

Injustice, Human Rights, and Intellectual Savagery. A Review
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International repatriation is both a cultural duty and a human right that arises from the historic progression of injustices perpetrated against Indigenous people. The 2013 „Recommendations for the Care of Human Remains in Museums and Collections“ („Empfehlungen zum Umgang mit menschlichen Überresten in Museen und Sammlungen“; hereinafter, „recommendations“) promulgated by scholars and German museum administrators are problematic in several fundamental ways. Significantly, they fail to include Indigenous Peoples perspectives, to provide a clear process for repatriation, to cite well-researched scholarship on repatriation practices and to reference repatriation procedures already established in Australia, New Zealand, and the United States. These significant omissions leave the document incomplete. This article will address key concepts of international repatriation to increase the awareness of German museums and institutions of repatriation practices by Indigenous Peoples in the United States and will provide a review of specific challenges posed by the „recommendations“ that should be reconsidered in order for a more equitable and meaningful process to emerge.

We start with an ongoing effort to repatriate *iwi kūpuna* (ancestral skeletal remains) and *moepū* (funerary possessions) from a museum in Dresden, and share Native Hawaiian (‘Ōiwi) perspectives on this more than two decades long ordeal. These perspectives establish that Indigenous Peoples have the primary duty to decide what happens to their ancestors, funerary objects, sacred objects, and cultural patrimony; that the burden of proof to retain possessory control of Indigenous cultural items is the exclusive responsibility of the repository; that the context of injustice required in the „recommendations“ should be presumed; and that once ethnicity is established, the question of repatriation must only pivot upon whether the institution obtained free, prior, and informed consent (FPIC) from Indigenous Peoples to

collect or acquire the ancestral remains and cultural items.

Duty of Care

Hawaiians express who we are as human beings in essential ways, including the relationships among the living and deceased and the resulting *kuleana* (duty, responsibility, privilege) to provide care for the ancestors in their physical and spiritual forms. In the post-contact period, this duty of care expanded to include the responsibility to repatriate as a result of the removal of *iwi kūpuna* and *moepū* by foreigners without the knowledge of living descendants. Hawaiian values clearly establish that the treatment of the deceased including their skeletal remains is a family matter.

The spiritual relationship is considered interdependent whereby the living and the ancestors have the duty to provide and the privilege to receive, care and protection from the other. For many there is a sacred duty to maintain connections to the deceased to care for their *‘uhane* (spirit) and *mana* (spiritual essence/power) in a manner that benefits the living family. In recent years, such traditional spiritual practices have strengthened as Hawaiians continue to return to who we are.¹

A critical requirement in the care of the spiritual form of our ancestors is for their bones to be where they were placed and for the living families to know that the *iwi kūpuna* have not been disturbed. Where *iwi kūpuna* were removed, the spiritual relationship suffers, manifesting itself in physical, spiritual and psychological harm to the

¹Hawaiians have also worked to restore and advance our native language; improved our understanding and practice of other forms of traditional spirituality; restored and advanced traditional arts; restored long distance sailing through celestial navigation resulting in the journey by the sailing canoe *Hōkūle‘a* to traverse the oceans of the planet as part of a global message of conservation and sustainability; increased efforts to care for *wahi pana* (cultural sites); restored traditional forms of learning called *hālau* for *hula* (traditional dance), *‘oli* (chant) and other forms of education; and sought deeper understandings of our history and place in Polynesia while undertaking efforts to restore our *‘ea* (sovereignty). Taken together, these expressions help characterize Hawaiian humanity.

living from the realization that the ancestors were desecrated.

