



**National Heritage Council**  
S O U T H A F R I C A

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**Position Paper on a proposed  
Policy Framework on the Repatriation of Heritage Resources**

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The NHC would appreciate any comment and inputs regarding the content of the document. Please contact Dr Helene Vollgraaff by 25 March 2011 in this regard.

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## Preamble

The position paper proposes principles and guidelines for the repatriation of heritage resources. It therefore defines stakeholders, provides ethical guidelines and principles of collecting. The position paper guides the identification of cases for repatriation, processes for repatriation as well as the continued conservation of repatriated heritage resources.

There is some discomfort in developing policy proposals that includes both human remains and objects. The position taken in this paper is that neither historical remains nor the remains of victims of political conflict can or should be regarded as heritage objects. In the case of the latter especially, they are associated with immediate living relatives. Although the graves and burial sites of these victims are defined as heritage resources in the National Heritage Resource Act of 1999, full cognisance is taken of the distinctive nature of human remains associated with these burial sites. While the graves themselves may be sites of commemoration and memorialisation, it is argued that the remains therein are not heritage items. Rather, it is argued that they belong to surviving family members.

## Accronyms & Abbreviations

CARA	Criminal Assets Recovery Account
DAC	Department of Arts and Culture
DIRCO	Department of International Relations and Cooperation
DOD&MV	Department of Defence and Military Veterans
DOJ &CD	Department of Justice and Constitutional Development
ICOM	International Council of Museums
INTERPOL	International Criminal Police Organisation
MK	Umkhonto we Sizwe
MPTT	Missing Persons Task Team, National Prosecuting Authority
MRC	Medical Research Council
NHC	National Heritage Council
NHCA	National Heritage Council Act, Act 11 of 1999
NHRA	National Heritage Resources Act, Act 25 of 1999
NPA	National Prosecuting Authority
PHRA	Provincial Heritage Resource Authority
PNRUA	Promotion of National Unity and Reconciliation Act, Act 34 of 1995
SAHRA	South African Heritage Resource Agency
SAMA	South African Museums Association
SAPS	South African Police Service
TRC	Truth and Reconciliation Commission
TRU	Truth and Reconciliation Unit
UN	United Nations
UNESCO	United Nations Education, Scientific and Cultural Organisation

## Definitions

### Defining human remains, heritage objects and collections

Burial site means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited. The burial site includes the contents, headstones or other marker of such a place and any other structure on or associated with such place.

Human remains refer to all forms of material or remains of anatomically modern humans including:

- Osteological material (whole or part of skeletons, individual bones or fragments of bones, teeth)
- Soft tissue including organs, skin, hair, nail, etc (preserved or waxed or dried/mummified)
- Slide preparations of human tissue
- Artefacts made wholly or largely from any of the above.

Human remains exclude fossils and sub-fossils.

Movable heritage objects are defined in the NHRA (Act no 25 of 1999) as:

- Objects recovered from the soil or waters of South Africa, including archaeological and palaeontological objects and material, meteorites and rare geological specimens
- Objects to which oral traditions are attached or which are associated with living heritage
- Ethnographic art and objects
- Military objects
- Objects of decorative or fine art
- Objects of scientific or technological interest
- Books, record, documents, photographic positives and negatives, graphic, film or video material or sound recordings, excluding those that are public records as defined in section 1 (xiv) of the National Archives of South Act, 1996 (Act no 43 of 1996)

Heritage objects refer to movable heritage objects as defined in the NHRA (1999) as well as elements of artist or historical monuments or archaeological sites which have been dismembered, but exclude human remains as defined in this policy position paper.

Public collections consist of a group of inventoried or otherwise identified cultural objects owned by the state or government agency aided by a national, provincial or local department or authority, a religious institution or an institution that has been established for essentially cultural, educational or scientific purposes and is generally recognized as serving the public interest.

Cultural significance means aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance.

### Defining communities and bona fide interests

Bona fide interest refers to a person or persons of a cultural group considered to be either genealogical and/or cultural descendants. Claims of a genealogical or cultural relationship have to be supported by a preponderance of evidence based upon geographical, kinship, biological,

archaeological, anthropological, linguistic, folkloric, oral traditional, historical or other relevant information or expert opinion to be accepted as a *bona fide* interest.

Relatives and genealogical descendents refer to biological, social and adoptive kin or family, i.e. persons who define themselves by a demonstrable social or biological relation to the deceased which they express as a form of kinship. The tie may be demonstrated through birth, marriage, adoption, family membership, or some other arrangement through which the parties share a close identity of a kinship kind, either within or across generations.

Cultural descendents refer to persons of the same cultural group who are the common descendents of a historical culture, even though they may not have or recognise family ties. Such individuals are bound together through the distinctive nature of their practices and values, which may include a name (or set of names) or language or tradition or heritage, or other common reference points. These reference points may be of variable time depth, but inheriting and practicing them gives persons a common identity within the group and links current and previous generations.

Interested and affected parties refers to individuals or groups of people who submitted a claim regarding the repatriation of human remains, archival documents and heritage objects or who request to be included in negotiations and processes regarding a repatriation claim or a reburial.

Source communities and communities of origin refer to communities from which human remains and/or movable heritage objects originated.

### **Defining processes**

Consultation refers to dialogue with stakeholders, for example genealogical descendents, cultural descendents and source communities with the intention to reach consensus. With regards to victims of political conflict it may include political parties, victim and veteran associations.

Repatriation refers to the return of human remains, archival documents and heritage objects to their country, source community or place of origin. In many policies, a distinction is made between repatriation of human remains while the term restitution is used in relation to heritage objects. In this position paper, the term repatriation has been used to include the concepts of restitution and return with the exception of cases where documents are quoted or analysed that use the term "restitution", for example the National Heritage Resources Act of 1999.

Symbolic repatriation is a process of return of human remains, archival documents and heritage objects to their country, source community or place of origin that does not involve the physical relocation of such remains or heritage resources, but some symbolic or ceremonial process of return that is meaningful and acceptable to the interested and affected parties.

### **Defining curatorial processes and treatments**

Ethical collecting of human remains refers firstly to human remains excavated as part of a legitimate archaeological project and secondly to taking custody of human remains that were accidentally discovered on private or public property and/or a legitimate intervention at the request of a community in areas where burial places are at risk.



Unethical collecting of human remains refers to collecting human remains solely for the purposes of racial study and collecting, without appropriate consent, human remains from recent graves of individuals who were known in life, or were from known communities.

Ethical collecting of archival documents and movable heritage objects refer to the acquisition of such documents and movable heritage objects after following reasonable verification processes to ensure that their recovery does not involve unauthorised or unscientific fieldwork, or intentional destruction or damage of monuments, archaeological or geological sites, or of species and natural habitats, or have been subject to illicit or illegal trade.

Destructive analysis of human remains refers to analysis that results in permanent damage to bone or tissue

Non-destructive analysis of human remains refers to analysis such as metrical or morphological analysis that does not alter or damage bone or tissue

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## 1. Introduction

In its foundational act (Act 11 of 1999), the National Heritage Council (NHC) has been mandated to advise the Minister of Arts and Culture regarding heritage policy. In regards with repatriation and restitution, this mandate is shared with the South African Heritage Resources Agency (SAHRA). These recommendations have been informed by research undertaken by the National Heritage Council regarding similar policy frameworks adopted by international and South African heritage institutions as well as inputs received through an extensive consultation process that included both heritage professionals and interested and affected parties.

