

A Proposition of International Recommendation Protecting Human Remains and Individual Liberties

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Introduction

For roughly two decades, international museums are aware of requests for restitution and repatriation of cultural property, and, in particular, human remains. One of the oldest is the NAGPRA (Native American Graves Protection and Repatriation Act) that originates in the USA in 1990. Such requests reflect a positive phenomenon, which must be welcomed: the accession of some populations in national or international forums where they can finally make their voices heard. It therefore reflects progress in the recognition of the rights of cultural minorities. These rights concern both the past and the present, as well as the dead and the living, and requests for repatriation seem even more legitimate in the eyes of public opinion that they come from communities often victims of European colonial expansion and today still sometimes marginalized in their own country.

But it has to be said that these requests raise real questions, mainly because they deal with very different cases. What is the legal statutes – and the legitimate ethical considerations – for the remains of an identified individual (for example, Saartjie Baartman or a pathological case into a medical collection), or for remnants which have undergone a ritual treatment prior to their collection (for example, embedded skulls of Oceania or Jivaro shrunken heads)? What about human remains inserted into cultural objects, such as skulls present in damaru (i.e. Tibetan drums), or femur bone flutes? What about all the human samples (sometimes a full skeleton or main parts of organs conserved into formaldehyde) deposited in the collections of the museums of natural history and medicine? So many cases, that can be seen as very different. The age of the remains is an important factor for the evaluation of the status of such “objects” [1]: do we consider the same fragments of hominids prehistory and contemporary human remains? Not exactly... We even call them pre-hominid, and this qualification is in itself a way of dehumanize them (from a paleontological point of view, of course, but also from a religious and moral one).

These claims raise questions in terms of international law. The responsibility of the professionals of museums is questioned with force for decades in all parts of the world, as evidenced by the successive drafts of the code of ethics of the ICOM since 1986 [2]. How to deal with cultural property problems involving different countries, and communities of very different origins with each legislative heterogeneous devices? Finally, can we reconcile this approach of restitution with the constituent principles of our museums? The function of a museum is not limited to the presentation of his collections; it also has a mission study, it has to conserve for future generations a sum of objects that reflect the diversity of the ways to live and think all around the world. Public collections express our history and the relations we have with other peoples for centuries. The current strength of identity heritage movement cannot, for understandable and legitimate it is, obviously, putting at risk the universalism vocation of our museums.

The treatment of our dead raises deep philosophical questions about what makes a person, on the rights of specific communities on memory and the physical expression of their ancestors, and also,

at least since the Enlightenment, on the desire to use human remains to reconstruct the way in which our species appeared and adapted to the circumstances of life on Earth [3]. Are part of the problem difficult questions about the nature and limits of the concepts of ownership as soon as there is interest in museum collections.

Some groups, for example, believe that all of the human remains held in the collections of the museums should be repatriated without delay to be buried or for another type of ritual treatment. Others believe that once the remains have been exhumed, it is better to leave them in the museums than disturb them once more by imposing on them a long trip, even back in the country. Others are in favor of the compromise, and accept repatriation at the end of a predetermined period. Others finally are opposed to this return, that they deem dangerous and as a form of “pollution”.

Moral background

The arguments regarding museum policies toward human remains, are classifiable into three categories [4]. Two of them are for the return of the remains in their communities of origin, if they so request. The third defends keeping them in collections.

The first of these relies on the human rights: the treatment given to the community of the dead in a culturally appropriate manner is a fundamental human right, which should not be violated. If it is proven that it has been violated in the past, it should then be repaired by an immediate repatriation. The force of this argument comes for a part of its explicit association with the idea of universal human rights, which arose during the 20th century, and has attained an almost sacred status (and one of the greatest achievements of modernity). Unfortunately, the requirement that the human rights guarantee should be allowed to process our dead as understood, without external intervention or violation of burial, is contradicted by numerous familiar situations. Without taking into account the wishes of families and religious communities, the State may request an autopsy for judicial reasons, or impose a mode of burial for reasons of public safety. Another complication lies in the link, which over time became more and more required, between a death and its supposed home community. A group can go back in time and say that thousands of years remains are his, but who then decides that the request is legitimate? What happens if there is evidence that the remains come from very different groups who existed in the region thousands years or centuries ago? The “human

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rights” approach is not in practice as robust as it seems. It seems more useful to invoke both ideas – basic decency and common good – which have the advantage of being reciprocal virtues [5,6]. Scientists have an ethical obligation to respect a local community, which implies among other things not to dig up their dead without permission, and only after giving them very good reasons. And there are very good reasons, the thing shall be made quickly in keeping the community informed of progress and minimizing as much as possible the impact of the work. On the other hand, the communities feel a moral obligation to listen to scientists and to consider their position when they handle the remains for the good of humanity.