Dresden Museum (1991-Present)

In 1991, *Hui Mālama I Nā Kūpuna O Hawai'i Nei* (Group Caring for the Ancestors of Hawai'i)² initiated an effort to repatriate four *iwi kūpuna* (ancestral skeletal remains) in the collections of the *Staatliches Museum für Völkerkunde Dresden*. The organization was responsible for over 100 repatriation efforts from institutions in Hawai'i, the United States, Australia, Canada, England, Scotland, Switzerland, and Sweden involving over 6,000 *iwi kūpuna* and *moepū*. During efforts to repatriate the bones of four ancestral Hawaiians, *Hui Mālama I Nā Kūpuna O Hawai'i Nei* was directly opposed by the *Dresden Museum*, *German Ministry of Science*, and the *Cultural Section* of the *Germany Embassy* in Washington, D.C. The resulting discourse with German officials was highly disturbing. An inventory was provided in a letter from Ingrid Wustmann, Head of the *Department of Anthropology* of the *Staatliches Museum für Völkerkunde Dresden*.³

Written requests by *Hui Mālama I Nā Kūpuna O Hawai'i Nei* for copies of archival records and documents describing the manner of collection was not responded to by the museum. Documentation explicitly demonstrating requisite consent from family members for the collection of „3002 Calvarium“, „3688 Cranium“, „3913 Calvarium“, and „3914 Mandibula“ was never provided. In our organization's 26 years of repatriation experience⁴, no entity in possession of ancestral Hawaiian skeletal remains has ever provided any proof of family consent. Such evidence is the only acceptable justification for the removal and collection of *iwi kūpuna* and *moepū*. The museum effectively ignored this requirement.

²The organization voluntarily dissolved itself on January 23, 2015.

³The four ancestral Hawaiian remains included two calvarium, a cranium and a mandible. Dr. Wustmann's letter is dated March 27, 1991. She was responding to a formal inquiry by the State of Hawai'i Historic Preservation Officer. The inventory information was provided to *Hui Mālama I Nā Kūpuna O Hawai'i Nei*.

⁴A list of repatriations between 1990 to 2015 is available upon request to halealoha-hapai64@gmail.com.

By letter dated April 15, 1992, Director Heinz Israel of the *Staatliches Museum für Völkerkunde Dresden* stated to our organization:

„I wish to inform you that the State Museum for Ethnology, Dresden, cannot consent to the return to Hawaii of the requested parts of the anthropological collection. *These parts came to Dresden and have since been state property*. We as safekeepers of the free state of Saxonia, Federal Republic of Germany, are bound to protect the right of ownership regarding the museum sector.“⁵ (Emphasis added.)

In July 1993, a member of the German *Ministry of Science* wrote to a member of the *Embassy of the Federal Republic of Germany* in Washington, D.C., in reference to Hawaiian skeletal remains at the *Staatliches Museum für Völkerkunde Dresden* that are being requested for repatriation, and stated:

„[t]he relics of Hawaiian origin in the anthropology collection were received by the Museum of Ethnology between 1896 and 1904. *It is impossible that the acquisition was illegal, Arthur Baessler, the collector was a respected co-worker at the Museum and was known for his good and friendly contacts with the Natives...* There is no reason to believe that the above mentioned human remains in the anthropology collection of the Museum of Ethnology was not accorded „proper treatment“.“⁶ (Emphasis added.)

Efforts to seek repatriation from the Dresden museum proved unsuccessful. In January, 2015, *Hui Mālama I Nā Kūpuna O Hawai'i Nei* formally dissolved itself. Before doing so, it collaborated with the *Office of Hawaiian Affairs* (OHA)⁷ to submit a letter pursuant to the

⁵Copies of this letter, which was provided in the German language and translated into English by a German-speaking resident of Hawai'i, is on file with the authors.

⁶The July 29, 1993, letter in the German language and its English translation is on file with the authors.

⁷The Office of Hawaiian Affairs (OHA) was established in 1978 through amendments to the Hawai'i Constitution to achieve self-governance for aboriginal Native Hawaiian people to take action to better the conditions of Native Hawaiians, and to advocated for

2013 „recommendations“ requesting to re-set the claim for repatriation with the *Staatliches Museum für Völkerkunde Dresden* which was transferred to OHA.⁸

Review of the „Recommendations“

The following provides suggestions for the „recommendations“, pointing out several important points regarding repatriation. Not only will this assist in revisions for the „recommendations“, but it will also use the example above to point out the obvious failings in the responses from the *Staatliches Museum für Völkerkunde Dresden*: to not provide any historical documentation to demonstrate family consent for the removal of the collected human remains, the lack of proof of authorization from the government of Hawai‘i to export human remains from the jurisdiction, and the failure to substantiate the assertions regarding the manner of collection by Mr. Baessler.