The position paper on a proposed Policy Framework on Repatriation of Heritage Resources aims to address three related, but distinct issues, namely:

- The Repatriation human remains held in public collections.
- The Repatriation of heritage objects, including archival documents.
- The Repatriation of the bodies of victims of political conflict.

In the absence of a national policy on repatriation of heritage resources, public institutions have developed their own policies and managed claims on an *ad hoc* basis. In addition, non-governmental organisations are also undertaking repatriation projects. A policy framework will therefore contribute towards coordination and alignment of objectives and tactics within the heritage sector by providing guidelines to follow. A policy framework on repatriation of heritage resources has to address more than mere procedures. This position paper also aims to provide a philosophical and ethical framework as well as setting professional standards to guide heritage practice.

With regards to the repatriation of victims of political conflict, the policy development process was initiated by SAHRA in 2005. In 2006, arising out of the work of the Missing Persons Task Team (MPTT) and the the Truth and Reconciliation Unit (TRU), the then Minister of Justice and Constitutional Development initiated a process to develop an exhumation policy. SAHRA and the MPTT participated in the work of the committee established by the Minister and jointly submitted a draft policy for the repatriation of human remains, titled *Location, Exhumation, Identification and Memorialisation: Tracing the casualties of South Africa's political conflict*. However, the Department of Justice and Constitutional Development (DOJ&CD) subsequently proceeded with a more restricted mandate relating only to cases from the work of the Truth and Reconciliation Commission (TRC) and the committee was disbanded.

A new and wider policy research process was initiated in March 2008 with a conference on Repatriation and Restitution organised by the NHC in partnership with the Department of Arts and Culture (DAC) and SAHRA. Following the conference, a National Coordinating Committee was appointed to guide the policy development process. The composition of the National Coordinating Team includes representatives of government departments and agencies that deals with repatriation. The content of the discussion document has been developed internally by the NHC with input from the National Coordinating Team as well as experts consulted. A revised draft of the document has been completed after being workshopped by a focus group consisting of members of the National Coordinating Team, the Heritage Reference Group of the NHC and NHC Council members.

The position paper has been refined further with comments and input from a policy development workshop that took place on 11 February 2010 at Midrand Conference Centre. The policy development workshop was attended by 76 delegates and consisted of facilitated discussion groups.

## 2. Towards a policy concept

The repatriation experience is one that evokes many emotions and is closely associated with the transformation of the international and cultural landscape. It forms part of a broader debate on reconciliation, nation-building and redress.

Internationally, previously colonised countries are claiming their heritage from colonial powers who obtained ownership through colonial power structures, economic inequality and sometimes, downright theft and looting. This awareness is gaining momentum in South Africa with communities becoming increasingly assertive about their cultural and intellectual rights that includes a demand for the return of heritage resources, including human remains.

Within the decolonization discourse the continued “ownership” of human remains and heritage objects is a continuation of colonization. From the indigenous right’s perspective, the repatriation of human remains and associated objects followed by burial ceremonies relevant to the community, is a duty of descendants to their ancestors to ensure a culturally appropriate rite of passage. Within the human right’s debate, the community’s right to treat its dead in a culturally appropriate way is a basic human right which may not be violated under any circumstances. Where there is evidence that this right has been violated, remedial steps have to be taken. From a humanitarian perspective, all people have a right to dignity – a right enshrined in the Constitution of South Africa. The right to dignity is interpreted within international humanitarian law to include a right of communities and descendants to know the fate of a person, once conflict ceases. According to the Fourth Geneva Convention (1949) the right to a culturally appropriate burial is a basic human right. International humanitarian law thus requires active steps to ensure that the whereabouts of victims of conflict are established and that the remains of such a person are repatriated to his/her community or descendants.

The debate on repatriation of human remains in public collections, in particular, is heated. However, much international literature on this debate is limited to the return of human remains of indigenous communities, especially Australian Aborigines and Torres Strait Islanders as well as Maori claims against United Kingdom, Australian and New Zealand Museums and Native American claims against United States and Canadian Museums. Claims for the repatriation of human remains include the restitution of funerary and associated objects.

The indigenous rights debate has been given impetus by the United Nations Declaration on the Rights of Indigenous Peoples, 2007. According to:

- Article 11(1): Indigenous peoples have the right to practise 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, visual and performing arts and literature.
- Article 11(2): 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.
- Article 12 (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 use and control of their ceremonial objects; and the right to the repatriation of their human remains.

- Article 12 (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.

In this paper, cognisance is taken of the mutually supportive human rights and indigenous rights approaches towards the deceased. The argument for repatriation is not only the restoration of personhood, but a claim for the restoration of dignity and the right to a culturally appropriate burial. Human remains in public collections have been collected ethically and unethically. Unethically collected human remains consist disproportionately of indigenous African people reflecting the unequal access to economic means, medical treatment, political power and human rights in South Africa before 1994. Therefore, repatriation of human remains is part of a process to acknowledge inequality and denial of basic human rights for the deceased and to conduct remedial actions to restore the rights of the people involved.

Linked to the repatriation of human remains in public collections is the repatriation of the remains of victims of conflict. In the case of victims of conflict, the repatriation process is not limited to known human remains, but includes a process to find and positively identify victims who went missing as a consequence of political conflict. The remains of victims of conflict in this case are known individuals with living friends, colleagues and descendents whose very personal feelings and emotional and psychological needs have to be considered with the repatriation of the bodies of these victims. The identification and repatriation of the bodies of victims of the liberation struggle is part of a process to acknowledge culpability and wrongdoing in the past as well as the acknowledgement of the role people played in the liberation struggle. This debate is framed within that of international humanitarian law.

The repatriation of heritage objects tends to focus on the repatriation of objects that left the country of origin illegally, for example due to theft and looting, as well as the return of iconic objects removed by a colonizing power or as an act of war. Again, arguments rest on a nation's right to access and enjoyment of its cultural property. In South Africa, some art works have been taken out of the country with the objective to be returned to a post-Apartheid South Africa. Many works were taken out of the country as their value was not recognised by South African art institutions of the time.

The objective of the position paper is to guide the approach, ethics and professional standards that frame decisions regarding the relationship between communities and heritage resources and the role of public institutions in facilitating this relationship.

Throughout this document, processes and procedures will be proposed that provide frameworks for discussion and negotiation between the relevant government authority, heritage institution and community representatives. This approach acknowledges that circumstances differ and should be addressed on a case by case basis. However, the principle of community access to information and to be included in the decision-making process is unnegotiable.

The position paper provides guidelines regarding South African heritage resources within a context of international, national and local significance. Throughout this document, it is aimed to find a balance between the claims of local communities, of South Africans as a nation and South Africans a part of humanity. Finally, as heritage in its essence is about conservation and building bridges between past and future generations, proposals in this document also aim to consider the interests of future generations.

