

UN Special Rapporteur on Freedom of Religion or Belief, Dr Ahmed Shaheed

Call for inputs: Indigenous Peoples and the right to freedom of religion or belief – GA report of the Special Rapporteur on freedom of religion or belief

Written note for the stakeholder consultation on *Repatriation of ceremonial objects and human remains*, 16 June 2022, updated after the consultation

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Working Question 1) How would you describe Indigenous peoples' spirituality including examples of traditions, customs and ceremonies and the objects that are used therein?

Each element of Indigenous' peoples religious and spiritual heritage – either tangible or intangible, immovable or movable – represents an essential component of the world as it is generally conceived by Indigenous peoples themselves, i.e. a holistic unity in which all beings are deeply interconnected with each other and share the same soul and spirit, grounded on, and living in, the land. All elements of this whole are infused by a profound connotation of spirituality and compose a perfect order, by virtue of which they are united with each other in forming the Circle of Life. Each time that an Indigenous community is deprived of even only one of such elements, the Circle of Life is broken, and so is the harmony of the community's existence, with detrimental effects which may persist for generations.

Religious and spiritual heritage embodies an essential part of the cultural identity and distinctiveness of most Indigenous peoples. In light of the said holistic perspective characterizing Indigenous peoples' conception of life – according to which the cosmic order is only guaranteed through living in harmony with nature and all existing beings – their religious and spiritual heritage defines their distinctive identities as peoples and contributes to give life its correct significance.

Ceremonial objects and human remains are elements of particular significance of Indigenous' peoples religious and spiritual heritage. Given their materiality, these elements are usually classified and considered as tangible objects, including in the context of their legal regulation. In reality, however, their meaning for Indigenous communities is especially determined by their intangible component, produced by the *spiritual* significance attached to them by the community concerned. This is the reason why their role in the life of Indigenous peoples goes much beyond the one usually played by a material property, determining huge implications in terms of human rights, particularly the right to freedom of religion or belief. Consistently, the African Commission on Human and Peoples' Rights has emphasised that:

protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity ... [The State is obliged] to promote and protect traditional values recognised by a community. ... [C]ulture [is to be

understood] to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups.¹

Depriving an Indigenous community of its own ceremonial objects and human remains does not simply mean stealing its material property, but usually involves disruption of an element of its belief system indispensable to its existence as a community. In addition, the commercialisation of such objects and remains usually determines an additional, profound, offence for the communities concerned, as entities of high spiritual value are trivialized, their significance being downgraded to that of mere commercial items. When situations of this kind happen, if the violation is not properly redressed, the inheritance transmitted by the community to future generations is mutilated by the lack of one of its essential elements, opening a wound the healing of which becomes an intergenerational demand, as future generations are prevented from enjoying a life in harmony with all surrounding elements – nature, spirits, and the entire universe – until their religious and spiritual heritage is recovered. For instance, in 2005 the Inter-American Court of Human Rights, in its judgment in the *Case of the Moiwana Community v. Suriname*, held that

it is extremely important [for an Indigenous or tribal community] to have possession of the physical remains of the deceased, as the corpse must be treated in a particular manner during [...] death ceremonies and must be placed in the burial ground of the appropriate descent group ... If the various death rituals are not performed according to [the community] tradition, it is considered a profound moral transgression, which will not only anger the spirit of the individual who died, but also may offend other ancestors of the community ... This leads to a number of "spiritually-caused illnesses" that become manifest as actual physical maladies and can potentially affect the entire natural lineage ... such illnesses are not cured on their own, but rather must be resolved through cultural and ceremonial means; if not, the conditions will persist through generations.²

On account of the deep spiritual significance of ceremonial objects and human remains for Indigenous communities, their repatriation is a reparatory act through which legal and moral obligations existing towards Indigenous communities are finally honoured.

Repatriation of Indigenous peoples' ceremonial objects and human remains. Main international legal provisions

Article 11 UNDRIP provides for the right of indigenous peoples "to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature." Paragraph 2 of the same article establishes the duty of states to provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with

¹ See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication No. 276/2003, 2010, para. 241.