The second principle returned to the topic of decolonization: with a few rare exceptions, the existence of Aboriginal human remains in museums around the world is a shameful vestige of colonialism and a continual affront to human dignity. Under the colonial yoke, the modern criteria of informed consent were rarely respected, and exposure of the remains of the defeated was one of the most repugnant expressions of colonial domination. The argument here is both simpler and more complex than in the context of human rights. Few are those who deny that reprehensible acts were committed on the Aboriginal graves on behalf of Science. One of the most striking examples is the Norway graves, which were systematically collected for museum collections until the 1920s by scientists looking for such or such racial theory. The dead were from the Sami of 18th and 19th century, whose names and families were known and whose parents refused this violation of burial. These practices are part of a broader ethnic aggression type. The citizens of the former colonial nations see these episodes with regret and shame, and most work to repair the errors of the past and to reconcile with the descendants of those who suffered the wounds of colonial policies (including scientific injuries). These movements require that museums and the institutions that hold these materials change their way of doing research and make amends for past injuries.

The third theme, which could be called “Science is the largest”, is funded on the following argument: the human remains in the collections of the world are a scientific treasure of inestimable value. When one reads press reports, some explorers’ books, we see that they knew that they violated the law and that what they were doing was morally unjustifiable. But they did so anyway, on behalf of the Science, or the idea that they were then science. Although it is recognized that the circumstances in which they were obtained are sometimes disturbing, they are used with modern scientific methods such as molecular techniques that allow us to better understand human prehistory. They also contribute to medical advances that may minor human suffering all around the world. The moral claims of the global community must come before those of the communities of origin, for the common good [7,5]. Indeed, Science carries with it its own moral value, i.e. a value for its practitioners, as important as the opinions moral and religious of their interlocutors. As Science has done much against the racist beliefs and for the advancement of the equality of men, because these researches shed light on the history of humanity, the background material (human remains) should not be thwarted by religious beliefs or other specific groups asks [8]. But the problem is: does any one use them really? Are they not only stored in case of or simply for a kind of collections of scientific treasures? Aboriginal people are right when they ask the scientific community: if these remains are so important, why use-you so rarely?

Common good?

One main question is: does the public interest come before requests

for repatriation of Aboriginal communities? In the USA, the Federal Court decided that the human remains known as the “Kennewick Man” should be available to scientists before their repatriation to the Indian communities, which claimed it. The repatriation itself helps constitute a body of knowledge (for example the recent full study of the maori head of Rouen in 2010-2012).

Physical anthropology researchers study human populations, not individuals, and an individual case has only a modest scientific interest. There are obviously exceptions: the ancient remains or the exceptionally well preserved body (such as Ötzi, the man of ice, or “bog-people” in Europe). A nearby location would be the bones taken to the dead on a battlefield during the colonial war. Although the remains cannot be identified, the practice of taking to the enemy parts of their bodies is so repugnant and in contradiction with the treatment of enemies in the European war, that it is forever intolerable. But as the origin of the remains is more and more remote geographically and temporally contemporary communities, the demands of local communities become more ambiguous.

Anyway, aboriginal tribes are involved in the scientific study of their ancestor: some in the USA (the Navajo, for example) have their own archaeological program with physical anthropologists and archaeologists. By definition, in essence, they respect their traditions.

How to conserve and how long?

In general, several millennia old human remains call a less protective attitude on the part of local communities, partly because it do not see themselves as having strong identity links with these remains [9]. It has also to be said that the collections of some museums comes from sites that may be destroyed by professional looters (central America, for example: Peru, Guatemala, Mexico, etc.); conserving human remains in museums, at least for a time, seems more respectful than in their original graves, exposed to the dispersion or to a destruction by professional robbers. If these remains are deposited again into the ground, do we have the certainty that they will be protected? Such conservation sites or warehouse places (where the remains can be kept in a respectful manner, permanently or until further notice), often outside the museum, have to be considered as a kind of receiver in which the materials are available for research or for immediate burial. An example is the one of Santa Barbara (California), created in collaboration with the Indian communities: organized as an ossuary designed by the descendants of the dead, it is open to both the researchers and the Indians as a one-time ritual.

One of the main issues is the resting place of the remains that have no identified source. An example is the consequence of the international repatriation of *Toi moko* (i.e. mummified tattooed Maori heads) to the New Zealand. For now, they are held at *Te Papa* museum in a dedicated *Wahi Tapu* (i.e. a sacred place under the regime of the *Tapu* (taboo) and the *Noa*). The *Tapu* is the total access restriction, unless it is for a sufficient and validated reason. There are many *Wahi Tapu* everywhere in New Zealand, that contain human remains waiting for a decision on their final location. This discussion of the final resting place can be hastened. The identities of these remains are unknown. Needed careful research for this mystery, determine the sources so the final locations.