Furthermore the position paper considered the legacy of inequality and restricted access to heritage resources and the decision-making bodies of the institutions that manage the resources. This includes the alienation of communities from heritage resources through academic research and curatorial standards. The aim of the document is not to negate the importance of academic research and curatorial standards, but rather to encourage researchers and heritage professionals to communicate with and engage communities regarding their work. Knowledge is empowering to the knowledge holder while at the same time, disempowering and alienating for those excluded from that knowledge.

Although South Africa can learn much from the international debate regarding repatriation and restitution, it has to address these issues within its own context. For example, the international debate is quiet regarding the following issues that are of importance to South Africa:

- The repatriation of human remains of victims of political conflict who died outside the borders of the country;
- Restitution and return of archival and documentary heritage; and
- Return of iconic artworks which have been obtained in a legal fashion by their current owners.

Repatriation in the South African context is part of the healing process in post-Apartheid South Africa. Firstly, the remains of the victims of political conflict need to be returned to their families as part of the process of healing, reconciliation and restitution in the country. The debate around repatriation of human remains in public collections, also include an acknowledgement of inequality and an abuse of power in South Africa and should inform the transformation of heritage practice in the country. Lastly, the repatriation of heritage objects, including archival records, is informed by post-Apartheid South Africa taking its rightful position in cultural politics and asserting its right to hold and care for its cultural property. It is also an expression of an appropriate evaluation of the work of its neglected artists.

### **3. Legislative review and institutional mandates**

Repatriation currently falls into the ambit of various departments and government agencies. In some cases the different government agencies have been mandated to deal with the same issues while there are gaps in the legislation regarding other aspects. For the sake of simplicity these are dealt with separately.

The position taken in this paper on the roles of state departments and agencies is that existing structures and mandates should be honoured. In other words, the proposed processes can be implemented easily within the framework of the *status quo*. This include proposals made in the Cultural Laws Amendment Bill which is in an advance stage of consultation and is expected to be tabled in the Parliament of South Africa in 2011.

#### **3.1 Historical/archaeological human remains**

Section 13(2)(a)(iv) of the National Heritage Resources Act (Act 25 of 1999) includes providing advise regarding “the repatriation of heritage resources which have been removed from South Africa and which SAHRA considers to be significant as part of the national estate” amongst the responsibilities of SAHRA.

Section 41 of the same act makes provision for restitution of movable heritage. Section 41 reads:

- 1) “When a community or body with a *bona fide* interest makes a claim for the restitution of a movable heritage resource which is part of the national estate and is held by or

- curated in a publicly funded institution, the institution concerned must enter into a process of negotiation with the claimants regarding the future of the resource.
- 2) The Minister may make regulations regarding the establishment of *bona fide* interest in terms of subsection (1) and the conditions under which such claims may be made.
  - 3) In the absence of an agreement on a heritage resource which is subject of negotiations in terms of subsection (1), the claimants or the institution concerned may appeal to the Minister, who must, with due regard to subsection 5(4) and in a spirit of compromise –
    - a) Mediate between the parties concerned with the aim of finding a mutually satisfactory solution; and
    - b) in the absence of agreement between the parties concerned, make a final decision on the future of the resource, including any conditions necessary to ensure its safety, the conditions of access of the claimants or the institution or any other interested party to the resource, or any other appropriate conditions.”

Section 41 is limited to the restitution of “movable heritage” in public institutions only. No explicit provision has been made for the repatriation of human remains although the definition of “movable heritage” could be read to include human remains. However, including human remains under the definition of “movable heritage” conflicts with current ethical and philosophical standards and practice regarding human remains. According to current ethical and professional standards, human remains cannot be owned by a person or institution and human remains in public collections should be excluded from provisions such as Section 10 of the Cultural Institutions Act, No 119 of 1998.

According to the Cultural Institutions Act (1998) collections of national museums may only be alienated with the approval of the Minister of Arts and Culture. However, these collections are defined as consisting of :

- a. “any specimen, collection piece, collection or other movable property which
  - i. Belongs, has been given or has been bequeathed to the Government or to the Republic or its inhabitants; or
  - ii. Was bequeathed on condition that it be for the use or benefit of the Republic and its inhabitants or any section of its inhabitants; or
- b. Any portion of that moveable property, under the care and management of any declared institution, unless the donor or testator has made other provision for the care thereof.”

Alienation of collections in provincial museums is subject to similar provisions in provincial museum ordinances. Many of these ordinances still date to the pre-1994 period and have not been replaced by Provincial Museum Acts.

Further, taking into account the fact that human remains are, in the first place, the physical remains of deceased human beings, and not objects, different ethical concerns are at play. In this regard, cognisance should be taken of the Medical Research Council’s ethical standards for research on humans. The NHRA enforces a requirement to undertake concerted efforts to identify and consult with interested and affected communities.

The handling, storage and transport of all human remains – archaeological or recent remains – are subject to the Graves and Dead Bodies Ordinance (Ord 7 of 1925 – re-instituted by Proclamation 109 of 17 June 1994), the Exhumations Ordinance (Ord 12 of 1980) as well as the Human Tissues Act (Act 65 of 1983 as amended) or the National Health Act (Act 61 of 2003). The Health Act did not fully replace all

sections of the Human Tissues Act and therefore the two acts should be read in conjunction. In addition, graves and human remains in municipal cemeteries are regulated by municipal by-laws.

Permission to excavate/exhume and transport human remains is a lengthy process that, in addition to community consultation, includes permission and/or permits from various authorities such as:

- SAHRA
- SANParks of the graves or burials are in national parks
- Landowner
- Premier of the Province
- Permission of the local authority or Traditional Authority
- South African Police Services.

Bodies may be handled, transported or stored by either a certified funeral undertaker or an institution with a similar legal status and facilities only. South African medical schools legally have this status.

A second shortcoming of Section 41 is the lack of clarity regarding *bona fide* interest. The Minister of Arts and Culture has the power to make regulations to define *bona fide* interest and the conditions under which such claims may be made. In May 2004, the SAHRA circulated draft regulations in this regard although they have not been formally promulgated yet. A draft Restitution Policy that makes provision for regulations and processes regarding claims for the restitution of heritage objects was circulated in 2009 for comment. However, the definition of *bona fide* interest still remains unclear and ambivalent. It is proposed that the requirement of *bona fide* interest should be replaced by a concept of self-identified interested and affected parties.

Thirdly, Section 41 deals with restitution claims within the borders of South Africa only. It is unclear whether it includes restitution claims from non-South African communities against South African collections and is ambivalent regarding whether it includes claims by South African communities against collections in other states.

Fourthly, Section 41 identifies SAHRA as the appropriate body to facilitate disputes regarding restitution. However, SAHRA is not mandated to negotiate on behalf of a South African community in disputes with foreign entities, nor is it mandated to act as a temporary or permanent holding institution for heritage objects under dispute or heritage objects or human remains repatriated to South Africa.

Fifthly, any regulations dealing with the restitution of movable heritage objects and human remains should take cognisance of legislation regarding the alienation of museum artefacts as enacted in the Cultural Institutions Act (1998) and related provincial museum ordinances and acts.

