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Repatriation of Indigenous Peoples' Cultural Property: Could Alternative Dispute Resolution Be a Solution? Lessons Learned from the G'psgolox Totem Pole and the Maaso Kova Case

Abstract: Considering that the vast majority of the objects constituting Indigenous peoples' cultural heritage are now located outside their source communities, the restitution of cultural property has become a pressing issue among Indigenous peoples worldwide and should be understood as part of Indigenous peoples' historical (as well as current) encounter with colonization and its consequences. As such, this article investigates whether international cultural heritage law offers any possibilities for successful repatriation and to what extent the shortcomings of the framework in place could be complemented by alternative dispute resolution (ADR) mechanisms and the new mandate of the Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism). First, crucial concepts

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in the repatriation debates are explained. Next the factual background of the case studies of the G'psgolox Totem Pole and Maaso Kova are presented. This is followed by a discussion of the most pertinent mechanisms of international cultural heritage law and the place of Indigenous peoples' rights within such a framework. Subsequently, the concept of ADR is introduced, and the details of the negotiation processes between the Haisla First Nation (Canada) and the Yaqui People (Mexico, the United States) – both with the Museum of Ethnography in Stockholm (Sweden) – are presented. Finally, the article evaluates to what extent ADR could be an appropriate mechanism for the settlement of disputes concerning Indigenous peoples' cultural property, and whether the Expert Mechanism is a well-suited body for facilitating the process of repatriating Indigenous peoples' cultural heritage.

Keywords: Indigenous peoples, repatriation of cultural property, alternative dispute resolution, Expert Mechanism on the Rights of Indigenous Peoples, totem pole

Introduction

Indigenous peoples from different parts of the world share comparable experiences of having their cultural objects plundered and scattered all over the globe. Some of these objects are irretrievably lost, while others can be found in prominent museums, either on display or hidden in their storage rooms. During the colonial regime, Indigenous graves were desecrated and human remains and burial goods were stolen. Personal belongings were “found” on Indigenous peoples' lands or were taken by force; deception; or under circumstances of duress, including war, discriminatory laws, and economic pressures introduced by the colonizing governments.¹ On rare occasions when purchase records from this period exist, given the circumstances of those times it should be understood that most of these transactions occurred under duress. Furthermore, the sales were often undertaken by persons who, in view of the customary law of Indigenous peoples, did not have the legal authority to part with such objects.²

¹ See H. Keeler, *Indigenous International Repatriation*, “Arizona State Law Journal” 2012, Vol. 44(2), pp. 710-730.

² One such a case of the sale of an Indigenous object by an unauthorized member of the community concerns the so-called Echo Mask of the Nuxalk Nation, British Columbia, Canada. The mask, which is owned collectively and has a profound significance for the Nation, was sold in 1995 to an art dealer by a Nuxalk elder of Bella Coola for Can\$35,000; see J. Kramer, *Figurative Repatriation. First Nations' Artist-Warriors' Recover, Reclaim, and Return Cultural Property through Self-Definition*, “Journal of Material Culture” 2004, Vol. 9(2), pp. 161-182.

As indicated above, these objects are often found today in museums. While Western viewers' enjoy them merely for their aesthetic value, for members of Indigenous communities they usually represent much more. As explained by Honor Keeler:

However, a Western museum may have the ceremonial object within its collection, identify it as simply a hat, put it in a box available for public research or on public display, and comment on it based upon its design and artistic value. The primary missing link for the international repository is communication with the indigenous community. Not only is the object being improperly handled and cared for, but its improper treatment may be comparative in a Western context to throwing stones at church statues or a tabernacle.³

The reason for this is the special relationship between Indigenous peoples and their cultural artifacts⁴ – a relationship that is an essential part of their pride, self-esteem, and more importantly, identity. In many cases heritage, understood broadly as a cultural process and the cultural objects related to that process,⁵ bears a spiritual connection with communities that greatly transcends its artistic, archaeological, monetary, and/or aesthetic value. For Indigenous peoples, artifacts are not merely cultural property but “living” objects that embody not only moral values but also their owners and traditions, such as the songs and stories related to these objects.⁶ As such, for Indigenous peoples the question of repatriation is not simply a claim for receiving their property back, but rather having a member of their family back within the community.

As international cultural heritage law is rapidly developing, there are currently three different terms that describe the process of giving property back to the original possessor or owner.⁷ The term “restitution” has the oldest historical origin,⁸ and until recently it has been the only term used to describe the process of recovery of lost cultural property. However, with the proliferation of international correlations, namely the increase in trafficking of cultural objects and the collapse of colo-

³ H. Keeler, *op. cit.*, p. 769.

⁴ This article uses the terms “cultural property”, “artifacts”, and “objects” interchangeably, bearing in mind that frequently for Indigenous peoples the cultural property is a living spirit and that cultural property has broader connotations; see J. Blake, *On Defining the Cultural Heritage*, “The International and Comparative Law Quarterly” 2000, Vol. 49(1), pp. 61-85.

⁵ See L. Smith, *Uses of Heritage*, Routledge, Oxon–New York 2006, pp. 44-84.

⁶ See L. Van Broekhoven, *Yesterday's Knowledge, Tomorrow's Future. Setting up Community Consultations at the NME, Leiden*, in: L. Van Broekhoven, C. Buijs, P. Hovens (eds.), *Sharing Knowledge and Cultural Heritage: First Nations of the Americas. Studies in Collaboration with Indigenous Peoples from Greenland, North and South America*, Sidestone Press, Leiden 2010, p. 161.

⁷ See M. Cornu, M.-A. Renold, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*, “International Journal of Cultural Property” 2010, Vol. 57(4), p. 1.

⁸ See W. Kowalski, *Types of Claims for Recovery of Lost Cultural Property*, “Museum International” 2005, Vol. 57(1), pp. 85-102.

nial empires, two new terms have emerged: “return” and “repatriation”. Accordingly, the originally broad term “restitution” has given rise to the concept of “return”,⁹ which involves claims for cultural property to be returned to the country of origin, whether such property was taken from the former colonies or illegally exported.¹⁰ Similarly, “repatriation” may be defined “as the return of cultural objects to their nations of origin (or to the nations whose people include the cultural descendants of those who made the objects; or to the nations whose territory includes their original sites or the sites from which they were last removed)”.¹¹ This term became particularly popular in the 1980s and 1990s in North America and Australia in relation to the return of human remains and sacred objects to Indigenous communities, especially when the claims encompassed significant ethical issues,¹² and it is now widely used to describe the recovery of cultural objects by Indigenous peoples.¹³

For Indigenous peoples, a claim for repatriation is first and foremost linked to the general effort towards the redress of past injustices and to self-determination.¹⁴ As such, repatriation of the elements of cultural heritage represents an “essential condition for the proper realization of their internationally recognized human rights”.¹⁵ As the source of human rights is dignity, the human rights foundation for repatriation claims of Indigenous peoples is the attempt to regain dignity, through repatriation, which “is essential for the recovery of the spiritual integrity and cultural identity of an indigenous community”.¹⁶ The reasons for repatriation, as proposed by Ana Filipa Vrdoljak, can be threefold: first of all, repatriation is connected with the restoration of the “sacred” link between people, land, and cultural heritage; secondly, it may be a partial remedy for internationally wrongful acts, including discrimination and genocide; and finally, repatriation may be understood as “an essential component of a people’s ability to maintain, revitalize and develop their collective cultural identity”.¹⁷ Deprivation of their cultural heritage, especially when combined with an ongoing refusal of repatriation of cultural artifacts, may

⁹ On the meaning of the terms “return” and “restitution” under the 1995 UNIDROIT Convention, see section “International Cultural Heritage Law vs. Indigenous Peoples’ Rights”.

