition of Indigenous peoples' rights with respect to restitution and reburial of human remains has been on the government agenda since the 1980s. However, the first legal instrument on the restitution of human remains was only adopted in 2001 when Law 25,517 was enacted. This provides that museums must make available the human remains that are part of their collections to those Indigenous groups that claim them. This law was followed by regulatory Decree 701, which gives the National Institute of Indigenous Affairs the power to coordinate, articulate, and assist in the implementation of Law 25,517. Notably, it contains the requirements for groups to make a legitimate claim and the criteria to be followed by museums to deliver the remains.[74]

Finally, it is worth mentioning the French law on the restitution of human remains, which was adopted by the French Parliament in 2023. This piece of legislation provides that human remains less than 500 years old that are held in French public collections can be returned to their countries of origin by a decision of the Prime Minister. Requests must be submitted by a foreign State and will be accepted if it is proved that restitution enables the fulfillment of the funerary customs of a living community (thereby excluding exhibitions). Decisions will be taken on the basis of a report submitted by a commission comprised of experts from France and concerned countries. Ostensibly, this law will greatly facilitate the restitution of human remains given that it establishes a new system that does not rely on the approval of special laws.[75]

The development of a (weak) international legal framework

The international legal instruments that contain clauses on the right of Indigenous peoples to recover human remains include the 1970 Convention, the 1995 Convention, and the 2007 Declaration. Having already addressed the content and limits of the 1970 Convention and the 1995 Convention, this section will focus on the 2007 Declaration.

The 2007 Declaration contains the core of international Indigenous-specific human rights norms. In effect, this declaration was adopted out of the recognition that the (then) existing human rights regime was not fully responsive to the diverse cultural contexts of Indigenous peoples and that, hence, specific human rights standards were needed to promote universal respect for and observance of the collective human rights of Indigenous peoples.[76] Noticeably, the preamble of the 2007 Declaration affirms that "all doctrines, policies, and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic, or cultural differences are racist, scientifically false, legally invalid,

[72] Available at: https://www.gov.uk/government/publications/guidance-for-the-care-of-human-remains-in-museums. This document indicates that the Human Tissue Act 2004 focuses only on the museums that were prohibited from deaccessioning human remains under pre-existing legal rules. It also notes that the government encourages the museums that are subject to a statutory restriction to deaccession human remains to remove such restriction (p. 12).

[73] However, the British Museum's Human Remains Policy of 2013 contains formidable impediments to restitution, as it asserts the overarching principle that human remains collections should be retained. See Sections 4.1, 5.1, 5.16.1, 5.16.2, and 5.17.2.

[74] Endere 2020, 190–92.

[75] Laurence, Caramel. "Le Parlement français adopte une loi sur la restitution de restes humains à des Etats étrangers." *Le Monde* 18 December 2023. For a criticism of the situation in France see Vigneron 2020.

[76] Sambo Dorough and Wiessner 2020.

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morally condemnable and socially unjust,"[77] and that "[I]ndigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories, and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."[78] Even more importantly, the 2007 Declaration contains guarantees concerning the rights of Indigenous peoples to self-determination, access, and/or repatriation of ceremonial objects and human remains. Article 11 provides 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," whereas Article 12 recognizes the right of Indigenous peoples to "the repatriation of their human remains." As the main provision addressing Indigenous cultural heritage, Article 31 provides that "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, literature, designs, sports and traditional games, and visual and performing arts …."