² Series C No. 124, Judgment of June 15, 2005 (Preliminary Objections, Merits, Reparations and Costs), paras. 98-99.

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. This provision, in referring to “religious and spiritual property”, undoubtedly includes the right of Indigenous peoples to repatriation of their own ceremonial objects and human remains.

Article 12 UNDRIP affirms the right of indigenous peoples to, *inter alia*, “maintain, protect, and have access in privacy to their religious and cultural sites ... to the use and control of their ceremonial objects; and ... to the repatriation of their human remains”. This article also commits states to “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”. While this provision partially overlaps with paragraph 2 of Article 11, it is more explicit in affirming the right of Indigenous peoples to repatriation of ceremonial objects and human remains, although it does not formulate the corresponding duty of States as a firm legal obligation, but rather as a duty of seeking to enable such repatriation. However, it involves at least a strong commitment for States to act in good faith – at the best of their possibilities and resources – to make repatriation effectively possible. The right of Indigenous peoples to “redress through effective mechanisms, which may include restitution ... 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” is also contemplated – as part of the right to cultural identity and integrity – by Article XIII(2) of the American Declaration on the Rights of Indigenous Peoples, adopted on 15 June 2016.

Article 31 UNDRIP establishes 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, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article XVI of the American Declaration on the Rights of Indigenous Peoples establishes, respectively at paragraphs 3 and 4, that “Indigenous peoples have the right to preserve, protect, and access their sacred sites, including their burial grounds, to use and control their sacred objects and relics, and to recover their human remains”. It also determines that “States, in conjunction with indigenous peoples, shall adopt effective measures, to promote respect for indigenous spirituality and beliefs, and to protect the integrity of the symbols, practices, ceremonies, expressions, and spiritual protocols of indigenous peoples, in accordance with international law”.³

Article 8 of UNDRIP is also of significance, though indirectly, for the right of Indigenous peoples to protection and repatriation of their ceremonial objects and human remains. This provision establishes that “indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture,” as well as that states must “provide effective

³ See also paragraphs 1 and 2 of the same article, providing, respectively, that “Indigenous peoples have the right freely to exercise their own spirituality and beliefs and, by virtue of that right, to practice, develop, transmit, and teach their traditions, customs, and ceremonies, and to carry them out in public and in private, whether individually or collectively”, and that “[n]o indigenous people or individual shall be subjected to pressures or impositions, or any other type of coercive measures that might impair or limit their right freely to exercise their indigenous spirituality and beliefs”.

mechanisms for prevention of, and redress for... [any] action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities”.

Principle 21 of the Principles & Guidelines for the Protection of the Heritage of Indigenous People, adopted in 1995, requires that governments and international organizations “assist indigenous peoples and communities in recovering control and possession of their moveable cultural property and other heritage.” It further provides that human remains and associated funeral objects “must be returned to their descendants and territories in a culturally appropriate manner, as determined by the indigenous peoples concerned.” Additionally, Principle 22 stresses that movable cultural objects “should be returned wherever possible to [their] traditional owners, particularly if shown to be of significant cultural, religious or historical value to them”.

At the treaty level, Article 5 of ILO Convention No. 169 of 1989 provides that “the social, cultural, religious and spiritual values and practices of [Indigenous and tribal] peoples shall be recognised and protected”, and that “the integrity of the values, practices and institutions of these peoples shall be respected”. This article, properly interpreted, is to be considered as including the right of Indigenous peoples to protection and repatriation of ceremonial objects and human remains.