¹⁰ W. Kowalski, *op. cit.*, p. 98.

¹¹ J.H. Merryman, *Two Ways of Thinking About Cultural Property*, “The American Journal of International Law” 1986, Vol. 80(4), p. 845.

¹² See P. Bienkowski, *A Critique of Museum Restitution and Repatriation Practices*, in: S. Macdonald, H. Rees Leahy (eds.), *The International Handbooks of Museum Studies: Museum Practice*, John Wiley & Sons, Hoboken 2015, p. 432.

¹³ See M. Cornu, M.-A. Renold, *op. cit.*, p. 2.

¹⁴ See K. Kuprecht, *Human Rights Aspects of Indigenous Cultural Property Repatriation*, “NCCR Trade Working Paper” No 2009/34, p. 5.

¹⁵ F. Lenzerini, *Cultural Identity, Human Rights, and Repatriation of Cultural Heritage of Indigenous Peoples*, “Brown Journal of World Affairs” 2016, Vol. 23(1), p. 136.

¹⁶ *Ibidem*, p. 138.

¹⁷ K. Kuprecht, *Human Rights Aspects...*, p. 15.

give rise to “intergenerational implications, preventing future generations from the possibility of enjoying a life in harmony with all surrounding elements – nature, spirits, and the entire universe – until their heritage is recovered”.¹⁸

Inasmuch as Indigenous peoples' cultural artifacts may either be displayed outside of the source community, or still remain located within the national borders of the State, or even both outside of the community and the State inhabited by the source community, the repatriation of Indigenous peoples' cultural property may be divided into domestic¹⁹ or international repatriation.

Domestic repatriation is regulated through one national legal framework, as has been done in for example the United States with the Native American Graves Protection and Repatriation Act (NAGPRA).²⁰ In such cases, the communities concerned can bring claims against a holding institution within the same country,²¹ as for example in the case of a totem pole repatriated from the Honolulu Museum of Art in Hawaii to Tlingit tribal members from the village of Klawock, Alaska,²² or the repatriation of over two thousand artifacts from the National Museum of Finland in Helsinki to the Sámi Museum and Nature Centre Siida, in Inari, northern Lapland in 2021.²³

International repatriation claims, on the other hand, involve different national legal frameworks that may be applicable to the claimed cultural heritage, and as pointed out in the Report of the Expert Mechanism on the Rights of Indigenous Peoples (“Expert Mechanism”), international repatriations are complex and involve many challenges, which include: “differing legal and policy frameworks at the international, national and subnational levels; high financial costs; and importantly, the lack of a legal framework or mechanism for the repatriation of ceremonial objects, human remains and cultural heritage directly to the indigenous peoples involved”.²⁴

Given such a state of affairs, the following paragraphs provide an analysis of two cases concerning international repatriation: the case of the G'psgolox Totem

¹⁸ F. Lenzerini, *Cultural Identity...*, p. 129.

¹⁹ See for example C. Bell, *Restructuring the Relationship: Domestic Repatriation and Canadian Law Reform*, in: C. Bell, R.K. Paterson, *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform*, UBC Press, Vancouver-Toronto 2008, pp. 15-77.

²⁰ Pub. L. 101-601, 25 U.S.C. 3001 et seq., 104 Stat. 3048.

²¹ V. Tümsmeyer, *Repatriation of Sacred Indigenous Cultural Heritage and the Law. Lessons from the United States and Canada*, Springer, Cham 2022, pp. 18-19.

²² *Totem Pole in Hawaii Returned to Alaska*, “Archaeology”, 23 October 2015, <https://www.archaeology.org/news/3825-151023-alaska-totem-repatriated> [accessed: 18.08.2022].

²³ A. Ehrnrooth, *Museum Extension Allows Indigenous Sámi People to Welcome Home More than 2,000 Artefacts Held in Finland*, “The Art Newspaper”, 23 April 2021, <https://www.theartnewspaper.com/2021/04/23/museum-extension-allows-indigenous-sami-people-to-welcome-home-more-than-2000-artefacts-held-in-finland> [accessed: 18.08.2022].

²⁴ Human Rights Council, *Repatriation of Ceremonial Objects, Human Remains and Intangible Cultural Heritage under the United Nations Declaration on the Rights of Indigenous Peoples*, 21 July 2020, UN Doc. A/HRC/45/35, para. 51.

Pole, taken in 1929 from the Haisla First Nation in British Columbia, Canada without the consent of the members of the community and gifted to the Museum of Ethnography in Stockholm, Sweden; and the case of the Maasa Kova, a ceremonial deer head of the Yaqui People of Sonora (Mexico) and Arizona (the United States), which in the 1930s was transferred – contrary to the Indigenous peoples’ laws, customs, and traditions – to the Museum of Ethnography in Stockholm. While the cases involve different communities and different types of artifacts, the point in common, besides the efforts to repatriate Indigenous peoples’ cultural heritage, is the institution holding the objects. The following sections therefore describe the background of these repatriation cases, while the fourth section briefly discusses the most pertinent mechanisms of international cultural heritage law and the place of Indigenous peoples’ rights within such a framework, and aims at establishing whether international cultural heritage law offers any actual solutions to the claims of Indigenous peoples. Inasmuch as in both cases the Indigenous peoples concerned resigned from court litigation in favour of alternative dispute resolution (ADR), the concept of ADR is introduced, and the details of the negotiation process between the Indigenous peoples and the Museum of Ethnography in Sweden are presented. Since the repatriation claim in the case of Maasa Kova was brought later than in the case of G’psgolox Totem Pole, the Yaqui People were not only able to base it on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),²⁵ but also to request the Expert Mechanism to participate in the negotiations. Given that this was the first time that the Expert Mechanism was engaged in such a case, the comparative analysis of these two cases aims at evaluating to what extent ADR could be an appropriate mechanism for the settlement of disputes concerning Indigenous peoples’ cultural property, and whether the Expert Mechanism is a well-suited body for facilitating the process of repatriating Indigenous peoples’ cultural heritage.