A few years ago in Hawaii, a large multinational company has decided to build a huge hotel on the North coast of the island of Maui. The archaeologist responsible for the study discovered that he was on the edge of a huge cemetery. To take them in his laboratory, he put so 2000 skeletons in boxes. This resulted in a trial, by which the Hawaiian

movement has managed to stop the process in its entirety. The hotel had to be moved into the interior and the remains to stay in their original location. Obviously, nobody lives in this place, but Hawaiian representatives were able to take care of the place (a guard was hired).

Legal background

Our collections are part of the cultural heritage of our world. They must be preserved in accordance with provisions such as the convention on world heritage of the UNESCO, and the code of ethics of the ICOM. Museums have an obligation to preserve the collections for future generations and for the present generation [10]. In the USA exist the Native American Graves Protection and Repatriation Act, but also international principles, and the Federal law, but ethics and morality have also to be taken into account, as well as Aboriginal perspectives. The UN Declaration on the rights of indigenous peoples was adopted by the General Assembly of the 13th of September 2007. In articles 11 and 12 she enjoins States to grant compensation to indigenous peoples and article 12 makes it clear that "States shall allow access to the objects of worship and to human remains in their possession or repatriation, through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned." More, the code of ethics of the ICOM, which is the culmination of 6 years of revisions and that was formally approved at the 21st General Assembly in Seoul in October 2004 has largely addressed this issue of what is still euphemistically called cultural and sensitive artifacts.

On the other hand, there are human remains that we are not studied, present in the collections for decades, even hundreds of years, without being studied (in the French National Museum of Natural History at Paris, for example), but accessible. What part of the specimens is studied in a generation? Less than one percent for the American Natural History Museum at Washington (concerning the nearly 70 million specimens). The interest of these collections comes from the accumulation of inventory of what exists and which is representative of the biodiversity, including human [11]. This fundamental accumulation will be useful to the next generation, and scientific interest comes from there [12].

The *post-mortem* examination of cadavers, and the opening of tombs is not a problem when surrounded by legitimate reasons, and if the bodies continue to be considered with full dignity. But it goes without saying that the opening of old tombs, especially if it is not in order to extract a relic for the devotion from the faithful ones – and this is the case of many archaeological excavations – should be followed by a systematic decent reburial of the human remains, and located like such. Is it morally (and religiously) legitimate not to rebury at the end of all macroscopic research and after full scientific sampling, the remains in a consecrated place (that could be different from the first one) with an adapted ceremony, as they were deranged in their "eternal rest"? If such individuals do not have a conserved name, they had a precise and well-defined religion to be respected. Many international examples can be found, such as in France [13] and in India where excavations of a 16th c. Parsis (= Zoroastrians refugees from Iran) necropolis in the Gujarat from 2002 to 2007, never reburied after full anthropological study [14].

An opposite (and good) position is the one from the Bristol University following the excavations of more than 300 slave tombs on the island of Saint Helena [15]. If all the archaeological artifacts were studied in England and displayed for a public exhibition, the human remains did not leave the island and will be re-interred only (not in their original graves for practical reasons, but in a special ossuary tomb).

Even if an archaeological dig is a moral act and legal at the time, the non-realization of further studies on skeletal material, and the lack of preservation (negligence) of collections are something totally immoral. It is necessary that they become illegal.

Recommendation proposition

As a consequence, it is proposed to include the following recommendation (that may take the aspect of a local law for some countries, such as France, for example):

"Each State is the guarantor of the respect for the wishes of the deceased, within the limits of legality at the time where they are expressed.

Any human remains kept in private or public institution without the expressed consent of the lifetime of the person concerned, must be buried according to his beliefs and his last wishes".

Any human remains from archaeological excavations shall, within 30 years after its discovery, be re-interred in its original location, or in a location specially chosen for its relevance and adapted to the beliefs of the person concerned if they are known. It is not forbidden, for scientific research, to keep for later research, biological samples that can be preserved without timeout, should not represent more than 5% of the total weight of the remains, or maiming on the physical plane».

Are not affected by this proposal of recommendation:

- palaeontological/fossil remains (pre-humans, i.e. individuals not belonging to the species *Homo sapiens sapiens*);

- remains kept in medical, anthropological collections, and in the general sense, "historical" museum, that is dedicated by their seniority and their legitimacy, except that they are individually identifiable and proved that their acquisition was illegal or contrary to the wishes of the dying individual;

- sacred remains (relics);

- remains of individuals in a forensic context".

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