



UNIVERSITÉ
DE GENÈVE

FACULTÉ DE DROIT
Centre du droit de l'art



United Nations
Educational, Scientific and
Cultural Organization

In partnership with
UNESCO

Anne Laure Bandle, Alessandro Chechi, Marc-André Renold

March 2012

Case 17 Tasmanian Human Remains – Tasmanian Aboriginal Centre and Natural History Museum London

Tasmanian Aboriginal Centre – Natural History Museum London – Human remains/restes humains – Colonialism/colonialisme – Judicial claim/action en justice – Mediation/médiation – Settlement agreement/accord transactionnel – Deaccession – Conditional restitution/restitution sous condition

Since the 1980s, the Tasmanian Aboriginal Centre has made several requests to the Londoner Natural History Museum for the return of 17 Aboriginal human remains held in the collection of the Museum. When their dispute was brought to the Londoner High Court, the court's judge suggested proceeding by mediation. The dispute was ultimately settled by a mediated agreement, which provided for the dismissal of the legal proceedings and for the repatriation of the remains to Tasmania.

I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.

ART-LAW CENTER – UNIVERSITY OF GENEVA

PLATFORM ARTHEMIS

art-adr@unige.ch – <https://unige.ch/art-adr>

This material is copyright protected.

I. Chronology

Colonialism

- **Before 1850:** Collection of human remains by **George Augustus Robinson** and transfer of collected remains from Tasmanian burial sites to the **Natural History Museum in London (NHM)**.¹ The NHM's collection counts 19,950 human remains, most of which originated from the UK, but also from other parts of the world.²
- **From the 1980s onwards:** **Several requests by the Tasmanian Aboriginal Centre (TAC) of Australia** for the return of the human remains of 17 Tasmanian Aboriginals, including a complete skeleton, held in the NHM. These were either bought by or donated to the NHM.³ The NHM refuses the requests.⁴
- **4 July 2000: Joint Statement by Prime Minister Tony Blair (United Kingdom) and Prime Minister John Howard (Australia)** on the Repatriation of Human Remains.⁵ Both governments declare to increase efforts in order to facilitate the repatriation of human remains to Australian indigenous communities and to “endorse the repatriation of indigenous human remains wherever possible (and appropriate) from both private and public collections”.⁶ The statement also mentions the efforts made by the **NHM**, which **catalogued the 450 human remains** held in its collection and shared the information with the Australian government.
- **July 2001:** Establishment of the “**Ministerial Working Group on Human Remains**” (**WGHR**) by the British government’s **Department for Culture, Media and Sport (DCMS)**. The group examines the current legal status of human remains held within publicly funded galleries and museums in the UK.
- **November 2003:** Report of the Working Group on Human Remains.
- **2004:** Amendment to the **UK Human Tissue Act (HTA)** arranging for the voluntary return of human remains held in the collections of museums in the United Kingdom (section 27: consent principle).
- **2005:** At the National Museums Directors’ Conference, the Museum, Libraries and Archives Council together with the Museums Association welcomes and implements a “**Guidance for the Care of Human Remains in Museums**” drafted by the DCMS. The idea of establishing

¹ See Steven Gallagher, “Museums and the Return of Human Remains: An Equitable Solution?,” *International Journal of Cultural Property* 17 (2010): 69.

² See Lyndell V. Prott, ed., “Return of the Remains of Seventeen Tasmanian Aboriginals,” in *Witnesses to History, A Compendium of Documents and Writings on the Return of Cultural Objects* (UNESCO: Paris, 2009): 401.

³ Chris Davies and Kate Galloway, “The Story of Seventeen Tasmanians: the Tasmanian Aboriginal Centre and Repatriation from the Natural History Museum,” *New Law Review* 11 (2008-9): 147, accessed July 15, 2011, http://eprints.jcu.edu.au/8892/1/8892_Davies_and_Galloway_2009.pdf.

⁴ See Prott, “Return of the Remains of Seventeen Tasmanian Aboriginals,” 401.

⁵ John Howard, Media Release, “Joint Statement with Tony Blair on Aboriginal Remains,” July 4, 2000, accessed July 15, 2011, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/FC026/upload_binary/fc0261.pdf;fileType%3Dapplication%2Fpdf.

⁶ Ibid.