The National Heritage Council Act, No 11 of 1999 mandates the NHC to advise the Minister of Arts and Culture on:

- “national policies on heritage matters, including indigenous knowledge systems, living treasures, restitution and other relevant matters” (article 10(1)(a)(i) and
- to “investigate ways and means of effecting the repatriation of South African heritage objects presently being held by foreign governments, public and private institutions and individuals (article 10(1)(c)).

The Cultural Laws Amendment Bill, first draft (2009) proposes a repeal of the NHC’s mandate regarding restitution and repatriation (article 10 quoted above) as well as section 13(2)(a)(iv) of the NHRA.

However, section 41 in NHRA and section 36 of the same act discussed below, remains. It is therefore accepted that SAHRA will be the primary agency dealing with repatriation within the borders of the country, but that this role will be transferred to the Department of Arts and Culture and the Department of International Relations and Cooperation regarding international claims and processes.

The review above focused on human remains in public collections. However, the NHRA (1999) also addresses human remains in burial sites and graves, including accidental finds of burial sites, and victims of conflict in and outside South Africa.

According to Section 36 of the NHRA:

- (1) "Where it is not the responsibility of any other authority, SAHRA must conserve and generally take care for burial grounds and graves protected in terms of this section, and it may make such arrangements for their conservation as it sees fit.
- (2) SAHRA must identify and record the graves of victims of conflict and any other graves which it deems to be of cultural significance and may erect memorials associated with the grave referred to in subsection (1), and must maintain such memorials.
- (3) No person may, without a permit issued by SAHRA or a provincial heritage resource authority –
  - a. Destroy, damage, alter, exhume or remove from its original position or otherwise disturb the grave of a victim of conflict, or any burial ground or part thereof which contains such graves;
  - b. Destroy, damage, alter, exhume, remove from its original position or otherwise disturb any grave or burial ground older than 60 years which is situated outside a formal cemetery administered by a local authority; or
  - c. Bring onto or use at a burial ground or grave referred to in paragraph (a) or (b) any excavation equipment, or any equipment which assists in the detection or recovery of metals."

Section 36, subsection 6 reads:

"Subject to the provision of any other law, any person who in the course of development or any other activity discovers the location of a grave, the existence of which was previously unknown, must immediately cease such activity and report the discovery to the responsible heritage resources authority which, must, in co-operation with the South African Police Service and in accordance with regulations of the responsible heritage resources authority-

- a. Carry out an investigation for the purpose of obtaining information on whether or not such grave is protected in terms of this Act or is of significance to any community; and
- b. If such grave is protected or is of significance, assist any person who or community, which is a direct descendant to make arrangements for the exhumation and re-internment of the contents of such grave or, in the absence of such person or community, make any such arrangements as it deems fit."

### **3.2 Heritage objects**

In terms of the repatriation of heritage objects, including archival records, cognisance should be taken of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 24 June 1995) and the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

The UNESCO Convention states the institutional requirements to ensure appropriate care and curatorship of the national estate which also ensures that a country is in the position to identify objects



that have been illicitly obtained. The implementation of these requirements is essential as a basis for future repatriation claims. The requirements include that State Parties:

- Should set up one or more national services for the protection of the cultural heritage with qualified staff sufficient in number
- Must draft laws to protect cultural heritage
- Must establish and keep up to date a national inventory of protected property
- Must promote the development or establishment of scientific and technical institutions (museums, libraries, archives, laboratories, workshops...) required to ensure the preservation and presentation of cultural property
- Organise the supervision of archaeological excavations
- Establish for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this Convention
- Take educational measures to stimulate and develop respect for the cultural heritage of all States
- See that appropriate publicity is given to the disappearance of any items of cultural property.

In addition State Parties are required to:

- To take the necessary measures, consistent with legislation, to prevent museums and similar organisations within their territories from acquiring cultural property originating in another State Party which has been illegally exported.
- To take appropriate steps to recover and return any such cultural property imported. However, the requesting party shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.
- Oblige antique dealers, through subject to penal or administrative sanctions, to maintain a register recording the origin of each item of cultural property, names and addresses of the supplier, description and price of each item sold and to inform the purchaser of the cultural property of the export prohibition to which such property may be subject.

The UNIDROIT Convention states, amongst other matters, conditions under which repatriation claims may be made. Any claim has to be submitted within three years of the claimant knowing the location of the cultural object and in any case within 50 years of the time of theft. However, a claim for the repatriation of a cultural object forming part of an integral part of an identified monument or archaeological site, or belonging to a public collection, shall not be subject to time limitations other than a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor. The UNIDROIT Convention makes provision for just compensation for innocent purchasers or person with a valid title to the object. It does however put the responsibility on the possessor to prove due diligence in ascertaining the legality of the transaction in obtaining the object.

The UNESCO and UNIDROIT Conventions therefore require proof of ownership from the claimant. To ensure that such a proof of ownership can be provided, the national estate has to be managed according to international collection management standards.

### **3.3 Remains of victims of conflict**

The following section deals with the legal and institutional framework specifically relating to victims of political conflict. It should be noted that while the issue cuts across different departments, there is a significant absence of policy. Both the NHRA (1999) and decisions and regulations arising from the Promotion of National Unity and Reconciliation Act of 1995 (PNURA) are pertinent here.

Section 36 of the NHRA (1999) deals with victims of conflict. In addition to subsection 6, covered above, subsections 7 to 9 deals directly with victims of political conflict, especially those who died during the liberation struggle. It reads:

“(7) (a) SAHRA must, over a period of five years from the commencement of this Act, submit to the Minister for his or her approval lists of graves and burial grounds of persons connected with the liberation struggle and who died in exile or as a result of the action of State security forces or agents provocateur and which, after a process of public consultation, it believes should be included among those protected under this section.

(8) Subject to section 56(2), SAHRA has the power, with respect to the graves of victims of conflict outside the Republic, to perform any function of a provincial heritage resources authority in terms of this section.

(9) SAHRA must assist other State Departments in identifying graves in foreign country of victims of conflict connected with the liberation struggle and, following negotiations with the next of kin, or relevant authorities, it may re-inter the remains of that person in a prominent place in the capital of the Republic.”

The second body of legislation that is of relevance is PNURA (1995) in terms of which the TRC was established. The TRC conducted a limited intra-national programme to repatriate remains. Following the completion of the TRC’s work, the MPTT was established by the NPA to locate the whereabouts (including remains) of persons reported missing to the TRC. This unit, together with the TRU in DOJ&CD has managed the exhumation and re-internment of bodies.

Regulations making provision for family members to apply for assistance in respect of location, exhumation, reburial or symbolic reburial have been promulgated (Promotion of National Unity and Reconciliation Act (act 34 of 1995)): Regulations on exhumation or symbolic burial of deceased victims (No 33164, 7 May 2010). Assistance includes financial assistance for reburial. However, both regulations and the scope of the MPTT are limited to TRC cases and exclude:

- Cases not involving a gross violation of human rights
- Cases not reported to the TRC
- Cases occurring before 1 March 1960 and after 10 April 1994.

Institutionally, there are a range of structures whose work of mandates overlap with or are concerned with aspects of repatriation. These include SAHRA, the MPTT and veterans and victims’ associations.

