



**Ana Filipa Vrdoljak**  
Professor  
Faculty of Law  
The University of Technology Sydney  
15 Broadway, Ultimo NSW 2007

T: +61 2 9514 9677  
Ana.Vrdoljak@uts.edu.au

Special Rapporteur on Freedom of Religion or Belief  
UN Office of the High Commissioner for Human Rights  
Geneva

[hrc-sr-freedomofreligion@un.org](mailto:hrc-sr-freedomofreligion@un.org)

[erik.fattorelli@un.org](mailto:erik.fattorelli@un.org)

[jennifer@srorb.org](mailto:jennifer@srorb.org)

July 4, 2022

Dear Professor Ahmed Shaheed

### **Consultation on Repatriation of Ceremonial Objects and Ancestral Remains**

We thank you for this opportunity to provide further information concerning your current thematic report which is to be submitted to the General Assembly in 2022. This information is prepared and submitted by Mr Phil Gordon, co-Chair of the Commonwealth of Australia's [Advisory Committee for Indigenous Repatriation](#), and Professor Ana Filipa Vrdoljak, [UNESCO Chair in International Law and Cultural Heritage](#). This joint submission is prepared in our personal capacities.

Prior to addressing the specific questions raised by the consultation document we wish to express our strong support for existing normative instruments and standards adopted by the United Nations and its human bodies in collaboration with Indigenous representatives covering this field including but not limited to

- UN Declaration on the Rights of Indigenous Peoples (2007) ('UNDRIP')
- Outcome Document of the World Conference on Indigenous Peoples (2014) ('Outcome Document')
- Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) Report on Repatriation of Ceremonial Objects, Human Remains, and Intangible Cultural Heritage (2020) ('EMRIP 2020 Report')
- Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) Report on Promotion and Protection of the Rights of Indigenous Peoples with respect to their Cultural Heritage (2015) ('EMRIP 2015 Report') and Advice No.8

The Special Rapporteur's work must build on these minimum standards concerning 'affirmation and recognition of the importance of Indigenous peoples' religious and cultural sites and of providing access to and repatriation of their ceremonial objects and human remains as contemplated' by UNDRIP; and facilitate 'develop[ment], in conjunction with Indigenous peoples concerned, fair, transparent, and effective mechanisms for access to and repatriation' at international and national levels.

This submission is prepared on the understanding that the UN Declaration (although not a treaty) was adopted with near universal approval of UN Member States; and the provisions covering the field of this consultation reflect customary international law.<sup>1</sup> We also call on the Special Rapporteur to endorse the adoption of the draft optional protocol prepared by the UN Permanent Forum on Indigenous Issues to facilitate implementation of the UNDRIP.<sup>2</sup>

In respect of the specific questions raised in the consultation document, we advise:

## **1 Indigenous peoples, the right to manifest one's religion and State obligations**

Pursuant to Article 1 UNDRIP, Indigenous peoples enjoy all human rights under the UN Charter, Universal Declaration of Human Rights (UDHR) and international human rights law in full, individually and collectively. This right can be manifested in public or private. Enjoyment of this right, including access to ancestral remains and ceremonial objects, is not dependent on disclosure of related traditions, customs, and ceremonies. Disclosure of Indigenous religious practices and knowledge can be restricted by the laws and customs of the relevant Indigenous peoples.

Instead, we call on the Special Rapporteur to refocus the inquiry on how States Parties are failing to comply with the human rights obligations including the right to manifest one's religion or belief vis-à-vis Indigenous peoples. Noting that international and regional human rights bodies have repeatedly found that this covers practices relating to the dead and ceremonial objects, sites, shrines etc. A right which is specifically elaborated upon in respect of Indigenous peoples in the UNDRIP and EMRIP reports.

## **2 Freedom of religion or belief and use and control of ancestral remains and ceremonial objects**

The right to freedom of religion or belief in international human rights law must be read in conjunction with other legal rights Indigenous peoples and individuals flowing from treaties (multilateral and bilateral), constitutions (e.g. Chile) and domestic laws (e.g. *Native Title Act 1993 (Cth)*) and UNDRIP. Other normative standards should prevail, if and, when they offer stronger recognition and enforcement of the rights of Indigenous peoples.