- a UK Human Remains Advisory Panel was rejected on the grounds of being “too bureaucratic”.⁷
- **17 November 2006:** The NHM agrees to permanently return the Aboriginal Remains to Tasmania “based on advice from its independent Human Remains Advisory Panel [convened by NHM Trustees] and DCMS guidelines”⁸ **after commencing with several invasive scientific tests.** These would be conducted between January and March 2007 and include extractions of DNA, chemical analyses of slivers of bone, making scans and photographs of the human remains.⁹ The **TAC protests** about these examinations as they violate Aboriginal customary rights.
 - The TAC attempts to prevent the planned examinations by the NHM by filing an application for an injunction in the Administrative jurisdiction of the **Londoner High Court**, based on advice from the NHM Human Remains Advisory Panel and DCMS guidelines.
 - **9 February 2007:** The Supreme Court of Tasmania Decision responds to a second application filed by the TAC urgently seeking to prevent the start of scientific investigations on the remains by the NHM.¹⁰
 - **11 February 2007:** The High Court Queen’s Bench Division grants an interim injunction in favour of the TAC “to stop any further interference of any kind with the remains” by the NHM.¹¹
 - **18 February 2007:** The NHM in turn seeks the discharge of the TAC’s application for injunction and requests a £ 100,000 security deposit by the TAC to cover eventual legal fees in the main action.¹² **The High Court**, pending its judgment on the main case, **granted partial injunctive relief** in so far as invasive examination techniques are involved, however the court did allow non-invasive techniques such as x-ray or photography.¹³ In addition, it ordered a reduced amount for the security deposit of £ 20,000.¹⁴
 - **24 April 2007: Repatriation of 4** out of 17 human **remains** to Tasmania. Negotiations for the remaining 13 ones begin.
 - **May 2007: 3-day-mediation session** during which the TAC and the NHM jointly determine the extent of permissible scientific investigations on the human remains before their return.

⁷ Norman Palmer, “Human Remains and Their Restitution to Indigenous Communities: The Approach in England,” Lecture at the *Conference on the Restitution of Human Remains*, jointly held by the Foundation for Art-Law and the Art-Law Centre, Geneva, November 9, 2010.

⁸ Natural History Museum London Press Release, “Natural History Museum Offers an Alternative Dispute Resolution to the Tasmanian Aboriginal Centre (TAC),” 2007, accessed July 15, 2011, http://www.nhm.ac.uk/about-us/press-office/press-releases/2007/press_release_10853.html. According to the NHM Policy on Human Remains 2010, an “[a] human remains advisory panel may be convened by Trustees when advice is required on particular requests. Such a panel will then consider relevant information available and will advise Trustees on appropriate options for a decision. It may make a recommendation to the Trustees. A panel may also be asked to brief Trustees on other relevant issues that may from time to time arise.” (policy guideline no. 43).

⁹ See Gallagher, “Museums and the Return of Human Remains,” 69.

¹⁰ *In re An Application by the Tasmanian Aboriginal Centre Inc*, Supreme Court of Tasmania, [2007] TASSC 5 (February 9, 2007).

¹¹ Prott, “Return of the Remains of Seventeen Tasmanian Aboriginals,” 402.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

- **11 May 2007:** Official announcement of the **reached agreement.**
- **14 May 2007:** **Return of the human remains to Tasmania.**

II. Dispute Resolution Process

Judicial claim – Mediation – Settlement agreement

- The NHM Trustees' initial proposal for a return after scientific testing aimed to strike a balance between what the Trustees considered being “two very different opinions of what is the right thing to do. On the one hand, the NHM considered returning the remains to the country of origin; on the other using this invaluable and unique resource for scientific research”.¹⁵ The Trustees were determined to extract DNA samples from the remains as these “represent a human population from a time when Tasmania was isolated from the rest of the world and this scientific information gathered from them could enable future generations to understand more about how their ancestors lived, where they came from and ultimately provide a fascinating chapter in the story of what it means to be human”.¹⁶ However, the Trustees acknowledged that the remains were wrongfully taken from the Tasmanian Aboriginals, thus creating a basis for their return.
- In view of the lengthy trial and the mounting legal costs, the NHM Board of Trustees agreed to proceed by means of mediation as suggested by the judge of the High Court.¹⁷ Each of the parties appointed a mediator who jointly tried to lead the parties to reach an agreement by identifying their respective interests.¹⁸ The museum pursued scientific interests, considering data collection and the preservation of genetic material to be fundamental for future research.¹⁹ According to Tasmanian traditions, the aboriginals on the other hand wished for the remains to be preserved and did not want “any physical interference with the remains and no future desecrations”²⁰. Ultimately, the mediator succeeded in convincing the parties to agree to a mutually acceptable compromise. The Aboriginals acknowledged the importance for the NHM to retain the DNA which been collected so far and the NHM scientists in turn agreed that the remains and all pertinent documentation should be vested in a Tasmanian medical facility.²¹

¹⁵ Natural History Museum London Press Release, “Natural History Museum Offers an Alternative Dispute Resolution to the Tasmanian Aboriginal Centre (TAC).”