More specifically, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, at Article 5(3)(d), provides that the court or other competent authority of the State to which a request for the return of an illegally exported cultural object has been submitted shall order such return if the requesting State establishes that the removal of the object from its territory significantly impairs “the traditional or ritual use of the object by a tribal or indigenous community”. Although this obligation exists vis-à-vis the territorial State where the object was originally located – and not the Indigenous community spoiled of it – it is evident that it actually safeguards the right of Indigenous peoples to keep their cultural objects of traditional and ritual use. In addition, Article 7(2), in establishing the cases in which return of a cultural object is not due, affirms that, in any event, they do not cover the situation in which “a cultural object was made by a member or members of a tribal or indigenous community for traditional or ritual use by that community and the object will be returned to that community”. In this situation, the competent authority is therefore bound to order return of the object concerned, on the condition that the requesting State actually returns the property to the Indigenous community affected by its loss.

Most of the provisions just described are of *soft law* character, hence not producing direct legal obligations for States. The only existing binding provisions in the field are located in instruments ratified by a limited number of countries only, precisely 24 (ILO Convention No. 169/1989),⁴ and 53 (UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects),⁵ not including most countries in which large Indigenous communities exist. One should therefore assume that their effectiveness is rather limited. However, the developments in the field under customary international law should be considered. As authoritatively stressed by International Law Association Resolution No. 5/2012,⁶ “States are bound to recognise, respect, protect and fulfil indigenous peoples’ cultural identity (in all its elements, including cultural heritage) and to cooperate with them

⁴ See <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314> (accessed 13 June 2022).

⁵ See <<https://www.unidroit.org/instruments/cultural-property/1995-convention/status/>> (accessed 13 June 2022).

⁶ Available at <<https://www.ila-hq.org/index.php/committees>> (accessed 13 June 2022).

in good faith – through all possible means – in order to ensure its preservation and transmission to future generations”.⁷ The Resolution also affirms that

States must comply with their obligations – under customary and applicable conventional international law – to recognise and fulfil the rights of indigenous peoples to reparation and redress for wrongs they have suffered ... Effective mechanisms for redress – established in conjunction with the peoples concerned – must be available and accessible in favour of indigenous peoples. Reparation must be adequate and effective, and, according to the perspective of the indigenous communities concerned, actually capable of repairing the wrongs they have suffered.

The right to reparation, as expressed by the sentence just reproduced, plainly includes the right to repatriation of ceremonial objects and human remains.

Furthermore, one should consider that, in the practice of international human rights bodies, the UNDRIP has been recognized as bearing a legal significance which goes much beyond its formal status of declaration of principles. In fact, it has been recognized as being the instrument of reference when the rights of Indigenous peoples are concerned, providing the rules that states *must comply with* in order to guarantee proper enjoyment of human rights by Indigenous communities. **For more details, I attach my own article entitled “Implementation of the UNDRIP around the world: achievements and future perspectives. The outcome of the work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples”, published on the *International Journal of Human Rights* in 2019. The relevant assessment of the practice of human rights bodies relating to the UNDRIP is included in Section 3 of the article.**

Working Question 4) Are there any examples of good practices - including those led by Indigenous peoples, civil society, museums and other cultural institutions, States, or international organizations - in relation to protecting ceremonial objects and human remains of Indigenous peoples, including through repatriation?

Examples of Relevant Practice

The existence of legal provisions only represents a first step in the affirmation of rights, and the relevant laws must be accompanied by proper and effective implementation. Still today, the practice concerning repatriation of ceremonial objects and human remains is not univocal. However, in the last two-three decades, several cases of good practice have occurred, especially as far as human remains are concerned.

One of the most known examples concerns the Māori *Mokomokai*, hundreds of which – following the Karanga Aotearoa Repatriation Programme, launched in 2003 by the Museum of New Zealand Te Papa Tongarewa in cooperation with the government – have been repatriated to New Zealand by a number of countries (including Australia, France, the United Kingdom, and other European states). The masks are either to be returned to their relatives or, when the latter are unknown, to

⁷ See para. 6.