G’psgolox Totem Pole: The First Totem Pole Repatriated from Europe

The Haisla, a First Nation in Canada, is made up of two historic bands: the Kitamaat of the upper Douglas Channel and Devastation Channel, and the Kitlope of the upper Princess Royal Channel and Gardner Canal in British Columbia.²⁶ Today centred around Kitamaat Village, the Haisla have occupied their lands for

²⁵ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, UN Doc. A/RES/61/295.

²⁶ A.-M. Pedersen, J. Pritchard, *Haisla (Kitamaat)*, in: *The Canadian Encyclopedia*, 16 October 2011 (last edited 8 June 2020), <https://thecanadianencyclopedia.ca/en/article/haisla-kitamaat> [accessed: 04.05.2022].

over 9,000 years.²⁷ After 1793, the Haisla People began trading with Europeans, and one result of these encounters was the decimation of the Haisla population due to the smallpox and measles epidemic in the 1860s²⁸ and the 1918 influenza pandemic.²⁹

The story of the G'psgolox Totem Pole goes back to 1872, when Chief G'psgolox of the Eagle clan commissioned the totem pole to commemorate an encounter with a being from the spirit world, Tsooda, who helped the Chief to reunite with his dead children and members of his clan in a spiritual experience.³⁰ The 9-meter pole was erected in the village of Misk'usa in the Kitlope Valley, one of the four traditional villages of the Henaksiala People, who joined the Haisla people in 1947 to form the Haisla First Nation.³¹ The pole depicted Tsooda at the top; Asoalget, a mythical grizzly bear, beneath; and another mythical male grizzly bear that lives under water, who represents spiritual power.³² Due to mudslides, the Henaksiala People moved the site of their permanent village from Misk'usa up the river to Kemano. However, their way of life was governed by the changing seasons and, depending on the time of year, they lived in several different villages.³³

In 1927, a Swedish consul to British Columbia, Olaf Hansson, expressed interest in acquiring a First Nations totem pole. An Indian agent³⁴ named Ivan Fougner proposed the G'psgolox Pole and was given permission by the Canadian government to sell it to Sweden. The authorities presumed that the village was abandoned and no longer important to the Henaksiala. In 1929, the totem pole was cut down and shipped to Sweden, where Hansson gave it to the Swedish Museum of Ethnography as a gift.

The Haisla Nation learned about the totem pole's location at the National Museum of Ethnography in 1991. In the same year, the Haisla delegation arrived in Sweden and began negotiations for the repatriation of the totem pole.³⁵

²⁷ Haisla Nation, *About the Haisla*, <https://haisla.ca/community-2/about-the-haisla/> [accessed: 04.05.2022].

²⁸ S.R. Jessiman, *The Repatriation of the G'psgolox Totem Pole: A Study of its Context, Process, and Outcome*, "International Journal of Cultural Property" 2011, Vol. 18(3), p. 368.

²⁹ A.-M. Pedersen, J. Pritchard, op. cit.

³⁰ S.R. Jessiman, op. cit., p. 366; J.R. Baird, A. Solanki, M. Askren (eds.), *Returning the Past: Repatriation of First Nations Cultural Property. Four Case Studies of First Nations Repatriation*, UBC Museum of Anthropology, Vancouver 2008, p. 25.

³¹ S.R. Jessiman, op. cit., p. 366.

³² J.R. Baird, A. Solanki, M. Askren (eds.), op. cit., p. 25.

³³ S.R. Jessiman, op. cit., pp. 369-370.

³⁴ Indian agents were the Canadian government's representatives on First Nations reserves from the 1830s to the 1960s, responsible for implementing the policies of the Department of Indian Affairs and keeping government officials informed of activities on reserves; see R. Irwin, *Indian Agents in Canada*, in: *The Canadian Encyclopedia*, 25 October 2018, <https://www.thecanadianencyclopedia.ca/en/article/indian-agents-in-canada> [accessed: 04.05.2022].

³⁵ J.R. Baird, A. Solanki, M. Askren (eds.), op. cit., p. 26.

The Haisla representatives travelled to Sweden on five occasions, but it was not until 2006 that the totem pole was finally brought back to Canada.³⁶

Maaso Kova: The Yaqui Peoples' Sacred Deer Head

The Maaso Kova is a ceremonial deer head, sacred for the Yaqui (Yoeme) People of Sonora (Mexico) and Arizona (United States).³⁷ They originally inhabited the banks of the river Yaqui and their first contact with the Spanish colonizers dates back to 1533.³⁸ With the arrival of the Spanish and English to the Americas, the Yaquis were often persecuted and driven out of their territories.³⁹ At the end of the 19th century, the Yaqui Tribe faced one of the most intense extermination efforts by the Mexican State.⁴⁰ The Yaqui People were deported to Yucatán, Oaxaca, and Veracruz, for forced labour on haciendas, as well as forced conscription for military service in several parts of Mexico, including Tlaxcala.⁴¹ In the 1930s, the Yaqui were in an armed conflict with Mexico and it was during that time that the Maaso Kova was purchased by two Danish anthropologist sisters, Bodil Christensen and Helga Larsen, in Tlaxcala, which is over 1,750 km away from the Yaqui homeland in Sonora and was home to a military garrison to which Yaqui soldiers had been forcibly enlisted.⁴² In 1937, the artifact was shipped to Sweden with a listed value of US\$10⁴³ and transferred to the Swedish Museum of Ethnography,⁴⁴ which together with three other museums forms the National Museums of World Culture – a government agency under the Swedish Ministry of Culture.⁴⁵

According to Yaqui tradition, the Maaso Kova is worn by a Yaqui deer dancer (a member of the exclusively men's society referred to as "Kolensia") in a sacred ceremony, called "Deer Dance", which is performed at certain times of the year.⁴⁶ According to the Yaqui People "a consecrated Maaso Kova like the one held by

³⁶ S.R. Jessiman, op. cit., p. 376.

³⁷ K. Carpenter, A. Tsykarev, *Indigenous Peoples and Diplomacy on the World Stage*, "American Journal of International Law. Unbound" 2021, Vol. 115, p. 121.

³⁸ Wikipedia, *Pueblo Yaqui*, https://es.wikipedia.org/wiki/Pueblo_yaqui [accessed: 18.08.2022].

³⁹ Expert Mechanism on the Rights of Indigenous People, *Technical Advisory Note – Repatriation Request for the Yaqui Maaso Kova*, 16 June 2020, p. 10, <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/Session12/MaasoKova.pdf> [accessed: 31.08.2022].