In summary, SAHRA has been mandated with the identification and protection of graves and burial sites by NHRA section 36, including the graves of victims who died during the liberation struggle within and outside the borders of the country. However, ten years on, the identification process has not been completed.. In addition, the NRHA (1999) does not make provision for the repatriation of the remains of those who died to their families, or to another place outside the capital of South Africa. It also does not stipulate who will carry the cost for repatriation and re-internment and do not make provision for a fund to support families to identify and repatriate the remains of ex-combatants who died in exile. However, within the TRC framework, a small number of victims are catered for.

Cognisance should also be taken of an international humanitarian and human rights legislative framework. For example, Additional Protocol I of the Geneva Convention grants “the right of families to know the fate of their relatives,” (AP 1, Art.32). Moreover, Protocol I stipulates that as soon as circumstances permit, “each Party to the conflict shall search for those who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons

in order to facilitate such searches.” (AP 1, Art. 33) This search implies a duty to undertake a genuine investigation to establish the fate of persons reported missing. Parties to the conflict are required to facilitate enquiries and gather information in order to aid and reunite families dispersed as a result of conflict. (AP 1, Art. 33). The International Committee for the Red Cross/Red Crescent (ICRC) which administers the Geneva Convention has more recently interpreted this to include the recovery of human remains in a manner that allows for identification and restitution to families.

The Convention for the Protection of All Persons from Enforced Disappearance (1949) sets the principle that no one may be subjected to enforced disappearance under any circumstances. Article 24 states that each State Party shall take the appropriate measures to search for, locate and release disappeared persons, and, in the event of death, to locate, respect and return their remains.

The above principles is supported in this position paper.

#### **4. Repatriation of human remains in public collections**

Human remains in public collections is a very emotive issue. For many, it resembles the most extreme form of objectification and “othering” of human beings. Unethical practices, especially in the early 20<sup>th</sup> century has been well documented. In addition, some human remains have been collected as an act of aggression, for example skulls collected as “war trophies”. However, not all human remains in public collections have been acquired illegally. Many have been excavated as part of legitimate archaeological excavations or have been accidental finds.

A repatriation policy cannot be divorced from the practises and ethics maintained at the holding places where human remains are currently kept or to which they could be repatriated from foreign collections. The repatriation of human remains should be considered within the broader practice of human remains in public collections and the research conducted on these remains.

The major philosophical and ethical shift during the last few decades has been the de-objectifying of human remains and the restoration of personhood of the deceased. Therefore the management of human remains in collections require a different set of ethics and professional standards than heritage objects.

Relationships with the deceased differ from culture to culture. However, all cultures practise a rite of passage at death and few would deny that the deceased should be treated with respect and dignity. Repatriation of human remains is in the first place a reclaiming of the right to dignity in death, but also a re-establishment of relationships between the dead and the living.

At the same time, research on human beings is generally accepted though under stringent ethical conditions. The research potential of human remains is one of the main arguments offered against repatriation. South Africa is especially rich in this regard. South Africa does not have large human remains collections due to unique burial practices in southern Africa. However, South Africa, together with Eastern Africa, is home to the earliest remains of anatomically modern humans. The age of human remains in public collections range from fairly recent until approximately 150 000 years ago. Most of the remains in public collections are younger than 10 000 years old. Therefore, the human remains in South African collections are highly valued in terms of research on the origins and development of humans. Other research conducted focus on past diseases, lifestyles and environmental disasters. This contribution to research is especially valuable regarding societies of which no written or oral records

survived. International experience has shown that a balance can be found between the needs of descendent and affected communities and the benefits of research for humanity as a whole. This experience has been confirmed locally in public collections that have engaged with local communities regarding the human remains in their collections. The Medical Research Council drafted extensive ethical guidelines regarding research on humans that could be adapted to provide guidelines for research on human remains in public collections.

Repatriation of human remains includes all associated funerary and sacred objects as well as the right to research, exhibit and publish the remains or reproductions of remains.

The position paper introduces a number of principles, some of which introduce new concepts into the repatriation of heritage resources debate.

- Firstly, the restoration of personhood is central to the proposals regarding the repatriation of human remains in public collections.
- Secondly, an active process to identify the human remains collected in a manner that consisting of human rights abuses is proposed and it is argued that these remains should be repatriated as a matter of urgency.
- Thirdly, while the National Heritage Resources Act (Act 25 of 1999) refers to *bona fide* descendents, this position paper suggests that the concept of interested and affected parties should be introduced as used in the environmental management. The requirement to proof *bona fide* descent has proved to be a major stumbling block for communities to submit claims, especially in the case of older remains where proof of direct descend is tenuous at best.
- Fourthly, the legal principle that the deceased do not enjoy human rights and that nobody can own human tissue, including the remains of a relative, is upheld in this position paper. However, the principle that the dignified treatment of the deceased impacts on the human rights of the living and that people have the right to conduct a culturally appropriate rite of passage burial on their deceased relatives and community members are proposed and supported in this position paper.
- Lastly, the position paper affirms the assumption that mutual ground can be found through discussion and mediation. The proposed processes is aimed at creating opportunities for the two groups to better understand each other positions and motivations.

#### **4.1 Ethical and professional standards**

A policy framework on the repatriation of human remains in heritage must take cognisance of the debate around the practice of human remains in public collections. In South Africa, illegal and unethical way in which some of the human remains in public collections were collected provides added emphasis to rethink the presence of human remains in public collections. This section will focus on ethics and professional standards regarding human remains in general, with a special emphasis on research on human remains as well as the care of human remains in public collections.

Cognisance is taken that human remains have been acquired by public institutions under different conditions. On the one end of the continuum is human remains of recently deceased persons whose identity is known and which has been acquired through clearly unethical and/or illegal means. On the other end of the continuum is human remains that are millennia old and which have been acquired through legitimate research projects, for example when graves are discovered during the course of archaeological research or inadvertently during construction activities. It is therefore proposed to follow

international standards by allowing for differentiation on the base of particular circumstances and with the policy providing guidelines only. It is acknowledged that every claim has to be treated on a case to case basis.

In general the approach used until recently, i.e. of classifying human remains in public collections as heritage objects has to be interrogated with the objective to incorporate the change in ethical and professional standards towards an emphasis on the restoration of personhood. The restoration of personhood not only brought respect for and accommodation of diverse cultural practices regarding the deceased, but also recognise the personhood of the deceased person, even if the person died millennia ago. It is generally accepted that human remains should be managed according to different legal, ethical and moral standards than heritage objects.

The concept of ownership of human remains is a continuation of repression and humiliation. Therefore, human remains cannot be owned by anyone and are excluded from generally accepted standards regarding ownership in public collections and the associated legislation and guidelines regarding alienation or deaccessioning of collections. There may be no financial gain from the transfer and curating of human body and its parts.

All decisions and practices regarding human remains should recognise:

- The dignity and humanity of the deceased
- The continuing relationship between genealogical and cultural descendents and the spirit of the deceased. This include the responsibility of the living to arrange for a culturally appropriate burial or rite of passage ceremony for the deceased.

Acknowledging that human remains are not heritage objects, collections of human remains should be limited to public collections that serve medical research and/or the study of human biology and that accepts the ethical and professional guidelines proposed in this document.