However, the protection of these prerogatives might be substantially impaired by the nature of the declaration, which is not a legally binding instrument under international law.[79] The UN General Assembly's non-binding declarations have some normative value in certain circumstances. This is the case when they reflect the commitment of the international community of States to abide by certain principles. In this sense, it should be noted that the 2007 Declaration was adopted by a large majority of States: 143 voted in favor, 4 voted against, and 11 abstained. Moreover, it must be stressed that since its adoption, the four States that voted against it (Australia, Canada, New Zealand, and the United States) have changed their position and endorsed the Declaration, as have three of the States that initially abstained (Samoa, Colombia, and Ukraine).[80] UN General Assembly declarations have some normative value when they "provide evidence important for … the emergence of *opinio juris.*"[81] In this respect, the 2007 Declaration may be regarded as the development of international legal norms designed to eliminate human rights violations, discrimination, and marginalization, as well as the starting point for the "hardening" of non-binding provisions, or as evidence of an emerging new customary rule. This has been confirmed by two studies. The first was published at the end of the last century by Siegfried Wiessner. He closely examined State practice and *opinio juris* of the most affected States and concluded that customary international law including Indigenous peoples' rights to cultural heritage was emerging.[82] Other scholars reviewed the evidence gathered by Professor Wiessner and largely concurred with the result.[83] The second study was published about a decade later by the experts of the Committee on the Rights of Indigenous Peoples of the International Law Association: Resolution 5/2012. These experts dealt with the meaning of the 2007 Declaration and carefully examined the relevant State practice and *opinio juris.* The Committee concluded that the 2007 Declaration as a whole "cannot yet be considered as a statement of

[77] Fourth recital.

[78] Sixth recital.

[79] The 2007 Declaration also lacks mechanisms for the enforcement of the rights contained in Articles 11 and 12. See Wilson 2024, 623.

[80] McKeown 2020, 23–24.

[81] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, para. 70.

[82] Wiessner 1999.

[83] Dorough and Wiessner 2020, fn 67 and related text.

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existing customary international law" (para. 2). Nevertheless, it recognized that the declaration includes a number of culture-based Indigenous peoples's rights that have become part and parcel of customary international law and therefore correspond to existing State obligations under customary international law (para. 2). The Committee further affirmed that the provisions which "do not yet correspond to customary international law nevertheless express the aspirations of the world's Indigenous peoples, as well as that of States, in their move to improve existing standards for the safeguarding of Indigenous peoples' human right[s]" (para. 3). Arguably, this is the case of Article 12, which codifies nearly two centuries of development in relation to the rights of Indigenous peoples.[84]

The international community reaffirmed its support for the 2007 Declaration at various times after 2012. In 2014, at the World Conference on Indigenous Peoples, the General Assembly explicitly addressed the issue of repatriation.[85] In 2018, the UN Permanent Forum on Indigenous Issues encouraged States, Indigenous peoples, and other stakeholders to continue to engage in active dialogue aimed at achieving recognition of the rights of Indigenous peoples with regard to the repatriation of their human remains and sacred items.[86] Still, in 2018, UNESCO published its policy on engaging with Indigenous peoples, which addresses the right to repatriation of human remains and ceremonial objects.[87] In the same year, the European Parliament adopted a resolution calling on the European Union and its member States to express support for Indigenous peoples' requests for repatriation.[88] Finally, in 2020, the Expert Mechanism on the Rights of Indigenous Peoples adopted a report examining good practices and lessons learned with respect to the repatriation of ceremonial objects, human remains, and intangible cultural heritage.[89] This report provided numerous examples of repatriation and pointed out that the restitution of cultural objects and human remains to ensure the realization of the rights of Indigenous peoples as set out in the 2007 Declaration, in that it advances recognition and respect for human dignity across cultures and societies, heals past injuries, promotes reconciliation, and allows the establishment of partnerships.

Transitional justice and the repatriation of Indigenous peoples' human remains

Exploring the boundaries of transitional justice

Transitional justice has been defined as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large[-]scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecution, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof."[90] Another definition

[84] McKeown 2020, 34–39.

[85] Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, Resolution 69/2, 22 September 2014, para. 27.

[86] Economic and Social Council, Report on the seventeenth session (16–27 April 2018), E/2018/43-E. C/19/2018/11, para. 57.

[87] Available at: https://en.unesco.org/indigenous-peoples/policy.