1. Free, Prior, and Informed Consent (FPIC)

The repatriation of Indigenous ancestors and cultural items is a human right, centered around the pivotal question of whether free, prior, and informed consent (FPIC) from Indigenous Peoples has been obtained in order for a museum to legitimately maintain possessory control. Generally, free, prior and informed consent requires: an absence of coercion, manipulation, threat, or duress when consent is sought; sufficient time for review of the implications; that it is limited in scope; and a broad opportunity for education on the matter to make an informed decision, as well as consultation and participation in the process. FPIC is universally acknowledged as a fundamental requirement for collection. In the absence of FPIC, collection is considered illicit giving way to the ability and right to repatriate which is well-recognized

the lawful interests of Native Hawaiians through the leadership of an elected Board of Trustees and hiring of professional staff. See, Constitution State of Hawai‘i Article 12, Sec 5-6 (1959) and Hawai‘i Revised Statutes Sec 10.3 (1979).

⁸A copy of the letter dated January 2, 2015, and addressed to Director General Hartwig Fischer, Besucherservice der Staatlichen Kunstsammlungen Dresden, is on file with author Edward Halealoha Ayau.

by the „U.N. Declaration on the Rights of Indigenous Peoples“⁹, by the *U.N. General Assembly*¹⁰, and within national and Indigenous policies and procedures developed in the United States¹¹, Australia, and New Zealand where Indigenous Peoples have been conducting repatriations for over 25 years.

FPIC and the human right of repatriation is also a significant part of legislation in the United States, including several Intertribal Resolutions, such as the „National Congress of the American Indian Act“, the „Intertribal Council of the Five Civilized Tribes Act“, the „All Pueblo Council of Governors“, and the „United South and Eastern Tribes“.¹²

⁹Article 12 of the U.N. Declaration on the Rights of Indigenous Peoples states: „1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.“ U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (12.12.2016).

¹⁰Operative paragraph 27 of the Outcome Document of the 2014 High Level Plenary Meeting of the U.N. General Assembly, known as the World Conference on Indigenous Peoples states, „We affirm and recognize the importance of indigenous peoples’ religious and cultural sites and of providing access to and repatriation of their ceremonial objects and human remains in accordance with the ends of the United Nations Declaration on the Rights of Indigenous Peoples. We commit ourselves to developing, in conjunction with the indigenous peoples concerned, fair, transparent and effective mechanisms for access to and repatriation of ceremonial objects and human remains at the national and international levels.“ UN General Assembly, Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, 22 September 2014, A/RES/69/2, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/2 (12.12.2016).

¹¹National repatriation laws within the United States include: the National Museum of the American Indian Act, Pub.L. No. 101-185, 103 Stat. 185 (1989), amended by Pub. L. No. 104-278, 110 Stat. 3355 (1996); the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq.; the Archaeological Resources Protection Act, 16 U.S.C. § 470aa et seq. Supporting legislation includes the American Indian Religious Freedom Act, 42 U.S.C. § 1996.

¹²Support for International Repatriation, NCAI Resolution SAC-12-008 (2012). A Resolution on International Repatriation of the Five Civilized Tribes, Intertribal Council of the Five Civilized Tribes Res. No. 12-07 (Oct. 12, 2012).

According to Native Hawaiians, only a living Hawaiian can commit his or her bones to be collected and stored permanently in an institution thereby effectively foregoing interment.¹³ For those Hawaiians who were buried, collection without consent violates the clear intent of the family to commit the bones to the care and protection of *Papahānaumoku* (the Earth Mother). Following burial, only a recognized family member would be authorized to consent to the removal of *iwi kūpuna*. In the Dresden repatriation claim, the assertion that „[i]t is impossible that the acquisition was illegal“ in the absence of any documentation establishing the actual manner of collection and any indicia of FPIC by the family is irresponsible and self-serving.