The Medical Research Council (MRC) has published a set of ethical guidelines regarding research on human beings. Research ethics is an important consideration in the repatriation debate as the significance of research is a key argument against repatriation. The potential conflict between the benefit of research to humankind and the cultural practices of a specific community is one issue that has to be addressed during repatriation negotiations.

A key element of the MRC guidelines is that only *bona fide* research practised by *bona fide* researchers is allowed. The MRC define research as a systematic investigation, including research development, testing and evaluation designed to develop or contribute to generisable knowledge. All research on human remains should be fully motivated in terms of scientific value to human society and should stipulate how the body will be treated during the research and how and when it would be returned to the genealogical and/or cultural descendents if they so request. It must be conducted by a professionally qualified researcher who is accountable to act in a responsible manner and upheld professional standards in accordance with his/her academic training.

In addition, the MRC ethical guidelines include:

- People should be treated as human beings in the context of their social, political, economic and religious environments;
- Participants must be treated as a unique human person;
- Basic human rights of human beings as well as rights of communities should be respected;

- Research should always respect the dignity of people involved and should never expose them to intentions and motives not directly attached to the research project, its methodology and objectives; and
- Integrity should be promoted by being honest and fair. Researchers must be honest about their limitations, competence, belief systems, values and needs.

Consent is a central theme regarding research on human beings. Ethically, consent can only be given by informed persons who are legally and factually capable of consenting. Lack of consent provides a strong argument for repatriation and reburial to communities, especially in cases where human remains have been acquired as acts of aggression or war and illegal exhumations such as grave robbery.

In the case of ethically acquired human remains, consent should be sought from the descendent as well as interested and affected communities. However, it is recognised that the older the human remains, the more difficult it would become to identify descendent communities and the more communities could legitimately claim to be interested or affected parties. As South Africa is rich in evidence regarding the development of early humanity, many human remains can be considered as the ancestry of all human beings rather than of a specific group. In such cases, holding places and research centres should share decision-making with Advisory Committees that represent community in general.

In cases where there are no claimant communities and/or the potential claimant communities agree that the relevant public collection or research centre should continue to hold the remains, it is proposed that such public collections and research centres conform to the following ethical and conservation standards:

- In institutions with mixed collections, for example museums, human remains should be housed separately from other collections.
- Advisory Committees consisting of interested and affected parties should be established to co-manage human remains in collections. The Advisory Committee should be representative of all interested and affected parties including cultural descendants, source communities and the scientific community. The Advisory Committee should be consulted regarding ethical concerns, repatriation claims, repatriation programmes initiated by the relevant institution, the management of collections for example access and storage facilities.
- Access to human remains should be strictly limited to caretakers of the collection, members of descendent and affected communities and researchers. Guidelines for access must be approved by an Advisory Committee that represent descendent and affected communities. This includes research access.
- The remains of individuals must be stored individually.
- Procedures and processes must be in place to ensure that human remains are handled in a respectful way by researchers if research is allowed under the access policy. For example, special working facilities should be installed to ensure that human remains are not handled on general work place surfaces
- Public institutions must abide by ICOM Code of Ethics requirements regarding human remains. A process for monitoring and ensuring compliance should be established at each public collection. ICOM is an affiliated body of UNESCO and the ICOM Code of Ethics is recognised as the minimum ethical standards for public collections such as museums. Such a process should be transparent and open to scrutiny by interested and affected parties.
- It is proposed that public institutions should abide by SAMA Professional Standards regarding conservation requirements. The SAMA Professional Standards has been revised in 2006-2007 and included an extensive consultation process funded by DAC.

- Caretakers at the holding spaces should be knowledgeable of osteology as well as rituals and customs regarding caring for the deceased in order to care for the human remains in a respectful way according to the relevant cultural practice.

#### **4.2 Intra-national repatriation of human remains in South African public collections**

It is proposed that an active repatriation programme, led by DAC, is developed and implemented to address unethical practices of the past. An active programme implies that collections of human remains should be investigated with the aim of possible repatriation in a coherent programme rather than responding to repatriation claims as they arise. Such a programme should consist of three complementing programmes, namely:

- Human remains collected in an unethical manner
- Human remains collected in an ethical manner that are not being claimed
- Human remains collected in an ethical manner that are being claimed by a South African group.

The DAC through its agencies should appoint a National Human Remains Committee to assist individual public collections to conduct the relevant research and to develop repatriation programme. The National Human Remains Committee should be representative of interested and affected parties, including genealogical descendents, cultural descendents, source communities, heritage experts and representatives of scientific communities. Every public collection holding human remains, has to appoint a Human Remains Task Team to conduct research and to develop a repatriation programme.

Included in research is an audit of human remains in South African collections as well as human remains from South African origin in foreign collections. The details of the audit is stipulated in sections 4.2.1, 4.2.2 (human remains in South African collections) and 4.4 (human remains of South African origin in foreign collections).

##### **4.2.1 Repatriation of human remains in South African public collections collected in an unethical manner**

Taking cognisance of the public discourse on human remains in public collections, it is proposed that DAC and its agencies should actively pursue a repatriation process of human remains in public collections that have been collected unethically. The first step in such a process is to conduct an audit of the provenance of human remains in all public collections in order to identify:

- Human remains of named individuals
- Human remains of individuals with living relatives and descendents who have been collected without consent
- Recently deceased individuals that have been collected unethically
- Human remains that have been collected as acts of aggression
- Human remains that intentionally have been collected for purposes of racist research.

The audit should be conducted with the assistance of Human Remains Task Teams appointed by each of the public collections. The National Committee on the Repatriation of Human Remains established by DAC should assist the institutional Human Remains Committees regarding research and the development of a repatriation programme.

A programme for the repatriation of human remains has to be compiled and implemented by each public collection on the basis of the findings of the above research project. The categories of human remains listed in the first paragraph of section 5.2.1 should be repatriated irrespective of the scientific value of the remains. The repatriation programme should include:

- The identification of interested and affected parties including genealogical descendants, cultural descendants and source communities
- Negotiations with interested and affected parties
- Manner of repatriation of human remains listed that cannot be linked to a specific community or where the relevant community is not interested in participating in a repatriation programme. In cases such as these, public collections can consider:
  - Reburial in a culturally appropriate place
  - Transfer to holding places created to hold human remains and that are managed by an Advisory Body representing interested and affected parties. Such holding spaces can take the form of mausoleum/memorial spaces.
  - As claimants can come forward at a later stage, burial processes should preferably be reversible.

The repatriation programme plan should be submitted to the National Committee on Repatriation of Human Remains within three years of acceptance of the policy framework.

#### **4.2.1 Repatriation of human remains in South African public collections that have been collected in an ethical manner and that are not subject to repatriation claims**

The National Human Remains Committee will compile an audit of human remains that have been collected in an ethical manner whether they are subjected to claims or not. The Committee will take responsibility to promote compliance with the policy framework.

In cases where a public institution that is unwilling to comply with ethical and professional standards or to share access, DAC should consider the repatriation of human remains in the relevant non-complying organisation's collection to another institution which does comply with ethical and professional standards as defined in this policy framework.