[88] Available at: www.europarl.europa.eu/doceo/document/TA-8-2018-0279_EN.html.

[89] Expert Mechanism on the Rights of Indigenous Peoples 2020. See also the Report on Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Recognition, Reparation, and Reconciliation, A/HRC/EMRIP/2019/3/Rev.1, 2 September 2019; and the Report on Promotion and Protection of the Rights of Indigenous Peoples with respect to their Cultural Heritage, A/HRC/30/53, 19 August 2015.

[90] UN Secretary-General's report on the rule of law and transitional justice in conflict and post-conflict Societies S/2004/61. Transitional justice emerged as a discrete field in the late 1980s through the study of the role of law in

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provides that transitional justice corresponds to "the ways countries emerging from periods of conflict and repression address large scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response."[91] These definitions indicate that transitional justice processes apply to societies that have been affected by protracted violence, serious human rights violations, and mass atrocities committed in the context of past armed conflicts[92] and dictatorial regimes. In these contexts, conventional retributive, criminal justice processes are not deemed adequate given the presence of many perpetrators (which might be entrenched in the apparatus of the State), broken institutions, exhausted resources, diminished security, and a distressed and divided population. Accordingly, in these contexts, transitional justice enables the stakeholders involved to: (i) acknowledge the occurrence of widespread and State-sanctioned crimes; (ii) ensure justice and accountability through the prosecution and punishment of perpetrators; (iii) prevent the repetition of similar widespread and systematic violations; (iv) fulfill the right to truth, that is, the right of the victims and society at large to know what had occurred under past conflicts or repressive rule; (v) provide reparation to the victims; and (vi) facilitate the reconciliation between victims and offenders. Transitional justice can achieve these goals not only with the participation of victims and perpetrators but also with (transitional justice) facilitators, members of foreign governments, international organizations, and non-governmental organizations.

It must be noted that transitional justice is premised on a "point of rupture"; that is, a drastic shift from violence and regime to democracy and freedom. This traditional understanding of transitional justice might seemingly hinder its application in contexts where such a "point of rupture" did not occur. This is the case in, for instance, States where Indigenous communities are still striving to recover representative colonial objects and the human remains of their ancestors. For them, the process of decolonization remains ongoing, as they continue to bear the enduring effects of misappropriations and the crimes associated with them.[93] It should not be surprising that commentators argue that transitional justice can be applied in these contexts. Consequently, transitional justice processes can be employed to facilitate the restitution of the human remains removed during the colonial era.[94] This means that the return of human remains enables the parties involved in such cases to achieve the objectives typically pursued through transitional justice, notably: (i) reparation, through the return of the disputed remains; (ii) truth, if the facts and circumstances surrounding the misappropriation and the crimes associated to it can be ascertained; and (iii) reconciliation, as restitution empowers the descendants of the victims of misappropriations to have a sense of closure.

Thus, transitional justice can contribute to the resolution of disputes involving ancestral human remains but only when its application beyond the habitual settings is accepted.

First, as hinted above, resorting to transitional justice requires that the parties involved in the disputes under consideration accept the argument that the States and the Indigenous peoples seeking to recover human remains are still in a phase of transition, even though colonial occupation ended decades ago. This is because ancestral remains are essential to the history, identity, well-being, and self-determination of formerly subjugated communities.

times of political transition in societies in South and Central America and the collapse of Communism in Eastern and Central Europe. Balint, Evans, and McMillan 2014, 198.

[91] International Center for Transitional Justice 'What is Transitional Justice?', 2019 https://www.ictj.org/about/transitional-justice.

[92] Especially non-international armed conflicts characterized by ethnic and religious divisions.

[93] On the ongoing character of the wrongs suffered by Indigenous peoples as a consequence of the taking of human remains see Stahn 2023, 456–67.

[94] Vrdoljak 2020; Cunneen 2016.