Absent FPIC, removal is considered a violation of the family honor and the inherited *kuleana* (duty, responsibility, privilege) to care for the ancestors both physically and spiritually. Furthermore, it represents denial of the ability of the living to be cared for by the ancestors. FPIC is absolute. The significance of family values and sensitivities are such that consent can never be presumed – it must be clearly and overtly demonstrated. Therefore, the burden of proof is not with Indigenous Peoples, but exclusively with the repositories to prove that they FPIC was obtained prior to collection in order to justify continued possession.

2. Funerary Objects Must Not Be Excluded

Section 2.2 of the „recommendations“ addresses human remains only. However, funerary objects must not be excluded. The common law also provides that funerary objects are not considered abandoned property, but belong to those with whom the items were placed. In addition, in Hawaiian culture placing an item with the deceased creates a permanent bond between both whereby the item is forever the possession of

¹³M. K. Pukui, E.W. Haertig, C. Lee, *Nānā I Ke Kumu* (Look to the Source) Vol. I, 108-109 (1972), „If the bones were desecrated, the spirit was insulted. Even the living descendants of the profaned dead were shamed and humiliated,” p. 109; see, S.M. Kamakau / *Ka Po’e Kahiko*, The People of Old, Honolulu 1987 (1st ed. 1964), pp. 33-35, 38-44; see also, David Malo, *Hawaiian Antiquities* (Mo’olelo Hawai’i), Honolulu 1978 (1st es. 1903), pp. 96-99.

the deceased.¹⁴ As with human remains, FPIC also applies to funerary objects. In the absence of FPIC, the acquisition of funerary objects is deemed illicit and must be allowed to be returned. There are no exceptions nor dates of expiration, as these relationships are without exception.

3. Context of Injustice Should be Presumed

Section 2.3 of the „recommendations“ appears to pivot repatriation on proof of a context of injustice and not on FPIC, thereby placing a substantial burden on already harmed Indigenous Peoples. Indigenous international repatriation is a human rights issue that arises from a progression of injustice perpetrated against Indigenous Peoples. These contexts of injustice surrounding the robbing of Indigenous graves, taking of Indigenous Peoples from massacre sites, and stealing of Indigenous sacred objects and cultural patrimony in best practice is presumed and reflected in national legislation, such as the „National Museum of the American Indian Act“ and the „Native American Graves Protection and Repatriation Act“ in the United States. Repatriation is the proper remedy to this injustice whereby claims for return involve connecting past acts to present action. A context of injustice exists whenever family consent was not obtained.

In addition, this section dismisses „the legal concepts and values of the people of origin“ when it should be the case that these legal concepts and values should be controlling. This section omits Indigenous Peoples and fails to provide a well-founded analysis of repatriation practices, which would have included meaningful consultation with Indigenous Peoples that not only allows for a mutually respectful exchange, but the consideration of Indigenous legal concepts and values.

4. Injustice Does Not Expire

One cannot impart a timestamp on injustice, and expect a self-proclaimed exoneration from responsibility. Time restrictions, such

¹⁴For more discussion of the importance of *moepū* (funerary possessions) in Hawaiian culture, see, Edward Halealoha Ayau, Honour thy ancestor’s possessions, in: *Public Archaeology* 4 (2005), p. 193-197.

as the 125 years listed in section 2.3 of the „recommendations“ are fundamentally flawed, as they do not take into account Indigenous knowledge and beliefs, but rather impose the perspectives of institutions and repositories responsible for the illicit acquisition of these cultural items. It is especially troubling for the „recommendations“ authors to assert that over time, injustice is cured whereby even the killing of a person has a limitations period which terminates its impact upon the present day. Such an assertion is extremely harmful upon the mindset of humanity. Does this mean that the massacre of innocent victims during the Holocaust will no longer be an atrocity once sufficient time passes? Such an assertion is wholly without merit because injustice does not have an expiration date.

The burden of proof to maintain the continued possession of Indigenous Ancestors and cultural items belong completely to the museum or repository, as purveyors of ongoing injustice. Failure to notify, consult, and repatriate to Indigenous Peoples, inflicts further harm and continues the progression of injustice and human rights violation originally perpetrated when Indigenous ancestors and cultural items were taken from their communities of origin without consent.