⁴⁰ G. Pastrana, *The Yaqui Tribe: An Indigenous Nation in Resistance*, "Cultural Survival", 2 December 2021, <https://www.culturalsurvival.org/news/yaqui-tribe-indigenous-nation-resistance> [accessed: 18.08.2022].

⁴¹ Expert Mechanism on the Rights of Indigenous People, *Technical Advisory Note...*, p. 7.

⁴² *Ibidem*, p. 8.

⁴³ *Ibidem*, p. 10.

⁴⁴ *Ibidem*, p. 8.

⁴⁵ Världskulturmuseerna, *Our Vision & Mission*, <https://www.varldskulturmuseerna.se/en/about-us/our-vision--mission/> [accessed: 18.08.2022].

⁴⁶ Expert Mechanism on the Rights of Indigenous People, *Technical Advisory Note...*, p. 9.

the Swedish Museums of World Culture that has been used and blessed in the deer dance is a sacred living being with its own life and spirit⁴⁷ and it cannot be in possession of anyone else outside the Kolensia and cannot be publicly displayed.

In 2003, during an event at the Museum of Ethnography the Maasa Kova was spotted by Andrea Carmen, a member of the Yaqui Nation and Executive Director of the International Indian Treaty Council. The Maaso Kova has since been removed from display by the Museum. In the same year, Rogelio Valencia, Chairman of the Yoemem Tekia Foundation, contacted the Permanent Mission of Sweden in Geneva to request a dialogue with the Swedish Government. The Permanent Mission of Sweden in Geneva indicated that the National Museums of World Culture were the appropriate authorities to deal with this matter on behalf of Sweden. The Yaquis kept raising the issue at the United Nations, with the vocal support of the Sami Parliament of Sweden, which more than once used its own time at the United Nations sessions to advocate for the Yaqui repatriation.⁴⁸ The official claim for the repatriation of Maaso Kova was finally brought in January 2014, when by request of the Yoemem Tekia Foundation, Andrea Carmen contacted the National Museums of World Culture. The claim was made under Article 11(2) of the UNDRIP. The Museum, however, considered this claim to be informal, due to the lack of a formal request under Article 7(b)(ii) of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property⁴⁹ ("the 1970 UNESCO Convention"), inasmuch as Sweden had not received a formal request from Mexico or the United States.

International Cultural Heritage Law vs. Indigenous Peoples' Rights

History is littered with examples of violent acts of wartime plunders, appropriations, or trades between dealers in times of colonization, and the occupation and illegal export of cultural property.⁵⁰ At the same time, modern international cultural heritage law has undergone significant development, first and foremost under the aegis of United Nations Educational, Scientific and Cultural Organisation

⁴⁷ Ibidem.

⁴⁸ K. Carpenter, A. Tsykarev, op. cit., p. 121.

⁴⁹ 14 November 1970, 823 UNTS 231.

⁵⁰ For more on history of cultural heritage law, see S.E. Nahlik, *Grabież dzieł sztuki. Rodowód zbrodni międzynarodowej* [The Looting of Works of Art. The Origins of International Crime], Ossolineum, Wrocław-Kraków 1958; S. Borelli, F. Lenzerini (eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, Brill, Leiden 2012; F. Francioni, A.F. Vrdoljak (eds.), *The Oxford Handbook of International Cultural Heritage Law*, Oxford University Press, Oxford 2020; A.F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, Cambridge University Press, Cambridge 2006; J. Greenfield, *The Return of Cultural Treasures*, Cambridge University Press, Cambridge 1996; J. Blake, *International Cultural Heritage Law*, Oxford University Press, Oxford 2015.

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(UNESCO). The work of UNESCO is multidimensional, and the scope of protection granted to cultural property has gradually been enlarged to include protection during peace times as well as the protection of cultural heritage,⁵¹ intangible cultural heritage,⁵² and cultural expressions.⁵³ The two most pertinent provisions concerning the return of cultural heritage are the 1970 UNESCO Convention and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects⁵⁴ (“the 1995 UNIDROIT Convention”), which although adopted by the International Institute for the Unification of Private Law (UNIDROIT) was elaborated at the request of UNESCO.⁵⁵

Article 1 of the 1970 UNESCO Convention defines cultural property as property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art, or science.⁵⁶ Moreover, cultural property should belong to one of the 15 enlisted categories, which include rare collections and specimens of fauna, flora, minerals, anatomy, and objects of paleontological interest;⁵⁷ property relating to history and to the life of national leaders and artists, and to events of national importance;⁵⁸ and objects of ethnological interest⁵⁹ or archives, including sound, photographic, and cinematographic archives.⁶⁰ As the 1995 UNIDROIT Convention was designed to complement the 1970 UNESCO Convention,⁶¹ the definition of cultural property is virtually identical in both conventions. The 1995 UNIDROIT Convention introduces a terminological differentiation between the terms “restitution” and “return” as it “applies to claims of an international character for: (a) the restitution of stolen cultural objects; (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter ‘illegally exported cultural objects’)”.⁶² Therefore, with this reservation the cultural property of Indigenous peoples falls within the scope of both Conventions.

⁵¹ Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.

⁵² Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 3.

⁵³ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, 2440 UNTS 311.

⁵⁴ 24 June 1995, 2421 UNTS 457.

⁵⁵ See L.V. Prott, *UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects*, “Uniform Law Review” 1996, Vol. 1(1), p. 59.

⁵⁶ 1970 UNESCO Convention, Art. 1.

⁵⁷ *Ibidem*, Art. 1(a).

⁵⁸ *Ibidem*, Art. 1(b).

⁵⁹ *Ibidem*, Art. 1(f).

⁶⁰ *Ibidem*, Art. 1(j).

⁶¹ See L.V. Prott, *op. cit.*, p. 61.

⁶² 1995 UNIDROIT Convention, Art. 1.