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The life of these groups is disrupted by the absence of ancestral remains and, accordingly, they will linger in a phase of transition until past injustices have been addressed and redressed, perpetuating injustice for present and future generations. It follows that the concept of transition should not be understood solely as a transition to a democratic regime but also as a transition to just relations following the resolution of the deep socio-cultural consequences of colonial injustices.

With respect to the latter point, it must be mentioned that in 1993, African leaders stated that "the damage sustained by African peoples is not a 'thing of the past' but is painfully manifest in the damaged lives of contemporary Africans."[95] In the same vein, in 2001 the UN Conference on Racism recognized "the need to develop programs for the social and economic development of [developing countries]" in various areas, one of which is the "[r]estitution of art objects, historical artifacts, and documents to their countries of origin."[96] Moreover, in 2014, the States of the Community of Latin American and Caribbean States recognized the enduring and nefarious legacy of genocide, slavery, and the plundering of cultural resources.[97] Finally, in 2020, the UN High Commissioner of Human Rights, Michelle Bachelet, criticized "the failure to acknowledge and confront the legacy of the slave trade and colonialism" in the Human Rights Council Urgent Debate on current racially inspired human rights violations. She combined this with a plea "to make amends for centuries of violence and discrimination, including through formal apologies, truth-telling processes, and reparations in various forms."[98]

Second, transitional justice should be construed as processes applying to macro-settings involving large groups of people who did not take part in the misappropriation of ancestral human remains. In effect, whereas it is not possible (owing to the length of time that has elapsed and the death of perpetrators, victims, and witnesses) to prosecute the colonialists that removed human remains (and committed the violent crimes associated with the misappropriations), it is possible to identify the descendants of the victims of the misappropriation, as well as the current holders of ancestral remains. The descendants of the victims (and the countries where they reside) should be treated as victims for the purposes of transitional justice as long as they can demonstrate the existence of a relationship with the community of the original victims and with the claimed human remains.

Identifying guiding principles for the return of ancestral human remains

Available practice demonstrates that discussions over the restitution of colonial objects in general and human remains in particular can go around in circles, feeding off each other like a Jungian ouroboros chasing its own tail. Yet, as demonstrated, many human remains have gone back to their country of origin in the past decades. However, in most cases, the goals of transitional justice have been achieved unwittingly by the parties without exploiting in full its flexibility and potentiality. In other words, the States and peoples involved in disputes over human remains lacked a conscious engagement with transitional justice. This should

[95] Declaration of the Abuja Pan-African Conference on Reparations for African Enslavement, Colonisation and Neo-Colonisation, 27–29 April 1993, Abuja, Nigeria.

[96] Para. 158. United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, 31 August to 7 September 2001.

[97] Declaration adopted at the II Summit of the Community of Latin American and Caribbean States (CELAC), 28–29 January 2014, Havana, Cuba.

[98] Statement by Michelle Bachelet, UN High Commissioner for Human Rights, 43rd session of the Human Rights Council Urgent Debate on current racially inspired human rights violations, systemic racism, police brutality against people of African descent, and violence against peaceful protests, 17 June 2020.

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not be surprising considering that transitional justice has not been used until recently as a framework to consider the injustices that occurred during the colonial era.

Arguably, this state of affairs could change if, first, the nations and peoples seeking to recover ancestral human remains offer to holding institutions persuasive evidence that the claimed human remains were illegitimately removed from the place of origin – taken by force, by unequal treaty, theft, deception, or without compensation – and that the misappropriation disrupted their well-being. Second, they should demonstrate that there is a "cultural context" where the claimed human remains can meaningfully return, namely a collective group, be it a nation or a community within a nation, that can rebury the remains according to dignified and proper funerary rites. Provenance research is essential for these developments to see the light. Indeed, as a means to confront colonial amnesia, provenance research is the cultural heritage equivalent of public inquiry and access to truth in the context of transitional justice. The more past takings of cultural objects are grounded in wrong, the more compelling it becomes to ensure the resolution of return claims by warranting access to the history of objects.[99] Third, parties involved in the colonial era restitution claims under consideration should engage both transitional justice and cultural heritage experts. These specialists could facilitate a meaningful dialogue between the parties, addressing their respective interests and needs. Additionally, they could help identify solutions complementing the repatriation of human remains, such as the establishment of memorials and the issue of guarantees of non-repetition. Furthermore, transitional justice and cultural heritage experts could assist claimants in identifying guiding principles to be applied throughout the repatriation process. Some steps in this direction have been taken by UN experts.