5. Indigenous Relationships and Values Must be Considered

In Section 2.4 of the „recommendations“, the requirement for claimants to demonstrate direct descent is problematic for several reasons. First, it shifts the burden of proof to victims, rather than the museums or collectors to establish consensual acquisition. Secondly, it does not take into full consideration Indigenous community, family, and relationship values which may not reflect Western concepts of family and direct lineal descendent inheritance rights. For instance, Hawaiian cultural values of *ohana* (family) and *lāhui* (nation) promote the care of all Hawaiians, living and deceased. During the original collection of ancestral human remains, only the person in question or his/her family would have had the standing to consent to the removal.

The duty, responsibility, and privilege to help ancestral Hawaiians return home apply to all Hawaiians and are based upon the belief

that Hawaiians descend from a common ancestor named *Hāloa*. The duty to return ancestral remains which were illicitly acquired does not require the person to be a direct family member, but the willingness to act on behalf of a deceased ancestor whose grave was desecrated and robbed. Also, the individual identities of the pillaged Hawaiian skeletal remains are now unknown, and the duty to retrieve, repatriate and re-inter becomes a profound responsibility of living Hawaiians, some of whom are descendants of these stolen ancestors. This phenomenon is itself created by the horrific act of theft of ancestral remains and the lack of FPIC.

6. Scientific Analysis Limited to Identifying Ethnicity Requires FPIC

Section 3.2 of the „recommendations“ focuses upon scientific analysis of Indigenous skeletal remains and, therefore, promotes the continued possession without exception. This is fundamentally problematic because it does not first establish that FPIC was obtained to legitimately collect the remains in the first instance. In the absence of FPIC, the analysis does not reach the question of scientific analysis because possessory control is illegitimate. To proceed with analysis in the absence of FPIC perpetrates injustice and ignores the value system of the culture from whom the individuals originated, i.e. that Hawaiians consider the practices of scientific analysis as forms of desecration.

We strongly recommend non-intrusive forms of inquiry be conducted first to help establish the probable ethnicity of the ancestral remains, including research of historical records and documents regarding the circumstance surrounding the original acquisition of the remains, identify provenance, date of removal, and any known family names and genealogies. Only where the results of the ethnographic approach are insufficient to meet an agreed upon standard of identification, will forms of non-intrusive analysis, including metric and non-metric observations be allowed to establish probable ethnicity. However, this must all be done through meaningful consultation with Indigenous Peoples. All intrusive forms of analysis must be barred

unless FPIC is clearly provided by Indigenous claimants.

7. Indigenous Practices Should Not Be Dismissed in Favor of Scientific Analysis

The „recommendations“, particularly in Section 3.2 regarding analyzing human remains, regard Indigenous practices as „mythical“ and explain away this disregard for religious and cultural beliefs as subservient to scientific analysis. Science and Indigenous practices are not mutually exclusive, and the science of one culture should not subject another culture’s ancestors to intrusive practices without the presence of FPIC.

The tone that pervades the „recommendations“ and that is especially prevalent in Section 3.2 is emblematic of the shift and self-reflection that must occur in Germany. Indigenous repatriation brings forward a legacy from past generations that must be addressed by museums, collectors, auction houses, governments, and other repositories, which may be difficult and unpalatable to reflect upon, admit connection to, and take responsibility for perpetuating. Such institutional self-reflection will unearth the historic and legal legacy of viewing Indigenous Peoples as outside of the realm of humanity, either as property or incapable of legal capacity. In understanding the history of the dehumanization of Indigenous Peoples and the roles museums and other repositories played, German museums and repositories will be better able to identify and acknowledge their current roles in perpetuating injustice against Indigenous Peoples. Indigenous Peoples have their own traditional laws and legal systems, regardless of nation-state law. They have the right of sovereignty, unimpeded by persecution by nation-states. Today, Indigenous Peoples are acknowledged and supported as human beings within the realm of protections of human rights under the law. When a People (living or deceased) is not recognized as human beings, it is an indicator of persecution and human rights abuses. However, under the „recommendations“, our Ancestral relatives are not afforded this same dignity. They are treated as property and reside in a perpetual state of posthumous slavery.