The 1970 UNESCO Convention provides only for a public right of action, on a government-to-government basis, through diplomatic relations.⁶³ It should be noted here that although Indigenous peoples concluded “international” treaties with foreign States during the times of European “discovery” and expeditions to the New World, their position as subjects of international law was gradually marginalized, and as a result “they were deprived of the essential attribute on which their original status as sovereign nations was granted”.⁶⁴ For this reason, as has already been mentioned in the case of Maasa Kova, the Museum regarded the claim from 2014 as informal due to the lack of a formal request from Mexico or the United States. As such, the approach of UNESCO is regarded as a state-centred property approach of cultural objects.⁶⁵

Conversely, the 1995 UNIDROIT Convention provides for a claim to be brought before a court or other competent tribunal, which means “that a private owner may make use of the normal legal channels available in the country where the object is located in order to seek a court order for the return of a stolen object, and a State may take similar action for the return of an illegally exported cultural object”.⁶⁶ Although this undoubtedly facilitates the possibility for Indigenous peoples to make claims for the repatriation of stolen cultural property, the problem of ratification arises, as the provisions only apply to cases where the two States, i.e. the originating State and the State where the property is located, have ratified the 1995 UNIDROIT Convention and enacted implementing legislation.⁶⁷

Although the 1995 UNIDROIT Convention, as a result of the increasing role of Indigenous peoples in the international arena, levels the “sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community’s traditional or ritual use” with the objects belonging to public collections, and thus establishes only a three-year period since the time when the claimant knew the location of the cultural object and the identity of its possessor, it does not however provide any effective mechanism for the repatriation of Indigenous peoples’ cultural property due to the principle of non-retroactivity stated in Article 10. The 1970 UNESCO Convention is similarly non-retroactive as well.⁶⁸ Considering that the vast majority of the objects

⁶³ 1970 UNESCO Convention, Art. 7(b)(ii).

⁶⁴ See Commission on Human Rights, *Human Rights of Indigenous Peoples. Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations. Final Report by Miguel Alfonso Martínez, Special Rapporteur*, 22 June 1999, UN Doc. E/CN.4/Sub.2/1999/20, para. 103.

⁶⁵ E. Campfens, *Cross-Border Title Claims to Cultural Objects: Property or Heritage?*, Eleven International Publishing, Leiden 2021, p. 159.

⁶⁶ L.V. Prött, *op. cit.*, p. 65. See also UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report, “Uniform Law Review” 2001, Vol. 6(3), p. 506.

⁶⁷ S. Falkoff, *Mutually-Beneficial Repatriation Agreements: Returning Cultural Patrimony, Perpetuating the Illicit Antiquities Market*, “Journal of Law and Policy” 2008, Vol. 16(1), p. 296.

⁶⁸ L.V. Prött, *op. cit.*, p. 68.

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constituting Indigenous peoples' cultural heritage that are now located outside the communities had been acquired without the consent of the original holders long before the entry into force of both Conventions (which took place in 1972 and 1998), the principle of non-retroactivity renders the mechanism of return of cultural property via international cultural heritage law ineffective.

However, while the benefits to Indigenous peoples from the two most important international conventions on stolen or illegally exported cultural objects remain insignificant,⁶⁹ the value and importance of culture and its elements for Indigenous peoples is now acknowledged at the international level, in particular with the remarkable example of the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted on 13 September 2007. According to Elsa Stamatopoulou, cultural rights are reflected in at least 17 of the 46 articles of the Declaration and “[t]he word ‘culture’ or ‘cultural’ is mentioned no fewer than eight times in the preamble and 16 times in the Articles of the declaration (Articles 3, 5, 7, 11, 12, 14, 15, 16, 31, 32, 36)”.⁷⁰ The most relevant provisions concerning the return of cultural property are found in Article 11(1), which provides for the right of Indigenous peoples “to practice 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”; Article 11(2), which addresses the States’ duty to establish “effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs”;⁷¹ and Article 12, which recognizes that:

(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.⁷²

This latter Article, as will be further elaborated, became the basis for the repatriation claim brought by the Yaqui People in the Maasa Kova case.

⁶⁹ K. Kuprecht, *Human Rights Aspects...*, p. 14.

⁷⁰ E. Stamatopoulou, *Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples*, in: S. Allen, A. Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Hart Publishing, Oxford-Portland 2011, p. 389.

⁷¹ UNDRIP, Art. 11.

⁷² *Ibidem*, Art. 12.

Thus the existence of the right of Indigenous peoples to restitution of their cultural property is explicitly provided for in the UNDRIP, but this raises the oft-articulated concern about UNDRIP's legal status. According to Stephen Allen, "the formal status of this international instrument was never in any doubt – it is not legally binding upon States as a matter of international law. This is clear from the statements made by States when voting on the Declaration's adoption".⁷³ However, as the author points out this does not preclude "that particular rights contained in the Declaration could bind States as a matter of customary international law".⁷⁴ Accordingly, Federico Lenzerini has noted that "the right of indigenous peoples to reparation for the wrongs suffered – including for the loss of their own cultural heritage – has today crystallized into a principle of customary international law",⁷⁵ while Evelien Campfens indicates that inasmuch as the provisions concerning the culture of Indigenous peoples in the UNDRIP "are acknowledged as part of the (binding) right of access to culture of Article 15(1)(a) ICESCR insofar as the cultural heritage of indigenous peoples is concerned, this is an important instrument".⁷⁶ Moreover, she points out that the 20 years of the negotiation process leading up to the adoption of the Declaration (UNDRIP) and the almost universal support for the UNDRIP makes it "more than 'just' a non-binding declaration".⁷⁷

For the right to be effective, however, the means for its realization must be available, and as has been demonstrated the system created by UNESCO is not suitable for Indigenous peoples' claims. As such, in a resolution adopted in 2019 the Human Rights Council encouraged:

the development of a process to facilitate the international repatriation of indigenous peoples' sacred items and human remains through the continued engagement of the United Nations Educational, Scientific and Cultural Organization, the World Intellectual Property Organization, the Expert Mechanism, the Special Rapporteur on the rights of indigenous peoples, the Permanent Forum on Indigenous Issues, States, indigenous peoples and all other relevant parties in accordance with their mandates.⁷⁸

⁷³ S. Allen, *The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project*, in: S. Allen, A. Xanthaki (eds.), *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Hart Publishing, Oxford–Portland 2011, pp. 227-228.

⁷⁴ *Ibidem*; see also S.G. Barnabas, *The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law*, "International Human Rights Law Review" 2017, Vol. 6(2), pp. 242-261.

⁷⁵ F. Lenzerini, *Reparations for Wrongs against Indigenous Peoples' Cultural Heritage*, in: A. Xanthaki (ed.), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges*, Brill, Leiden–Boston 2017, p. 343.

⁷⁶ E. Campfens, *op. cit.*, pp. 204-205.

⁷⁷ *Ibidem*, p. 205.

⁷⁸ Human Rights Council, *Resolution 42/19: Human Rights and Indigenous Peoples*, 26 September 2019, UN Doc. A/HRC/RES/42/19.

In 2020, the Expert Mechanism for the first time issued a Technical Advisory Note on the repatriation request. As the Expert Mechanism engaged and assisted Indigenous peoples, facilitating dialogue in order to achieve the objectives of the UNDRIP, the following paragraphs focus on the characteristics of the ADR methods and provide a comparative analysis between the case of the G'psgolox Totem Pole and the case of repatriation of the Maaso Kova, the latter of which proceeded with the assistance of the Expert Mechanism.