Notably, in 2021, the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, Fabián Salvioli, submitted a report analyzing the role of transitional justice measures in addressing the legacy of colonialism.[100] With this report, the Special Rapporteur argued that the design and application of transitional justice measures in the area of truth, justice, reparation, memorialization, and guarantees of non-recurrence should be adapted to address the gross violations of human rights and international humanitarian law committed in the colonial era, including the removal of cultural objects and human remains. Notably, the Special Rapporteur embarked on this examination because of the "lack of effective response to violations of human rights and international humanitarian law stemming from colonialism and the realization that those violations continue to have negative effects today."[101] For the purposes of the present article, it is important to focus on one component of transitional justice addressed by the Special Rapporteur in his report, namely reparations. According to the Special Rapporteur, the reparation of the violations committed during colonialism poses a number of challenges, the principal one being the impossibility of fully restoring the preoccupation situation. Nevertheless, the Special Rapporteur maintained that the restitution of the plundered cultural heritage of Indigenous peoples – such as artifacts, archaeological objects, and human remains – is the only feasible form of reparation.[102] In particular, in his opinion, the restitution of human remains is crucial to restoring the broken relationship between the living and their ancestors. In this sense, the Special Rapporteur provided a number of relevant examples concerning the restitution of human remains to Indigenous peoples in Japan, Mexico, New Zealand, and Australia.[103] Moreover, the Special Rapporteur emphasized that it is

[99] Stahn 2023, 442.
[100] UN Human Rights Council 2021.
[101] *Ibid.* para. 4.
[102] *Ibid.* para. 57.
[103] *Ibid.* paras. 67–69.

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not possible to remedy the violent past if the affected communities do not feel included and are not part of the negotiation process.[104]

Hence, the aforementioned report can be considered as a template for identifying a number of guiding principles applicable to Indigenous peoples' claims for the return of ancestral human remains.

The first is that ancestral human remains must be returned to the Indigenous communities to which they culturally belong. In 2008, James Nafziger wrote that, throughout the world, it is no longer a matter of whether or not to repatriate human remains and other sacred material to Indigenous cultures but rather of when and how.[105] This is confirmed by the ICOM Code of Ethics, which provides that "requests for removal from public display" and the return of "human remains or material of sacred significance from the originating communities must be addressed expeditiously with respect and sensitivity,"[106] and 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 impartially, 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."[107] Returning ancestral remains to Indigenous peoples and ensuring their access to them is part of a process to offset generations of discrimination.[108] Restitution also makes the violent nature of the colonial project clear by evidencing the past desecration of burial sites and the removal of bodies and illustrating the impact of racial science.[109] At another level, restitution allows the reparation of the harm perpetrated at the time of the removal because it enables the living to reconnect with their ancestors and to treat or bury the ancestral remains according to their rituals and belief systems. This deeper understanding of restitution signals that repatriation and healing are closely interrelated.[110] As demonstrated, the descendants of the victims of imperial powers will feel a sense of injustice and distress stemming from the misappropriations and the atrocities that accompanied them until the requested human remains are returned. Repatriation ceremonies bear witness to the healing resulting from the restitution of human remains. These ceremonies frequently highlight the dignified and protracted efforts of Indigenous peoples in coping with the emotional scar associated with the gloomy collective memories and sorrow stemming from the removal of human remains (and the associated violence), the subsequent exhibition, scientific use, or storage of these remains in distant, inaccessible museums.[111]