be displayed by the Te Papa museum itself.⁸ Other examples include the return, in 1988 and 1998, of the Sioux Ghost Dance shirts to the descendants of the victims of the 1890 Wounded Knee massacre; the return of 846 secret/sacred objects and 42 sets of human remains from several Australian museums – coordinated and managed by the national Museum’s Repatriation section – to Aboriginal communities living in various parts of Australia; the repatriation, by June 2005, of all known human remains belonging to ancestors of the Haida Nation (an indigenous community living in the Pacific Northwest of North America) which were previously held in museums and institutions across North America (during the Consultation it was noted that the Haida Repatriation Committee has brought home the remains of over 500 ancestors); the return, in May 2007, of 17 Aboriginal mortal remains to Tasmania, Australia, by the Natural History Museum in London; and the return, in September 2015, of five epa (wooden panels) to the people of Taranaki iwi Te Ātiawa and Ngāti Rāhiri hapū, in New Zealand, from which they were looted in 1971 (the epa are now housed at the local Puke Ariki Museum).

The general statistics concerning the United States, provided by the U.S. National Park Service, are also noteworthy. Since the passing of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990, to September 30, 2021, over 1.8 million associated funerary objects have been transferred with human remains, while 349,000 unassociated funerary objects, and about 21,600 sacred objects and other cultural items have been repatriated.⁹

Efforts to ensure repatriation of indigenous peoples’ cultural heritage are also carried out at the bilateral level. In 2003, for instance, a joint statement was released by the prime ministers of the United Kingdom and Australia, whereby they agreed to “increase efforts to repatriate human remains to Australian indigenous communities;” recognized “the special connection that indigenous peoples have with ancestral remains;” endorsed “the repatriation of indigenous human remains wherever possible and appropriate from both public and private collections;” and commended the British institutions which had already negotiated agreements with Aboriginal communities for the repatriation of remains.

While these examples show the fulfilment of indigenous peoples’ rights to their cultural heritage, the broader picture is not entirely positive. Indeed, repatriation – though increasingly commonplace – is far from consistently practiced. In recent times, several attempts by indigenous communities to regain cultural properties essential to their identity have been unsuccessful. For example, in April 2013, a French court held that selling Katsina “friends” (ritual objects considered particularly sacred by the members of the Hopi Native American tribe) at an auction in Paris was fully legitimate, because “the claim that Hopi cultural patrimony is exclusively their property has no legal basis according to French law.” This incident was not isolated, and other indigenous peoples’ sacred objects have been sold at French auctions against the protests of Native American tribes.

⁸ See Federico Lenzerini, “The Tension between Communities’ Cultural Rights and Global Interests: The Case of the Māori *Mokomoka*”, in S. BORELLI and F. LENZERINI (eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*, Leiden/Boston (Brill/Martinus Nijhoff Publishers), 2012, pp. 157-177.

⁹ Pub. L. 101–601, 25 U.S.C. 3001 et seq., 104 Stat. 3048; “Fiscal Year 2021 Report. National NAGPRA Program”, National NAGPRA Program, National Park Service, <<https://irma.nps.gov/DataStore/DownloadFile/673040>> (accessed 13 June 2022).

Main source: Federico Lenzerini, “Cultural Identity, Human Rights and Repatriation of Cultural Heritage of Indigenous Peoples”, in *The Brown Journal of World Affairs*, Volume XXXII, Issue 1, Fall/Winter 2016, 127, pp. 134-37.

During the stakeholder consultation, other examples have been mentioned, including those of the ancient stone sculpture called Ulug Khurtuyah tas in Khakassia and of the Princess of Ukok in Altai.

Other examples are available in the Report of the Expert Mechanism on the Rights of Indigenous Peoples, “Repatriation of ceremonial objects, human remains and intangible cultural heritage under the United Nations Declaration on the Rights of Indigenous Peoples”, UN Doc. A/HRC/45/35, 21 July 2020, paras. 45-70.

In practice, at the international level, it is generally agreed that human remains – as a very *sui generis* category of cultural property – should usually be repatriated, while much more controversy exists as regards ceremonial objects, due to the existence of competing interests potentially belonging to different actors (on this aspect see Working question 3) below).