Alternative Dispute Resolution and the New Mandate of the Expert Mechanism on the Rights of Indigenous Peoples

Court litigation may be understood as a public process that concludes with a winning and a losing party, and a process which may not necessarily take into account all the interests and issues at stake. Cases concerning the international repatriation of Indigenous peoples' cultural heritage brought to courts often result in Indigenous peoples losing the trial, as for example in the case of the Hopi Native Americans, who in 2013 intended to stop the sale of their sacred "Katsina" by the French auction house.⁷⁹

Conversely, the term ADR can be defined as "all dispute resolution processes other than formal court adjudicatory processes"⁸⁰ or "the techniques or procedures for resolving disputes short of trial in the public courts".⁸¹ Traditionally-recognized ADR includes negotiation, mediation (good offices), and arbitration.⁸² ADR can be employed either as an alternative that is wholly separate from the established system, or as a tool to facilitate existing court proceedings,⁸³ as happened in the case of Grand Ronde Tribe and the American Museum of Natural History in New York City concerning the repatriation of the Willamette Meteorite, also known as "Tomanowos", which can be translated as "Heavenly Visitor".⁸⁴

The two most popular methods of ADR are negotiation and mediation. The former can be defined as "discussions between the interested parties with a view to reconciling divergent opinions, or at least understanding the different positions maintained".⁸⁵ The main feature of negotiation is that it does not require any third

⁷⁹ E. Campfens, *op. cit.*, p. 144.

⁸⁰ C.J. Menkel-Meadow, *Alternative Dispute Resolution*, in: *Max Planck Encyclopedias of International Law*, 2018.

⁸¹ S. Markowitz, *A Meteorite and a Lost City: Mutually Beneficial Solutions through Alternative Dispute Resolution*, "Cardozo Journal of Conflict Resolution" 2012, Vol. 14(1), p. 233.

⁸² C.J. Menkel-Meadow, *op. cit.*

⁸³ H.T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, "Harvard Law Review" 1986, Vol. 99(3), p. 671.

⁸⁴ See S. Markowitz, *op. cit.*, pp. 219-250.

⁸⁵ M.N. Shaw, *International Law*, Cambridge University Press, Cambridge 2017, p. 767.

party, and it involves mutual discussions, while the employment of the procedures of good offices and mediation involves the use of a third party – whether an individual or individuals, a State or group of States, or an international organization – to encourage the contesting parties to come to a settlement.⁸⁶ Technically, good offices are involved where a third party attempts to influence the opposing sides to enter into negotiations, whereas mediation implies the active participation in the negotiating process of the third party itself, although in practice it is often difficult to differentiate between these two approaches as they tend to merge into one another.⁸⁷

The main characteristic of these ADR methods, which explains their growing popularity within the scope of cultural property disputes, is that they allow the parties to shape the process according to their needs and give them a certain degree of control over the chosen method. More importantly, ADR methods allow for the inclusion of extra-legal factors, such as moral obligations⁸⁸ and notions of ownership foreign to the Western concepts, which is especially pertinent in cases concerning Indigenous peoples' cultural property.

As pointed out by Sam Markowitz, the benefits that parties see in such alternative methods include privacy, the voluntary nature of the technique, timing, flexibility, efficiency, control, the prospect of a better and more mutually beneficial outcome, preservation of relationships, and the ability to be creative in moulding remedies to suit the specific conflict at hand.⁸⁹

The Haisla Nation began the repatriation process of the G'psglox Totem Pole in 1991, and in his first reaction the director of the Museum of Ethnography in Stockholm, Per Kaks, underlined that the totem pole was a state property and it was for the government to decide whether the totem can be repatriated.⁹⁰ However, his attitude towards the repatriation claim changed soon afterwards when he travelled to the Kitamaat Village and came to understand the meaning of the pole to the Haisla and their motivation for its return: "I had to realize that it wasn't a legal discussion, it was more a matter of an ethical discussion ... [namely] who has the better use of it, and for whom does this pole mean something".⁹¹ This statement illustrates the benefits of ADR compared to court proceedings, as it allows the discussion to go beyond the strict legal questions of ownership and include non-legal values.

Although the Museum recommended to the Swedish government that the pole be returned to the Haisla, and in 1994 Sweden's Minister of Culture granted permission for the repatriation, it was to be presented as a gift to Kitamaat

⁸⁶ *Ibidem*, p. 770.

⁸⁷ *Ibidem*.

⁸⁸ See M. Cornu, M.-A. Renold, *op. cit.*

⁸⁹ S. Markowitz, *op. cit.*, p. 233.

⁹⁰ S.R. Jessiman, *op. cit.*, p. 371.

⁹¹ *Ibidem*.

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Village,⁹² which put the process on hold as the Haisla Nation found it inappropriate and insulting. Moreover, the return of the G'psgolox Totem Pole was subject to an additional condition: the government also directed the Swedish Museum to ensure that the Haisla would preserve the pole upon its return.⁹³ The question of the future preservation of the totem pole became one of the most sensitive issues during the negotiations, as two conflicting values – namely the Western concept of preservation of cultural objects versus the Indigenous concept of “living” objects – had to be reconciled, because for the Haisla keeping the totem pole in a special facility was seen as a betrayal of their cultural traditions, as totem poles were supposed to fall down and return to Mother Earth: “If it falls you don't lift it, you let it go back to Mother Earth”.⁹⁴ The webpage of the Haisla Nation now provides a polite reminder for the community: “do not move fallen pieces of totem pole”.⁹⁵ It is visible that although the Museum was demonstrating good will, it lacked guidance in the customs and traditions of Indigenous peoples.

The negotiation's deadlock was ultimately overcome by Gerald Amos, the former chief councillor of the Haisla Nation, who convinced the other members of the community that the building of a special facility to store the Totem Pole could have an educational purpose and could restore the sense of pride for the Haisla Nation.⁹⁶

With regard to the outcome of the repatriation negotiation, two replicas of the G'psgolox Totem Pole were made; one was sent as a gift to Sweden, and the other was erected at Misk'usa, the original place of the totem pole. In 2006, after 15 years of negotiation, the original Totem Pole was returned to the Haisla Nation, as the first totem pole repatriated from Europe.

The application of ADR methods proved to be beneficial for both parties in the negotiation. Although the results of a hypothetical court trial remain unknown, legal proceedings generally conclude with a winning and a losing party. As such, if the Haisla Nation had been successful in their repatriation claim, the Museum of Ethnography would have been left without the replica of the G'psgolox Totem Pole. Alternatively, it is probable that the court proceedings would have centred first and foremost around the notion of ownership of the totem pole. In such a case, the Haisla Nation would not have been able to have the totem pole returned to their community. This in turn would have deepened the past injustices of colonization.