¹⁶ Natural History Museum London Press Release, “Natural History Museum Offers an Alternative Dispute Resolution to the Tasmanian Aboriginal Centre (TAC).”

¹⁷ See Marie Cornu and Marc-André Renold, “New Developments in the Restitution of Cultural Property, Alternative Means of Dispute Resolution,” *International Journal of Cultural Property* 17 (2010): 13.

¹⁸ Ibid.

¹⁹ See Prott, “Return of the Remains of Seventeen Tasmanian Aboriginals,” 402; Alessandro Chechi, “The Settlement of International Cultural Heritage Disputes: Towards a Lex Culturalis?” (PhD Diss., European University of Law, 2011), 229 (to be published).

²⁰ Chechi, “Towards a Lex Culturalis?”, 229.

²¹ Ibid; See also Prott, “Return of the Remains of Seventeen Tasmanian Aboriginals,” 402.

III. Legal Issues

Deaccession

- The major issues at stake were (1) the question of a property right on the human remains and (2) the clash between NHM's property right on the remains and TAC's determination to protect the "Aboriginal cultural and spiritual belief".²²
- Anti-disposal provisions in museum statutes have barred British museums from "**de-accessioning**" parts of their collections, including human remains.²³ Under common law, human remains cannot be subject to ownership rights ("0-property rule") except where the object has been transformed to such extent that it may be considered as an artwork.²⁴ However, recent legal developments do recognize the importance of consent of indigenous communities when dealing with their ancestors' human remains.
- The **United Nations Declaration on the Rights of Indigenous Peoples (DRIPs) 2007**²⁵ explicitly holds that "Indigenous peoples have the right to practise and revitalize their cultural traditions and customs" and that "States shall provide redress through 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" (art. 11). The Declaration prescribes the right of Indigenous peoples "to the repatriation of their human remains" (art. 12).
- In the United Kingdom, the **WGHR** has recommended an amendment to the national museums' statutes "to empower national museums to relinquish human remains".²⁶ Also, non-national museums "shall be given a power to relinquish human remains in so far as this does not already exist".²⁷ Interestingly, however, the Working Group did not call for the mandatory return of human remains by means of legislation. Instead, the "situation should be kept under review in order to take account of future changes in domestic law and treaty obligations and other appropriate conditions".²⁸

²² Davies and Galloway, "The Story of Seventeen Tasmanians," 143.

²³ Cf. *Attorney-General v. The Trustees of the British Museum*, Chancery Division **Sir Andrew Morritt VC, [2005] EWHC 1089 (Ch), (2005) Ch 397**.

²⁴ Norman Palmer, "Human Remains and Their Restitution to Indigenous Communities: The Approach in England" Lecture at the *Conference on the Restitution of Human Remains*, jointly held by the Foundation for Art-Law and the Art-Law Centre, Geneva, November 9, 2010.

²⁵ United Nations Declaration on the Rights of Indigenous Peoples (DRIPs), adopted by the General Assembly 13 September 2007.

²⁶ Working Group on Human Remains, Report on Human Remains (November 2003), 199. Accessed July 15, 2011, http://webarchive.nationalarchives.gov.uk/http://www.culture.gov.uk/reference_library/publications/4553.aspx.

²⁷ Ibid.

²⁸ Ibid.

IV. Adopted Solution

Conditional restitution

- The agreement between NHM and TAC provides for the return of the Aboriginals human remains accompanied by TAC's delegates.
- In addition to the return, some material shall "be preserved in Tasmania under the joint control of both the TAC and the Museum, pending further discussions"²⁹ instead of being buried.³⁰
- As agreed, a handover ceremony was held at the Museum on Friday, 11 May 2007.

V. Comment

- Interestingly, there was even a divide within the Tasmanian community between those favouring the return of the 17 Aboriginals and those who considered the money and effort invested in the dispute to be better spent for other matters.³¹
- The settlement was reached 20 years after the first requests made by the TAC in the 1980s. At that time, English law did not enable the NHM to concede to the Tasmanian claim. It was merely with the implementation of the Human Tissue Act that the museum was able to consider the return of the remains.