Working Question 3) What are key challenges that Indigenous peoples face in recovering and seeking repatriation of their ceremonial objects and human remains? What factors should be considered in making fair, transparent and effective mechanisms to this end in conjunction with indigenous peoples concerned?

Some of the key challenges that Indigenous peoples face in recovering and seeking repatriation of their ceremonial objects and human remains are the following:

- The right of Indigenous peoples to protection and repatriation of their ceremonial objects and human remains is **not explicitly contemplated** by rules included in international legal instruments of binding character, with the notable exception of the relevant articles of the 1995 UNIDROIT Convention. In any event, in general the relevant instruments **are not retroactive**, and only apply to situations occurred after their entry into force for the state concerned;
- Not many countries have a **legal framework specifically addressing repatriation of Indigenous peoples’ cultural heritage** (this is one of the reasons why it is even more important to rely on the human rights framework – once we have demonstrated that repatriation of Indigenous peoples’ ceremonial objects and human remains is a human rights issue – because virtually all States have a human rights framework and are bound by international human rights law).
- There are **competing interests** over Indigenous peoples’ ceremonial objects and human remains, protected by law, which sometimes hinder the possibility for Indigenous communities to obtain repatriation of such objects and remains. Such interests are, in particular:
 - o The interest of the State in the territory of which certain ceremonial objects or human remains are located, as such objects or remains are often considered as belonging to the *cultural heritage* of the nation. Indigenous sacred items are too

often regarded as goods of ethnological interest rather than sacred beings and essential components of cultures that are still living. They are considered and protected as such by domestic law, and usually relevant domestic rules may only be overcome by clear international obligations binding the State concerned, the existence of which is often denied or disputed. The situation is further complicated by the fact that usually national laws are considered by domestic courts as they main parameter to be used to settle disputes, and are usually believed as prevailing over international law. Furthermore, most international instruments privilege the approach according to which cultural items are considered as primarily belonging to the State, rather than to communities.

- The interest of the international community as a whole that ceremonial objects or human remains remain available for public enjoyment by anybody who would like to see those elements of cultural heritage. One method for overcoming this obstacle, often used in the practice – of course when and to the extent appropriate – consists in repatriating the relevant objects or remains to the Indigenous community concerned on the condition that the latter takes the commitment of displaying such objects or remains in ad hoc museums or other institutions open to the public managed by the community itself (an example is represented by the Sámi Museum in Northern Sweden, established at the end of the 1980s). This would facilitate repatriation, and, at the same time, would guarantee that the objects or remains would remain available for public enjoyment. However, in many cases this solution may not be practicable, for instance when a ceremonial object is necessary for use in religious ceremonies or when exhibition of human remains, given their inherent nature, is considered an unacceptable offense by the living members of the community concerned.
- Individual interests of those who are considered by the law in force as the legitimate owners of the ceremonial objects or human remains. This is a strong interest which is protected by law and corresponds to an internationally recognized human right (right to property). Normally this right should be considered as succumbing when the spiritual connection between the object concerned and the Indigenous community claiming repatriation of the object itself is proven, because such a connection determines implications relating to human rights of more fundamental character than the right to property (e.g. the right to freedom of religion or belief or even the right not to be subjected to inhuman or degrading treatment).
- Interests of scientists and researchers, who would like to keep the objects concerned available for scientific purposes. In relevant practice it has even happened that sacred objects and remains were stolen from Indigenous communities, including from graves, claiming that such an action was carried out in the ‘sacred’ interest of science and research.
- The existence of all these competing interests determines the consequence, in many cases, that there may be different actors advancing claims to an object which are all recognized legitimate by domestic law. In those cases, courts or other competent authorities are called to take very difficult decisions (although the spiritual connection existing between Indigenous peoples and their sacred objects or human remains should prevail on any competing interests).

- Sometimes it is **difficult to find convincing evidence** proving that certain ceremonial objects and human remains effectively belong(ed) to the Indigenous communities claiming their repatriation.

Working Question 2) Is the “freedom of religion or belief” framework helpful for advancing Indigenous peoples’ use and control over their ceremonial objects and human remains and promoting their repatriation? Why or why not?