However, alternative dispute resolution methods contain some shortcomings as well. First and foremost, the basic requirement to enter into an ADR is that both parties have to offer some degree of willingness to even start the negotiations.

⁹² Ibidem, p. 373.

⁹³ Ibidem.

⁹⁴ Ibidem, p. 374.

⁹⁵ Haisla Nation, *A Reminder of the Haisla Nuyem – Do Not Move Fallen Pieces of Totem Pole*, <https://haisla.ca/reminder-haisla-nuyem-not-move-fallen-pieces-totem-pole/> [accessed: 04.05.2022].

⁹⁶ S.R. Jessiman, op. cit., p. 375.

This prerequisite is critical for those cases concerning elements of the Indigenous peoples' cultural heritage, as museums are often reluctant to become engaged in repatriation claims.⁹⁷ One of the reasons for this hesitancy is the fear that answering one claim for repatriation will result in an increasing number of repatriation claims worldwide.⁹⁸ As such, the engagement of a third party in ADR could strengthen the position of Indigenous peoples and facilitate the process of repatriation.

The Expert Mechanism on the Rights of Indigenous Peoples, established in 2007, is a subsidiary body of the Human Rights Council. It replaced the Working Group on Indigenous Populations as the body responsible for providing thematic assistance on Indigenous issues to the Human Rights Council.⁹⁹ The Expert Mechanism is composed of seven independent members, one from each of the seven Indigenous sociocultural regions: Africa; Asia; the Arctic; Central and Eastern Europe, the Russian Federation, Central Asia, and Transcaucasia; Central and South America and the Caribbean; North America; and the Pacific.¹⁰⁰ In September 2016, the Human Rights Council adopted Resolution 33/25, which amended the mandate of the Expert Mechanism. The Expert Mechanism's new mandate is to provide the Human Rights Council with expertise and advice on the rights of Indigenous peoples as set out in the UNDRIP, and assist Member States, upon request, in achieving the ends of the Declaration through the promotion, protection, and fulfilment of the rights of Indigenous peoples.¹⁰¹ According to Kristen Carpenter, a current member of the Expert Mechanism, the new mandate sets forth three modalities for realizing the aims of the Declaration, namely: facilitating dialogue; providing technical advice; and coordinating among UN agencies (in response to requests by States and Indigenous peoples).¹⁰²

In February 2018, the Expert Mechanism received a request from the International Indian Treaty Council (IITC) to intervene in an advisory capacity in the case of repatriation of the Maaso Kova. In October 2018, the Expert Mechanism informed the IITC that they had accepted the request. The objectives of the Expert Mechanism were, firstly, to facilitate dialogue and provide technical advice regarding the repatriation of the Maaso Kova, and secondly to "provide technical expertise and capacity building regarding international repatriation more broadly,

⁹⁷ F. Lenzerini, *Cultural Identity*, p. 136.

⁹⁸ H. Keeler, op. cit., p. 794; C. Bell, G. Statt, Mookakin Cultural Society, *Repatriation and Heritage Protection: Reflections on the Kainai Experience*, in: C. Bell, V. Napoleon (eds.), *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives*, UBC Press, Vancouver 2008, p. 234.

⁹⁹ A. Xanthaki, *Indigenous Rights in International Law over the Last 10 Years and Future Developments*, "Melbourne Journal of International Law" 2009, Vol. 10(1), p. 28.

¹⁰⁰ B.M. Dhamai, *The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)*, in: D. Mamo (ed.), *The Indigenous World 2022*, The International Work Group for Indigenous Affairs, Copenhagen 2022, p. 730.

¹⁰¹ Expert Mechanism on the Rights of Indigenous Peoples, *Purpose of the Mandate*, <https://www.ohchr.org/en/hrc-subsiidiaries/expert-mechanism-on-indigenous-peoples> [accessed: 18.08.2022].

¹⁰² K. Carpenter, A. Tsykarev, op. cit., p. 120.

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toward meeting the aims of UNDRIP Articles 11, 12, and others, geared not only to the direct parties but also ICOM, UNESCO, WIPO, and others”.¹⁰³ In order to achieve these objectives, the Expert Mechanism informed Sweden that it intended to work on this request. In March 2019, the Expert Mechanism received a letter from the Director of the Swedish Museums of World Culture, which took the leadership in handling the request, setting out the Museum’s initial position thereon. Since that moment the Expert Mechanism organized five informal meetings with the parties involved, as well as an in-person meeting between representatives of the Ocho Pueblos of the Río Yaqui (Sonora, Mexico), the Pascua Yaqui Tribe (Arizona, United States), the IITC, and the leadership of the Swedish Museums of World Culture on 6 March 2020.¹⁰⁴

Before the engagement of the Expert Mechanism in the case, the Yaqui People, represented by the IITC, were negotiating with the Museum on their own and similarly as in the case of the G’psgolox, the first response of the Museum of Ethnography was to deny the claim.¹⁰⁵ In 2016, the Museum re-examined the case, still however concluding that “there is no ground for a return, neither on the basis of legislation, nor considering professional or scientific principles”.¹⁰⁶ According to the Museum, the object was legally acquired in a voluntary manner during a scientific expedition.¹⁰⁷

Because of the mediation by the Expert Mechanism, the Yaqui People were able to clarify that the 1930s period was one of forced relocation, imprisonment, and military conscription, in which the anthropologists’ acquisition of the Maaso Kova was itself evidence of the transgression of Yaqui laws regarding cultural property.¹⁰⁸ Moreover, according to the Yaqui laws, customs, and traditions, a consecrated Maaso Kova could not be purchased, gifted, or otherwise alienated to anyone other than a member of the Kolensias and women would not be allowed to possess or touch this item.¹⁰⁹ This broader context, as well as the qualification of the Maaso Kova as a ceremonial object under the UNDRIP, made it possible for the Museum to understand that the situation of the Yaqui People augmented the repatriation for “special ethical reasons”.¹¹⁰

One of the main concerns of the Museum had to do with representation of the Yaqui People in both Mexico and the United States, as the Museum did not wish to repatriate the item without assurances that it is returning it to the correct par-

¹⁰³ Expert Mechanism on the Rights of Indigenous People, *Technical Advisory Note...*, p. 4.

¹⁰⁴ *Ibidem*, pp. 4-5.

¹⁰⁵ *Ibidem*, p. 8.

¹⁰⁶ *Ibidem*, p. 9.

¹⁰⁷ *Ibidem*, p. 14.

¹⁰⁸ *Ibidem*, p. 10.

¹⁰⁹ *Ibidem*, p. 9.