The right to freedom of religion or belief has been used to the benefit and detriment of Indigenous peoples. It is clear that several contemporary examples of successful restitution claims concerning ancestral remains and ceremonial objects as based on this right (e.g. United States *Native American Graves Protection and Repatriation Act of 1990* or UK DMCS Guidance for the Care of Human Remains in Museums). State-based dispute resolution mechanisms and resources often focus on such claims. However, as the UNDRIP makes clear Indigenous restitution claims are not confined to ancestral remains and ceremonial objects. Instead, such restitution claims must be understood

---

<sup>1</sup> International Law Association, [Committee on Rights of Indigenous Peoples](#), Conference Report Sofia 2012 and Conference Resolution 2012; and W S Schabas, *The Customary International Law of Human Rights* (Oxford 2021).

<sup>2</sup> UNPFII Study on the Optional Protocol to the UN Declaration on the Rights of Indigenous Peoples focusing on a voluntary mechanism. Note of Secretariat (4 March 2014) E/C.19/2014/17.

holistically in the context of the exercise of the right of self-determination of Indigenous peoples and application of free prior and informed consent. Priorities in respect of restitution claims must be driven and determined by Indigenous peoples.

As the preamble to the UNDRIP notes, religion and discrimination based on religious difference is intimately related to the colonization and assimilation of Indigenous peoples. The destruction and removal of Indigenous ancestral remains, ceremonial and cultural objects informed policies and practices which excluded the equal application of legal norms to Indigenous peoples and individuals.<sup>3</sup> This included rules concerning armed conflict and belligerent occupation being applied to colonial powers and settler states concerning respect for the dead, attendant ceremonies related to care of the dead and human remains including their disposal, and ceremonial objects. These are reflected in international humanitarian law norms in treaty and customary international law.<sup>4</sup> It also requires the return of remains and personal effects of the dead to their families.<sup>5</sup> The obligation to respect the religious convictions and practices of persons in occupied territories, including burial rights and cremation of the dead, was recognized in the mid-19<sup>th</sup> century and in successive IHL formulations since.<sup>6</sup>

### **3 Key challenges and fair, transparent and effective dispute resolution mechanisms**

We support successive calls, since at least the 1990s by the UN Working Group on Indigenous Populations and more recently by the three UN mechanisms on Indigenous peoples' rights, for the establishment of an effective scheme for international repatriation. We also support the factors they identify as necessary for fair, transparent and effective dispute resolution mechanisms at the domestic levels. These mechanisms must also comply with the access to justice standards set down by UN human rights bodies.<sup>7</sup>

The Australian experience has shown that the following key challenges and factors inform the success or otherwise of repatriation claims at the domestic and international levels.

*Ready access to accurate and clear information about the location of ancestral remains and ceremonial objects.* Collecting institutions must be proactive in ensuring that such information is known to and accessible by the relevant Indigenous people. Restrictions

---

<sup>3</sup> Frederic Megret From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other' in A Orford (ed) *International Law and its Others* (Cambridge University Press 2006).

<sup>4</sup> Rules 113 Respect for the Dead and Rule 115 Disposal of Dead must be in a respectful manner and their graves respected and properly maintained. IHL Database Customary International Humanitarian Law, at <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule113](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule113)>.

<sup>5</sup> Rule 114, IHL Database Customary International Humanitarian Law, at <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule114](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule114)>.

<sup>6</sup> Rule 104 Respect for Convictions and Religious Practice, IHL Database Customary International Humanitarian Law, at <[https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule104](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule104)>.

<sup>7</sup> Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power UNGA Res 40/34 (29 November 1985) (Basic Principles of Justice); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (21 March 2006) A/RES/60/147 (Basic Principles and Guidelines on Reparations); and Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (8 February 2005) E/CN.4/2005/102/Add.1 (Updated Set of Principles to Combat Impunity).

on access to human remains and ceremonial objects required by the relevant Indigenous people must be respected by the holding institution until restitution claims are resolved. This obligation attaches to all States hosting collecting institutions with Indigenous ancestral remains and ceremonial objects.

*Effective assistance and capacity-building in negotiations.* Restitution claims for human remains, ceremonial and cultural objects, land and sites, and archives involve effectively navigating and engaging legal and political systems and collecting institutions which continued to be defined by the legacies of systemic racial discrimination, assimilation, and colonial occupation.