The “freedom of religion or belief” framework is definitely helpful for advancing Indigenous peoples’ use and control over their ceremonial objects and human remains and for promoting their repatriation, and solve some of the challenges listed above in examining Working Question 3). “Traditional” human rights standards are in fact much more practically enforceable – hence more effective – than instruments and rules specifically addressing Indigenous peoples’ rights. The latter are in fact either of non-binding character or, with regard to the only existing treaty in the field – i.e. ILO Convention No. 169 of 1989 – not equipped with very efficient monitoring procedures. On the contrary, at the UN level monitoring of human rights treaties is carried out by committees which, while not possessing the capacity of imposing their decisions to States parties, have a great moral and persuasive force. At the regional level, human rights bodies guarantee even more effectiveness, as they are full judicial bodies – i.e. courts – whose decisions are fully binding for States, which are legally obliged to entirely implement them. As regards Indigenous peoples, it is a well-known fact that their rights have been progressively recognized, affirmed and concretely implemented through the evolutive interpretation of human rights norms which were not originally conceived as applicable to those peoples. The example of land rights clearly illustrates this reality. Indigenous peoples’ land rights have been concretely sanctioned and imposed to States through the evolutive interpretation of human rights norms like Article 27 ICCPR (rights of members of minorities), Article 21 of the American Convention of Human Rights (right to property), or the whole International Convention on the Elimination of All Forms of Racial Discrimination.¹⁰

Given their authoritative force and enforceability, human rights rules are even capable of overcoming the most formidable legal claims which may be advanced by States to oppose to repatriation of Indigenous Peoples’ ceremonial objects and human remains, i.e. the assumption that such objects and remains, even if they traditionally belonged to Indigenous peoples, are today part of the cultural heritage of the nation, or the argument that they should stay in public collections or museums in the general interest of humanity. In fact, existing international instruments concerning the protection of cultural property (as ceremonial objects and human remains are traditionally qualified) are mainly oriented towards protecting State interests over such property, and only in a very few cases (the most notable example being the rules of the 1995 UNIDROIT Convention reproduced above) the instruments in point address the rights and interests of Indigenous communities. However, it is reasonable to assume that, when lack of repatriation of the objects and remains concerned would translate into a violation of internationally recognized human rights of Indigenous communities and/or their members, the latter should be considered as prevailing over any other legal claim which could be potentially used by States or even by individual owners.

¹⁰ See Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997).

For the “freedom of religion or belief” framework to properly work in view of advancing Indigenous peoples’ use and control over their ceremonial objects and human remains and promoting their repatriation, it is in any case necessary that the relevant rules are interpreted and applied in an *extensive* and *evolutionary* manner. An example of this technique of interpretation, specifically concerning the right to freedom of religion or belief applied to an Indigenous community, is provided by a recent judgment of the African Court of Human and Peoples’ Rights concerning the eviction of the Ogiek Indigenous community from their traditional land in Kenya. In this case the African Court noted that “the Ogieks’ religious sites are in the Mau Forest and they perform their religious practices there. The Mau Forest constitutes their spiritual home and is central to the practice of their religion. It is where they bury the dead according to their traditional rituals, where certain types of trees are found for use to worship and it is where they have kept their sacred sites for generations”.¹¹ In light of this, the Court concluded that, “given the link between indigenous populations and their land for purposes of practicing their religion, the evictions of the Ogieks from the Mau Forest rendered it impossible for the community to continue its religious practices and is an unjustifiable interference with the freedom of religion of the Ogieks”.¹²

In this particular case, the “freedom of religion or belief” framework proved to be particularly useful to recognize and protect Indigenous peoples’ land rights, despite the fact that such rights are not explicitly contemplated by the African Charter on Human and Peoples’ Rights. In other words, through recognizing and affirming the rights to freedom of religion or belief of the Ogiek people, it has been possible to provide effective protection for their rights to their own ancestral lands. While the case just described concerns land rights, the same legal reasoning may safely be applied to the right of Indigenous peoples to protection and repatriation of their ceremonial objects and human remains, to the extent that they are necessary for allowing the members of an Indigenous community to effectively enjoy their right to freedom of religion or belief, even if the latter is conceived as an individual right.