In the Native Hawaiian international repatriation claim in Dresden, the statements mentioned earlier asserting that „[i]t is impossible that the acquisition was illegal“ in the absence of documentation wrongly presumes that Hawaiians would undoubtedly provide ancestral remains as tokens of friendship with non-family members. That Arthur Baessler had „friendly contacts with the Natives“ does not guarantee that these Hawaiians would provide him a calvarium and mandibula belonging to their ancestors.

The arguments made by representatives in the above-mentioned statement fly in the face of the Hawaiian value system and the core of the Hawaiian concept of humanity, which is based in part upon *ohana* (family) bonds and relationships. The final unsupported assertion provides that „[t]here is no reason to believe that the above mentioned human remains. . . was not accorded „proper treatment“.“

The author does not bother to mention whether his definition of proper treatment contemplates Hawaiian values and practices. Perhaps Hawaiian ideas on humanity simply did not matter to him. It is discriminatory to define proper treatment of humans irrespective of the living culture to whom the remains belong. Taken together, these statements are an expression of intellectual savagery, defined as using one’s intellect to deny people their humanity.

8. Framework for Repatriation Should Include Ethical Considerations

In Section 3.4, it is confusing why so much emphasis is placed on German law with regard to repatriation when it is admittedly inadequate to address the challenges posed by repatriation. This admission of inadequacy should initiate the movement toward more capable systems such as ethical considerations, by which to address equitable claims for repatriation to country of origin.

9. Indigenous Remains are People and Not Objects

As described earlier, the objectification of Indigenous Peoples reflects severe, deep-set, and continued discrimination in the law, academia, and institutions, such as museums, that require significant reflection and change. Despite the case law establishing that a corpse must not be downgraded to the status of an object, the „recommendations“ in Sections 2, 3, and 4 clearly objectify human remains, as we will show. How is it that such a characterization does not violate „human dignity“ and downgrade skeletal remains to the status of an object? Also, why is it that the older remains are, the less protections they are afforded as human beings? In Hawaiian thinking, for instance, the opposite is true. The older an ancestor is, the higher the level of care and respect.

The topics discussed in the „recommendations“ include „property rights“ and the „concept of possession.“ Section 2 of the „recommendations“ asserts that it is generally accepted among legal experts that the human remains of persons who died a long time ago are „tradable items“ and rights of ownership may exist. However, no case law or treatise is cited to establish these assertions. Generally, there is an enormous lack of references throughout the „recommendations“. Assertions are made that seemingly come out of nowhere and are touted as generally accepted. These citations are imperative to ensure accountability. Also, there is no established period of time by which human skeletal remains lose their humanity and become property. Such a delineation should never be made and not only calls forth ethical and moral concerns, but makes our Ancestors slaves through the legal framework of property law. And once again, the „recommendations“ ignore any need to demonstrate requisite FPIC. Instead, they continue to support the objectification of remains for possessory purposes that allows for maintenance of collections while undermining claims for repatriation.

Section 2 of the „recommendations“ asserts that even though rights of ownership may exist in human remains, it does not mean ownership must always have been effectively transferred to the museum. An

example is given where a thief does not acquire ownership of items stolen by him, including human remains and cannot therefore transfer ownership. The discussion shifts to circumstances under which ownership may pass to a museum at a later time, despite theft. Consistent with previous sections, this one also promotes ownership and possession at the expense of legality and ethics. Recognizing the means to negate the theft of human remains is shameful.

Section 2’s position regarding legal provisions that allow claims for the return of human remains are flawed because they continue to objectify human remains into property. Once ethnicity is established, the focus should be on identifying who has the highest level of standing to decide proper treatment, members of the same ethnic group whose values deplore grave disturbance and who are closest in relations of the deceased, or museum staff who promote the collection, continued possession, and ownership of human remains acquired illicitly. It is our sincere hope that these „recommendations“ can be revised to identify ethical and professional standards to guide meaningful consultation among museums and Indigenous claimants.