VI. Sources

a. Bibliography

- Chechi, Alessandro. "The Settlement of International Cultural Heritage Disputes: Towards a Lex Culturalis?" PhD diss., European University of Law, 2011 (to be published).
- Cornu, Marie, and Marc-André Renold. "New Developments in the Restitution of Cultural Property, Alternative Means of Dispute Resolution." *International Journal of Cultural Property* 17 (2010): 1–31.
- Davies, Chris, and Kate Galloway. "The Story of Seventeen Tasmanians: the Tasmanian Aboriginal Centre and Repatriation from the Natural History Museum." *New Law Review* 11 (2008-9): 143 – 165. Accessed July 15, 2011, http://eprints.jcu.edu.au/8892/1/8892_Davies_and_Galloway_2009.pdf.
- Gallagher, Steven. "Museums and the Return of Human Remains: An Equitable Solution?" *International Journal of Cultural Property* 17 (2010): 65 – 86.

²⁹ Natural History Museum London Press Release, "Agreement on Aboriginal Remains Reached," 11 May 2011, accessed July 15, 2011, http://www.nhm.ac.uk/print-version/?p=http://www.nhm.ac.uk/about-us/news/2007/may/news_11682.html.

³⁰ Cf. Martin Bailey, "Natural History Museum Returns Aboriginal Remains," *The Art Newspaper* 181 (June 1, 2007) 1.

³¹ Davies and Galloway, "The Story of Seventeen Tasmanians," 143.

- Prott, Lyndell V., ed. “Return of the Remains of Seventeen Tasmanian Aboriginals.” In *Witnesses to History, A Compendium of Documents and Writings on the Return of Cultural Objects*, 401 – 407. UNESCO: Paris, 2009.
- Smith, Laurajane. “The Repatriation of Human Remains – Problem or Opportunity?” *Antiquity* Vol. 78 No. 300 (June 2004): 404 – 413.

b. Court decisions

- *In re An Application by the Tasmanian Aboriginal Centre Inc*, Supreme Court of Tasmania, [2007] TASSC 5 (9 February 2007).
- *Attorney-General v. The Trustees of the British Museum*, **Chancery Division Sir Andrew Morritt VC, [2005] EWHC 1089 (Ch), (2005) Ch 397.**

c. Legislation

- United Nations Declaration on the Rights of Indigenous Peoples (DRIPS), adopted by the General Assembly 13 September 2007.
- UK Human Tissue Act 2004 (HTA).

d. Documents

- Guidance for the Care of Human Remains in Museums, Department of Culture, Media and Sport, October 2005.
- Palmer, Norman. “Human Remains and Their Restitution to Indigenous Communities: The Approach in England.” Lecture at the *Conference on the Restitution of Human Remains*, jointly held by the Foundation for Art-Law and the Art-Law Centre, Geneva, November 9, 2010.
- Working Group on Human Remains, Report on Human Remains (published by the DCMS 14 November 2003). Accessed July 15, 2011, http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/reference_library/publications/4553.aspx.
- Natural History Museum (NHM) Policy on Human Remains 2010. Accessed September 7, 2011, http://www.nhm.ac.uk/resources-rx/files/110523nhm_human-remains-policy-2010-update-final-98153.pdf.

e. Media

- Bailey, Martin. "Natural History Museum Returns Aboriginal Remains." *The Art Newspaper* 181 (June 1, 2007): 1.
- Natural History Museum London Press Release. "Agreement on Aboriginal Remains Reached." May 11, 2007. Accessed July 15, 2011, http://www.nhm.ac.uk/print-version/?p=http://www.nhm.ac.uk/about-us/news/2007/may/news_11682.html.
- Tasmanian Aboriginal Centre (TAC) Press Release. "Victory for Aborigines against UK Museum." May, 11 2007. Accessed July 15, 2011, <http://www.firstpeoplesrights.org/wordpress/wp-content/uploads/2007/12/Tasmanian%20Aborigines%20Victory.pdf.pdf>.
- Natural History Museum London Press Release. "Natural History Museum Offers an Alternative Dispute Resolution to the Tasmanian Aboriginal Centre (TAC)." 2007. Accessed July 15, 2011, http://www.nhm.ac.uk/about-us/press-office/press-releases/2007/press_release_10853.html.
- Howard, John. Media Release. "Joint Statement with Tony Blair on Aboriginal Remains." July 4, 2000. Accessed July 15, 2011, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/FC026/upload_binary/fc0261.pdf;fileType%3Dapplication%2Fpdf.