Possible Recommendations

- **States should, *inter alia*, increase compliance with existing legal rules regulating the protection and repatriation of Indigenous peoples’ ceremonial objects and human remains, particularly the relevant provisions of the UNDRIP, of the 1995 UNIDROIT Convention and of the ILO Convention No. 169 of 1989;**
- **the relevant international instruments, particularly the UNDRIP, should be interpreted taking into primary account the perspective of Indigenous peoples;**
- **a human rights approach should be promoted, guided by the awareness that ceremonial objects and human remains are essential elements for the effective enjoyment of internationally recognized human rights by Indigenous peoples and their members, particularly the right to freedom of religion;**
- **the amount and/or quality of national legislation recognizing the right of Indigenous peoples to protection and repatriation of their own ceremonial objects and human**

¹¹ See *African Commission on Human and Peoples’ Rights v. Republic of Kenya*, Application No. 006/2012, Judgment of 26 May 2017, para. 165.

¹² *Ibid*, para. 169.

remains should be improved, following and possibly improving the example of NAGPRA in the United States.

- the profound spiritual value for Indigenous peoples of ceremonial objects and human remains should be recognized as sufficient to make their rights prevail over competing interests claimed with respect to such objects and remains;
- in the context of any repatriation claim, the realization of the specific expectations and needs of the Indigenous communities concerned should be a priority to be pursued. The Indigenous communities concerned, or their representatives, should be actively involved in all phases of each repatriation process;
- international institutions, national authorities and the civil society should promote awareness-raising about the decisive importance of repatriation of indigenous peoples' cultural heritage for the preservation of the cultural identity of the communities concerned, as well as for the enjoyment of fundamental human rights by both the affected communities as collectivities and their members as individuals;
- the civil society, at all levels, should help indigenous peoples in their struggle to recover their own cultural heritage through constantly pressuring governments and giving international visibility to the violations of their international obligations;
- in terms of "operational" strategies, when possible indigenous peoples should not be left alone in their struggle for recovering their lost heritage. Recent practice has shown that repatriation claims initiated and/or assisted by museums or governments are much more likely to be successful than those managed by indigenous communities alone (States and museums in particular usually have a negotiating power much higher than single Indigenous communities);
- a bottom-top approach – involving the promotion of public awareness among common people of the importance of repatriating ceremonial objects and human remains to Indigenous peoples, to be subsequently transfused to rulers – might represent a formidable weapon to achieve the goal of allowing indigenous peoples to recover their lost objects and human remains.

Further Possible Recommendations emerged from the discussion developed during the online Stakeholders Consultation of 16 June 2022

- Repatriation schemes and mechanisms should be fair, effective and transparent, and should be fully consistent with the provisions of the UNDRIP, particularly Articles 11, 12 and 31;
- an international process should be developed to facilitate the repatriation of human remains and sacred objects to Indigenous peoples across international boundaries;
- a database of the known ceremonial objects and human remains taken from Indigenous peoples should be developed, so as to facilitate the process of repatriation. More generally, access to relevant information by Indigenous peoples should be promoted. Good practices should also be appropriately disseminated for use by other Indigenous communities;
- Indigenous peoples should have access to adequate funds for making repatriation concretely possible;

- the creation and keeping of *ad hoc* museums or other cultural places for the preservation of ceremonial objects and human remains in a way consistent with the expectations and wishes of the Indigenous communities concerned should be encouraged.

As emphasized by somebody during the stakeholders consultation, “repatriation and reparations are a healing process of a community. Thus, the process must be carried out very carefully, so that communities can heal effectively”. Indigenous’ peoples ceremonial objects and human remains should always be treated with the respect due to living sacred beings, and not as mere inanimate objects.