The reburial of human remains, whether in a separate holding place or in special burial sites, should be considered for all human remains where the holding institution can not justify the continued presence of the remains in their collections in terms of scientific value. If reburial in whichever format is considered, a reversible process to ensure revision of decisions in future by the interested and affected communities should be considered.

If an institution successfully argues in favour of continuing to hold a human remain collection, the collection has to provide holding facilities that comply with ethical and professional standards defined in this document. This must be accomplished in a manner consistent with the interests and beliefs of the members of the genealogical and cultural descendants. The human remains may only be displayed in accordance with the beliefs and practices of the source community.



#### **4.2.2 Repatriation of human remains in South African public collections that have been collected in an ethical manner that are subject to claims**

This section deals with human remains that have been collected through ethical and legal excavations, including rescue archaeology that are being claimed by an interested and affected party. The results of the audit must be accessible to the general public, including potential claimants.

Public collections should consider all requests for the repatriation of human remains.

On receiving a request for repatriation, the public collection has to exercise due diligence to inform all potential stakeholders regarding the request. All stakeholder's interest must be taken into consideration in making a decision about repatriation. Due diligence includes advertisements in newspapers and actively identifying and approaching other stakeholders which may consider themselves interested and affected parties.

The claimant(s) have to provide proof of ties with the deceased supporting their claim as the appropriate community to receive and rebury the deceased. In addition, the claimant(s) must demonstrate that the claimant(s) has been authorised by the relevant cultural group to negotiate on its behalf.

When satisfied that the claimants are legitimate genealogical or cultural descendents or their representatives, the public collection concerned and claimant should enter in a consultation process with the objective to find a mutually satisfying agreement. This may include immediate repatriation or repatriation after the completion of research at a specified time. The following options could be considered in the quest for finding a mutually satisfying agreement. Considering options other than the extremes of immediate repatriation or refusal allow for opportunities to find middle ground between the institution and the claimants. Possible options include:

- Claimants could be asked to consider delaying repatriation in cases where human remains have scientific significance. This would allow researchers an opportunity to fully document the human remains to ensure the availability of research data for future use. However, the claimants should be fully informed about what research data that will be captured and how the remains will be treated in the process. This include time schedules for the completion of research. Claimants should give formal consent for research to continue.
- Burials could be conducted in a manner that are reversible in order for future generations to reconsider decisions.
- Human remains could be transferred to holding places created to hold human remains and under control of the descendent communities or under joint control of descendent communities and the relevant public institution. Such holding spaces can take the form of mausoleum/memorial spaces.

If the public collection concerned and claimant(s) cannot reach consensus, the case may be referred to SAHRA in terms of Section 41 of the NHRA to mediate between the parties with the aim to find a mutually satisfactory solution.

- If the public collection contest the repatriation claim, it must argue to the satisfaction of National Human Remains Committee why the claim should not be approved.
- SAHRA may conduct its own investigation to ascertain the facts of the case under consideration.
- SAHRA may establish a team of independent experts to assist with the investigation and facilitation process.

- SAHRA may, in the absence of an agreement between the parties concerned, make a final decision regarding the future of the objects including any conditions necessary to ensure its safety, the conditions of access of the claimants or other stakeholders to the object, or any other appropriate conditions.
- SAHRA must make its decisions and grounds on which its decision was taken, public.

The continued use of research and reproductions, including photographs and visual recordings, have to be negotiated as part of the consultation process between the claimant and public collection.

#### **4.3 Repatriation of human remains in South African public collections of claimants to foreign collections and communities**

Requests for repatriation of human remains will only be considered if submitted to DAC through the relevant countries official representatives.

DAC should establish a task team to investigate and engage with the relevant public collection and advise the Minister of Arts and Culture regarding possible repatriation. For this purpose, DAC may conduct its own investigation to ascertain the facts of the case under consideration. DAC may establish a team of independent experts to assist with the investigation and facilitation process. DAC must make its decisions and grounds on which it was taken public. The following guidelines have to be taken into account:

- The claimant(s) have to provide proof of ties with the deceased supporting their claim as the appropriate community to receive and rebury the deceased. In addition, the claimant(s) must demonstrate that the claimant(s) has been authorised by the relevant cultural group to negotiate on its behalf.
- In the absence of sufficient proof, the repatriation of human remains to the country of origin will be considered on condition that the remains are held by a national or regional public collection with suitable facilities according to the ICOM Code of Ethics. ICOM is an affiliated body of UNESCO and the ICOM Code of Ethics is generally accepted as the minimum ethical standards for public collections.
- The following categories of human remains will be returned irrespective of scientific value to communities that can provide sufficient proof of being genealogical descendents, cultural descendents of source communities:
  - Human remains of named individuals
  - Human remains of individuals with living relatives and descendents who have been collected without consent
  - Recently deceased individuals that have been collected unethically
  - Human remains that have been collected as acts of aggression
  - Human remains that intentionally have been collected for purposes of racial research.
- Repatriation will be refused if the claimant cannot provide any relevant relationship with the human remains.

#### **4.4 Repatriation of human remains originating from South Africa in foreign public collections**

The DAC should initiate a research project to list human remains originating from South Africa in foreign public institutions. The project team should include specialists such as scientists with osteological expertise, cultural experts and legal experts.

The project team is to advise the Minister of Arts and Culture on which repatriation claims to be initiated taking the following guidelines into consideration:

- An active process to submit and pursue repatriation claims should be undertaken in regards to
  - Human remains of named individuals
  - Human remains of individuals with living relatives and descendants who have been collected without consent
  - Recently deceased individuals that have been collected unethically
  - Human remains that have been collected as acts of aggression
  - Human remains that intentionally have been collected for purposes of racist research
- Successfully claimed human remains should be transferred to a government-funded public collection that comply with ethical and professional guidelines stipulated in section 5.1 as temporary holding spaces. Guidelines set out in section 4.2.1 should be followed on the return of the human remains to South Africa.

DIRCO, supported by DAC and the project team, has to engage with the relevant authorities regarding the repatriation of human remains with the relevant authorities with the aim to find a mutually acceptable agreement.

### **5. Repatriation of heritage objects, including archival records**

For the purpose of this document, restitution of heritage objects refers to the repatriation of movable heritage as defined by the NHRA (1999) (see definitions section at the beginning of this document) as well as elements of artistic or historical monuments or archaeological sites which have been dismembered.

Repatriation of heritage objects should include the right to research, exhibit and publish the objects or reproductions of objects. The continued use of research and reproductions, including photographs and visual recordings, have to be negotiated as part of the consultation process between the claimant and public collection.

Claims for the repatriation of heritage objects, especially repatriation from foreign countries, is based on rectifying inappropriate acquisitions. South Africa recognises that the right to culture and to information concerning history is a fundamental right of individuals and nations. Foreign collections usually require a proof of ownership or cultural significance before considering a repatriation claim. Therefore, this policy framework should address the environment and collection management standards required to enable local public collections to provide proof of ownership. In addition, normal international heritage practice require proof that repatriated objects would be kept in conditions consistent with professional curatorial standards before repatriation is considered. It is therefore proposed that all repatriated objects should be placed in the care of institutions, whether government-aided or community based, that comply with the ICOM Code of Ethics and SAMA Professional Standards. ICOM is an affiliated organisation of UNESCO

and the ICOM Code of Ethics is globally recognised as the minimum ethical standards while SAMA has compiled their Professional Standards after an extensive consultation amongst members and non-members in a process funded by DAC. The SAMA Professional Standards include transformation indicators and is suitable for small institutions with limited budgets.