¹¹⁰ *Ibidem*, p. 15.

ties.¹¹¹ This is a common concern regarding the repatriation of Indigenous peoples' cultural heritage, as there may be competing claims from different Indigenous communities. A similar concern involves the representation of Indigenous peoples during the ADR processes, however, according to Article 19 of the UNDRIP Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions.¹¹² Although it is impossible to eliminate the possibility of competing claims by different Indigenous communities, and they should be evaluated on a case-by-case basis, Indigenous peoples tend to support each other in their struggle for repatriation of cultural heritage.¹¹³ According to the Permanent Representative of Sweden to the United Nations in Geneva "the fact that there were several stakeholders involved, in two different countries, contributed initially to making respective mandates somewhat unclear",¹¹⁴ however, the Expert Mechanism's "qualified and skilled guidance throughout the process was crucial and highly appreciated by all Swedish parties involved".¹¹⁵ In the case of Maaso Kova, in order to facilitate the repatriation, in 2019 the Yaqui People decided to form a Maaso Kova Committee, composed entirely of members designated by the Traditional Authorities of the Ocho Pueblos, as well as committee members from the Pascua Yaqui. In 2020, the Committee issued a statement that: "The Maaso Kova must be returned as soon as possible directly into the hands of the designated representatives of the Kolensias from the Yaqui Pueblos. These Kolensias will need to decide among themselves, with no outside interference or intermediaries, where it should come home to finally be at rest".¹¹⁶ As a result, the Museum was assured that the Maaso Kova was to be repatriated to its rightful owners, while the final decision as to its placement was left for the Yaqui People themselves.

The role of the Expert Mechanism was not only to facilitate the dialogue between the parties, but also to provide a legal analysis of the repatriation claim. The Expert Mechanism concluded that the claim was coherent with Articles 11, 12, and 31 of the UNDRIP and that Article 12 affirms Indigenous peoples' right to the use and control of their ceremonial objects, such as the Maaso Kova, as well as the responsibility of States to enable the access and repatriation of ceremonial objects

¹¹¹ Ibidem, p. 12.

¹¹² UNDRIP, Art. 19.

¹¹³ S. Shields, *T'xwelatse Comes Home*, "The Seattle Times", 28 January 2007, <https://www.seattletimes.com/pacific-nw-magazine/txwelatse-comes-home/> [accessed: 18.08.2022].

¹¹⁴ A. Jardfelt, *Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), Statement on Country Engagement*, 7 July 2022, https://www.swedenabroad.se/sv/utlandsmyndigheter/fn-gen%C3%A8ve/aktuellt/statements/EMRIP_Sweden/ [accessed: 18.08.2022].

¹¹⁵ Ibidem.

¹¹⁶ Expert Mechanism on the Rights of Indigenous People, *Technical Advisory Note...*, p. 11.

in their possession through fair mechanisms developed in conjunction with the Indigenous peoples concerned. As underlined by the Expert Committee, Article 12(2) makes no reference to the circumstance under which artefacts were obtained, as it focuses on the right of Indigenous peoples to the use and control of their ceremonial objects and should be viewed as an encouragement to the Museum to support repatriation.¹¹⁷ This elucidation may foster future repatriation processes, as in many cases the abuse of the vulnerable situation of Indigenous peoples during the time of acquisition of an object is not seen as illegal in Western terms.

Thus first repatriation case in which the Expert Mechanism intervened in an advisory capacity was crowned with success on 3 June 2022, when the representatives of the Swedish and Mexican Governments, the Yaqui Traditional Authorities, and the Maaso Kova Committee signed the document authorizing the transfer of the Maaso Kova back to the Yaqui Nation. Moreover, the Maaso Kova will be accompanied by a collection of other cultural items, which were acquired in Mexico in the 1930s by the Swedish Museums of World Culture.¹¹⁸

In both of the cases examined herein, the use of ADR resulted in long-lasting relationships between the Indigenous peoples and the Swedish Museum.¹¹⁹ The engagement of the Expert Mechanism, however, positively accelerated the repatriation process between the Indigenous peoples and the Museum of Ethnography in Stockholm – from 15 years in the case of Haisla Nation to eight in the case of the Yaqui People (or even half of that time, considering that the Expert Mechanism agreed to work on the request only in 2018). Moreover, the negotiations were carried out in a culturally appropriate manner and allowed the Yaqui People to stay in control of the repatriation process, without dependency on action or inaction on the part of Mexico or the United States.

Conclusions

Repatriation of cultural property is a sensitive issue, and when it comes to Indigenous cultural property, the situation is usually particularly delicate. For Indigenous peoples, the importance of cultural heritage, understood broadly, usually goes beyond the view determined by mere property rights, playing an essential role in ensuring the preservation of Indigenous communities' cultural identity and their very cultural and physical survival.¹²⁰ As such, the restitution of cultural property

¹¹⁷ Ibidem, pp. 14-15.

¹¹⁸ International Indian Treaty Council, *An Historic Day in Stockholm, Sweden for the Yaqui Nation and the Cultural Rights of All Indigenous Peoples*, "Cultural Survival", 7 June 2022, <https://www.culturalsurvival.org/news/historic-day-stockholm-sweden-yaqui-nation-and-cultural-rights-all-indigenous-peoples> [accessed: 18.08.2022].

¹¹⁹ Expert Mechanism on the Rights of Indigenous People, *Technical Advisory Note...*, p. 12; S.R. Jessiman, op. cit., p. 380.

¹²⁰ F. Lenzerini, *Reparations...*, p. 345.

has become a pressing issue among Indigenous peoples worldwide¹²¹ and must be understood as part of Indigenous peoples' historical and current encounters with colonization, and its consequences.

The international cultural heritage law framework for repatriation, constituted by the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, does not provide any effective mechanism for the repatriation of Indigenous peoples' cultural property. Although ADR is a worthy solution as it allows non-legal interests and parties' perspectives to help shape the outcome of the dispute, Indigenous peoples are far too often left at the discretion of the behaviour of their negotiation partners. This, however, could be overcome by employing the Expert Mechanism, which can interpret UNDRIP and facilitate dialogue between the parties. The adoption of the UNDRIP strengthened the position of Indigenous peoples and led to the creation of the Expert Mechanism, whereby claims for repatriation of their cultural heritage are no longer to be set aside as merely "moral" in nature.¹²² In its report from 2020, the Expert Mechanism recommended the establishment "of an international indigenous repatriation review committee comprised of indigenous peoples, museum professionals, human rights experts and others to provide advice and assistance on these claims".¹²³ Even though such a review committee has not yet been established, the Expert Mechanism has already – due to its groundwork in the case of Maasa Kova – proven its potential to become an effective body to facilitate the repatriation of Indigenous peoples' cultural heritage.

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¹²¹ See K. Kuprecht, *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond*, Springer, Lucerne 2013.

¹²² See E. Campfens, op. cit., p. 137.

¹²³ Human Rights Council, *Repatriation of Ceremonial Objects...*, para. 90.

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