The second guiding principle is that the interests of scientists should not prevail over the interests of Indigenous communities in the repatriation of human remains. In case of conflict between the interests of science in keeping human remains for scientific study and the return of such remains in compliance with the religious and cultural rights of Indigenous peoples, preference should be accorded to the latter. This principle is grounded in the fact that caring for the dead outweighs the scientific benefit of retaining human remains. One cannot contest that the work of specialists is fundamental for studying and recording the information contained in tombs, artifacts, and archaeological sites, as well as human tissues. Scientific information is important to understand our common past and not

[104] *Ibid.* paras. 89–92.
[105] Nafziger 2008, 145, 213.
[106] Para. 4.4.
[107] Para. 6.2.
[108] Blake 2015, 280.
[109] Fforde, Knapman, and Walsh 2020, 747.
[110] Fforde, Knapman, and Walsh 2020, 750–57.
[111] Expert Mechanism on the Rights of Indigenous Peoples 2020, para. 14. See also Fforde, Knapman, and Walsh 2020, 747, 756–57.

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simply the lives of the ancestors of the citizens of a specific country. However, the research on human remains has never been an inherent right, whereas the right of Indigenous peoples (and of people in general) to respect their ancestors and to bury the dead is well-established in law and jurisprudence.

The third guiding principle that can be drawn from the 2021 report of the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence relates to the participation of affected communities in the restitution process. At the dawn of transitional justice, the State, or more precisely the executive branch of the government, was regarded as the key decision-maker concerning transitional justice. Whereas civil society and international actors could offer critical input, the development of transitional justice policies was ultimately left to new political leadership. By contrast, contemporary transitional justice discourses perceive the State as only one of several actors with the ability to shape and implement transitional justice. Moreover, today, consultation and the involvement of victims and/or their descendants, local communities, and civil society are emerging as benchmarks for the legitimacy of transitional justice processes. Transitional justice solutions that rely overly on international "best practices" and a "top-down design" without the effective participation of the affected communities are, therefore, widely ostracized by experts. In respect of the restitution of Indigenous peoples' ancestral human remains, the Expert Mechanism on the Rights of Indigenous Peoples indicated that States must consult and seek the prior informed consent of Indigenous peoples and their participation through their representative organizations. Further, States should enter into agreements on return that are consistent with the laws, customs, and traditions of Indigenous peoples. The Expert Mechanism encouraged UNESCO to facilitate these developments not only through capacity-building initiatives for Indigenous peoples but also through the establishment of an international committee made up of Indigenous peoples' representatives as well as cultural and human rights experts.[112]

Conclusions

Contemporary international law and international cultural heritage law do not apply to the injustices committed during the colonial era due to the non-retroactivity of legal norms. Thus, the passage of time is a significant obstacle to redress for colonial injustice. However, the heinous acts committed by colonialists in Africa, America, Asia, and Oceania should not be condoned or forgotten. Colonial injustice is not a distant wrong that passes away with time. Indeed, the lasting effects of past injustices should be recognized and addressed.[113] In particular, as this article has endeavored to demonstrate, the removal of ancestral human remains has left wounds in the victims of dispossession and their descendants that cannot be cured by the passage of time. This article argues that transitional justice – as a set of processes or mechanisms designed to promote justice, truth, reparation, and reconciliation – can strengthen the trend favoring the repatriation of ancestral human remains that were taken during colonialism. Moreover, transitional justice could empower States, Indigenous peoples, and civil society organizations to heal the far-reaching emotional scar represented by the intangible heritage made of the collective memories of the surviving communities and their descendants about the removal (and the absence) of the ancestral remains taken illegitimately by European invaders.

[112] Expert Mechanism on the Rights of Indigenous Peoples 2020, paras. 89–90.
[113] Löytömäki 2013, 222.

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