States must adopt a *national strategy* on restitution to Indigenous peoples within their states and in supporting claims for restitution from abroad. Reflective of the right to self-determination these national strategies must be design and implemented by Indigenous peoples, the effective and secure financing and resourcing by the State.

These factors should be viewed as a minimum requirement of a state's obligation in ensuring the enjoyment of the right of freedom of religion or belief by Indigenous peoples on their territory.

#### **4 National practice example – Australian experience**

Australia is a federated state. There is no treaty or constitutional recognition of Aboriginal and Torres Strait Islander peoples' rights including the rights to self-determination, religion or culture. The patchwork of laws arising from the federated nature of the Australian state and its adverse implications for Aboriginal and Torres Strait Islander peoples in respect of ancestors, secret sacred objects and cultural heritage was documented in a Senate inquiry report in 2021.<sup>8</sup>

The Commonwealth government support for Indigenous repatriation is implemented through policy. It supports the unconditional [international repatriation](#) of Aboriginal and Torres Strait Islander *ancestral remains* from collecting institutions and private collectors outside of Australia.

The Commonwealth government also support [domestic repatriation](#) through the Indigenous Repatriation Program – Museums Grants program aimed at identifying the Aboriginal and Torres Strait Islander of *ancestral remains and secret sacred objects* in the funded collections, and empowering Indigenous communities to be involved in the repatriation to the communities of origin.

They facilitate '[non-invasive research](#)' to determine provenance and support repatriation of ancestral remains and secret sacred objects. The type of research and circumstances under which it is conducted is confined to facilitating repatriation and only conducted with the free prior and informed consent of the traditional custodians.

[The Advisory Committee for Indigenous Repatriation](#) is made up of persons of Aboriginal and Torres Strait Islander descent with understanding of Aboriginal/Torres Strait Islander

---

<sup>8</sup> Parliament of the Commonwealth of Australia. Joint Standing Committee on Northern Australia. *A way forward. Final Report into the destruction of Indigenous heritage sites at Juukan Gorge* (Commonwealth of Australia 2021) at <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Northern\\_Australia/CavesatJuukanGorge/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge/Report)>.

culture and traditions and experience in Indigenous repatriation who are appointed by the Minister for the Arts. They advise the Government on domestic repatriation of ancestral remains and secret sacred objects in Australian collecting institutions and international repatriation of ancestors and associated material held abroad. The Committee also advises on repatriation of ancestors and objects with limited provenance and no identified community of origin; and repatriation matters that affect all or many communities, with each community advising on their own protocols for ancestors and objects. They also promote awareness and understanding in respect of repatriation of ancestors and objects.

The Australian Government committed to establishing a [National Resting Place](#) – Ngurra – to long-term care for ancestors with limited provenance and associated cultural materials repatriated from overseas collections in 2022.<sup>9</sup>

Guidelines have also been prepared for Australian collecting institutions in respect of good practice concerning repatriation of ancestors and objects.<sup>10</sup>

We would be pleased to elaborate on any aspect of this submission or provide further information that the Special Rapporteur may find beneficial in the preparation of his report.

Yours sincerely

Phil Gordon and Ana Filipa Vrdoljak

---

<sup>9</sup> National Resting Place Consultation Report 2014. Advisory Committee for Indigenous Repatriation (Commonwealth of Australia 2015), at < <https://www.arts.gov.au/documents/national-resting-place-consultation-report-2014>>.

<sup>10</sup> M Pickering *A Repatriation Handbook. A guide to repatriating Aboriginal and Torres Strait Islander Ancestral Remains* (National Museum of Australia Press, 2020), at < <https://www.nma.gov.au/about/publications/repatriation-handbook>>; and T Janke *First Nations: Connecting Custodians. Principles and Guidelines for Australian museums and galleries working with First Nations cultural materials*, draft for consultation (2018) at < [https://www.amaga.org.au/sites/default/files/uploaded-content/website-content/recommendation\\_for\\_update\\_of\\_ccor\\_principles\\_final.pdf](https://www.amaga.org.au/sites/default/files/uploaded-content/website-content/recommendation_for_update_of_ccor_principles_final.pdf)>.