10. „Recommendations“ Should Include Ethical and Legal Considerations

Section 3.5 regarding „Ethical Principles for Museums and Collections containing Human Remains“ correctly identifies that in certain cases involving the severity of the breach of law, a limitations period is secondary to the principle of material justice. The failure to obtain consent amounts to a severe breach of law and material justice dictates the return of human remains and funerary objects to the country of origin.

It is properly asserted that use of human remains in a modern context is achieved through consent. However, it is problematically asserted that „such a solution does not normally exist in relation to the human remains in historical collections.“ This is incorrect. If consent is demonstrated for remains in historical collections, continued possession is allowed. Absent consent, possession must give way to

repatriation.

Under Section 4 and elsewhere throughout the „recommendations“ it is important to hold human dignity as the highest ethical value and this should be guaranteed absolutely with high requirements placed on a finding of offense against it. It is asserted that removal of ancestral remains without family knowledge or approval meets the high requirements of offense against human dignity. So sacred is the duty to care for deceased family members that nothing short of permission to remove can overcome the duty. Further, this section correctly asserts that for archaeological collections, human remains „cannot be excluded from the guarantee of human dignity solely on the basis of their age.“ With regard to cultural claims, this section properly identifies that for cultures for whom the duty of care for the dead is a significant practice (as with Hawaiians), such beliefs must be recognized and followed over scientific interests.

11. A Process for International Repatriation Needs to be Established

Section 4.5 outlines processes for the return of human remains and, most importantly, recognizes that when a museum determines that return of human remains is required, such museum „can of course proactively set the return in motion. . . “ This section holds the most promise for the fair consideration of return claims. However, assertion of a limitations period is highly problematic. In Hawaiian culture, *aloha* (love) and respect for the ancestors is considered *pau’ole* (without end). The continued recognition of a limitations period utilized to cure illicit acquisition or other injustice is a critical issue that must be reconciled in order for the „recommendations“ to have any chance of being fair and meaningful to Indigenous claimants.

In general, the process of international repatriation should include the following:

- (1) an itemized inventory of cultural items and identification of the provenance of each;
- (2) notification by the museum or repository to the Indigenous Peoples

potentially affiliated to these cultural items based upon provenance;

- (3) the conduct of meaningful consultations so that museums and Indigenous Peoples may obtain required FPIC, agree upon the process to identify the ethnicity of the human remains and thereby the culture that the funerary objects, sacred objects, and cultural patrimony belong to;

- (4) the conduct of exhaustive research of historical documentation to establish the circumstances surrounding collection, the ethnicity of the individuals disinterred, and whether FPIC was obtained in the collection of the remains and cultural items;

- (5) a determination of ethnicity based upon historic documentation where the evidence meets an agreed upon standard of identification;
- (6) where historic documentation is determined to be insufficient, obtaining FPIC to conduct non-intrusive analysis for the limited purpose of identifying ethnicity;

- (7) a determination whether FPIC was obtained to continue possessory control or a determination that FPIC was not obtained such that the remains and cultural items are eligible for repatriation; and

- (8) establishing a process for the timely transfer of possession, and the export and repatriation of the ancestral remains and cultural items.

Repatriation has been done many times before and there are numerous resources available to educate German museums and other repositories and assist with navigating unknown issues to help establish a clear and functional repatriation process. The very first step is to ensure that Indigenous Peoples are at the table of any planning process when discussing and planning procedures for Indigenous repatriation. Our involvement in the planning process restores agency and dignity after it has been taken away from us and our ancestors. It also ensures a mutually respectful process that will help institutions and repositories to fully understand how to proceed with repatriation in a manner that is culturally sensitive and mutually respectful. Furthermore, it will help to establish core relationships with Indigenous Peoples that have been significantly and profoundly absent in the past. This in-

volvement will also lead to greater understanding and healing from the injustices that surround the unauthorized removal of Indigenous ancestral remains and cultural items from their lands of origin.

The „recommendations“ have failed to involve Indigenous Peoples in their authorship. They are clearly lacking Indigenous perspectives, voices, and leadership, which should be paramount in any issue that directly affects Indigenous Peoples as profoundly as international repatriation does. In addition, the „recommendations“ have given short shrift to the plethora of Indigenous and scholarly information available on repatriation.¹⁵ Rather than establishing a process for international repatriation for Indigenous Peoples, it has become a treatise of faulty arguments for German institutions to use to retain within their possession Indigenous family members, funerary objects, sacred objects, and cultural patrimony. Finally, the „recommendations“ fail to review and include the procedures for repatriation that Indigenous Peoples and nations have established in Australia, New Zealand, and the United States, the most active nations in establishing policies and procedures for repatriation to Indigenous Peoples.

¹⁵Native American Graves Protection and Repatriation Act (1990); Sangita Chari / Jaime M.N. Lavalley (eds.), *Accomplishing NAGPRA. Perspectives on the Intent, Impact, and Future of the Native American Graves Protection and Repatriation Act (First Peoples)*, Corvallis 2014; Fine-K.S. Dar, *Grave Injustice: The American Indian Repatriation Movement and NAGPRA*, Lincoln 2002; C. Timothy McKeown, *In the Smaller Scope of Conscience. The Struggle for National Repatriation Legislation, 1986–1990*, Tucson 2013; Joe Edward Watkins, *Sacred Sites and Repatriation: Contemporary Native American Issues*, Philadelphia 2006; Edward Halealoha Ayau, *Restoring the Ancestral Foundation of Native Hawaiians: Implementation of the Native American Graves Protection and Repatriation Act*, in: *Arizona State Law Journal* 24 (1992), pp. 193-216; Edward Halealoha Ayau, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, in: *Cardozo Journal of International and Comparative Law* 11 (2003), pp. 409-466; S.S. Harjo, *Native Peoples' Cultural and Human Rights: An Unfinished Agenda*, in: *Arizona State Law Journal* 24 (1992), pp. 321-328; Sherry Hutt / C. Timothy McKeown, *Control of Cultural Property as Human Rights Law*, in: *Arizona State Law Journal* 31 (1999), pp. 363-390; Honor Keeler, *Indigenous International Repatriation*, in: *Arizona State Law Journal* 44/2 (2012), pp. 703-802.

Conclusion

We recommend that the *Deutscher Museumsbund (German Museum Association)* revise the „recommendations“ and German Cultural Heritage Laws so that they even go beyond what the United States, Australia and New Zealand have addressed in repatriation. While domestic laws, such as the „National Museum of the American Indian Act“ (NMAIA) and the „Native American Graves Protection and Repatriation Act“ (NAGPRA) were established to address repatriation to American Indian Tribes and Native Hawaiian Organizations from the Smithsonian National Museums and federally funded institutions, respectively, they have not yet expanded into the private art market, nor do they address the remains of other Indigenous Peoples. Germany has the opportunity to do this through its cultural heritage laws and the „recommendations“ in a new and improved draft. At present, these „recommendations“ simply do not represent a fair, equitable process for the consideration of repatriation claims by Indigenous Peoples.

We further recommend a revision of the „recommendations“ in which Indigenous Peoples play an active role in redrafting with a perspective toward a more balanced approach. Museums and institutions in Germany will ultimately benefit from the resulting dialogue and broaden their knowledge base and understanding of Indigenous Peoples. Long-lasting relationships will be built among German institutions and Indigenous Peoples as has been the case in the United States and other countries. German museum audiences will ultimately be better educated on Indigenous issues, as relationships of trust begin to develop and German institutions start to educate the public regarding Indigenous perspectives on legitimately held collections.

While it is the prerogative of the *German Museum Association* to decide their course of action, it is the duty of Indigenous Peoples to defend and protect our ancestors, funerary objects, sacred objects, and cultural patrimony, as well as our values and beliefs. We have the opportunity to do both in a manner that reflects positively on us and

our respective ancestors. But first, we must each commit to elevate our respective humanity – our understanding of who we are as human beings through the proper treatment of the ancestral dead and their possessions.¹⁶

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¹⁶Editors' note: Since the publication of this article, the Dresden Museum has begun the process of repatriation, see: Jörg Häntzschel, Tausende Köpfe, in: *Süddeutsche Zeitung*, 24.10.2017, <http://www.sueddeutsche.de/kultur/voelkerkunde-tausende-koepfe-1.3722250> (22.05.2018).