Repatriation claims are subject to the location and identity of the possessor being known. Therefore, the implementation of this repatriation policy is subject to the successful completion of an inventory of movable heritage objects in foreign collections that are deemed of significant heritage value and sound collection management practices in public collections. These processes have to be prioritised and funded to make access to information to collections possible.

Whereas South Africa should respect the wish of colonized countries to reconstruct their cultural inheritance as a legitimate cultural aspiration, the archives created and built outside the respective countries, including those concerning the history of South Africa, should be regarded as part of a common cultural heritage.

Intra-nationally, the call for repatriation is often an implicit expression of a lack of trust in public collections by communities. The transformation of public institutions, access to heritage resources by communities and consultative decision-making should be addressed if one is seeking to find alternatives to confrontational models of communication between public institutions and communities.

### **5.1 Intra-national repatriation of heritage objects**

Intra-national repatriation of cultural objects comprises repatriation claims:

- From one South African public collection to another public collection in South Africa
- From a South African cultural group to a public collection in South Africa

Public collections have the obligation to consider all claims for repatriation when:

- (i) An object or objects have significant historical, traditional or cultural importance that are central to the cultural life and continuance of cultural practice of a cultural group.
- (ii) The circumstance of acquisition are problematic, i.e.
  - a. The object or objects have been acquired without the free and informed consent of the custodian of the time
  - b. Was acquired in contravention of tradition and custom
  - c. Was acquired through a person legally or culturally unauthorised to dispose of the object
  - d. Acquired through an illegal act of war or aggression
  - e. Acquired through a method that is illegal under South African law at the time and still is illegal.

In respect to a claim made related to 6.1(i) the claimant's request must be supported by the preponderance of evidence based on geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical or other relevant information or expert opinion. In addition, the claimant(s) must demonstrate that the claimant(s) has been authorised by the relevant cultural group to negotiate on its behalf.

In respect to a claim made in relation to 6.1(ii) the claimant must provide reasonable proof of ownership and that the relevant objects have been acquired under the circumstances as set out in 9.1(ii).

In addition, the claim must include the following information:

- a. Identify the objects that have to be repatriated
- b. The location to where the heritage objects will be repatriated
- c. Details on how the objects will be managed and conserved.

The public collection has to exercise due diligence in notifying other groups or individuals who it reasonably believes may have an interest in requests that are made for repatriation. Due diligence entails placing advertisements in media such as newspapers and to actively identify and notify stakeholders who may be descendent or affected communities.

Each claim has to be dealt with on a case by case process as circumstances in fact and law differ in each case. The claimant and public collection should enter into consultation with the objective to find a mutually satisfying solution. The public collection has the obligation to consult with and take into account the interests of other stakeholders. The national, regional and local significance of objects have to be considered as well as access of all affected and interested parties should be considered.

In negotiations, alternative models to repatriation could be considered. This include:

- Long-term loans to the public collection nearest to the descendent and/or affected communities with the condition that the public collection is able to conserve and manage the objects according to SAMA standards.
- The establishment of satellite institution that is jointly managed by the relevant community and public institution.
- In the case of sacred or secret objects, special keeping places that are jointly managed by the relevant community and public institution with strict limits to access according to cultural practices of the respective communities.
- Digital repatriation of documents and records.
- Replicas.

If the claimant and public collection come to an agreement, the public collection has to notify and obtain permission for deaccessioning from the relevant authority, for example the Minister of Arts and Culture and the case of national museums and the relevant MEC in the case of a provincial museum. In the case of archaeological objects, the institution has to apply to SAHRA or relevant provincial authority to be relieved of responsibilities in terms of the excavation permit.

All decisions and grounds on which it was taken must be made public and must be communicated to all interested and affected parties.

If the claimant and public collection cannot come to an agreement, the dispute has to be referred to SAHRA in terms of Section 41 of NHRA (Act 25 of 1999) who will mediate between the two parties with the aim to find a mutually satisfactory solution.

- SAHRA may conduct its own investigation to ascertain the facts of the case under consideration.
- SAHRA may establish a team of independent experts to assist with the investigation and facilitation process.
- SAHRA may establish committees representative of public institutions and communities to advise it regarding repatriation claims.
- SAHRA may, in the absence of an agreement between the parties concerned, make a final decision regarding the future of the objects including any conditions necessary to ensure its safety, the conditions of access of the claimants or other stakeholders to the object, or any other appropriate conditions.

- SARHA must make its decisions and grounds on which it was taken public.

## **5.2 Repatriation of heritage objects claimed by South African cultural groups and public institutions from foreign public collections**

Repatriation of heritage objects to South Africa involve both a particular project approach and a long term programme.

- A project approach is required to identify, locate heritage objects that have left the country or have been acquired by a foreign public collection due to colonization and/or circumstances particular to the liberation struggle. Special attention should be given to the archives of the liberation struggle held in neighbouring countries. The project includes the preparation and submission of a repatriation claim and engaging with the public collection as part of the repatriation process. It is proposed that the project should have a limited time span, be managed by a team of experts and the relevant officials in DAC, SAHRA, NHC and DIRCO and should have a separate budget attached to its programme of action.
- A repatriation programme is required to manage the repatriation of objects that have left the country through illicit export.

### **5.2.1 Repatriation of heritage objects of historical, traditional or cultural significance to South Africa**

It is proposed that DAC has to constitute an interdepartmental project team as a special project comprising of representatives and experts in the heritage sector, including the DAC, NHC and SAHRA, as well as representatives of DIRCO. The committee should be mandated to:

- Initiate and manage a national programme to identify and locate heritage objects that have been acquired by a foreign collection and are considered to be:
  - To have such significant historical, traditional or cultural significance as to be regarded as of central importance to the national estate of South Africa. This include the archives of the liberation struggle in exile.
  - An object or objects have significant historical, traditional or cultural importance that are central to the cultural life and continuance of cultural practice of a cultural group in South Africa.
  - The circumstance of acquisition are problematic, i.e.
    - The object or objects have been acquired without the free and informed consent of the custodian of the time
    - Was acquired in contravention of tradition and custom
    - Was acquired through a person legally or culturally unauthorised to dispose of the object
    - Acquired through an illegal act of war or aggression
    - Acquired through a method that is illegal under South African law at the time the objects left the country and still is illegal.
- To make recommendations regarding repatriation processes to be initiated
- To make recommendations regarding holding institutions to manage successfully repatriated heritage objects taking into considerations guidelines provided in this policy framework.
- To prepare supportive documentation for the repatriation process following the guidelines provided by the UN Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Repatriation in Case of Illicit Appropriation.

- To provide expert opinion and support to DIRCO in engaging in the repatriation negotiations and processes.

The Department of Arts and Culture and SAHRA is taking cognisance of repatriation projects initiated and managed by international and national non-governmental organisations and public collections. SAHRA is mandated to liaise with non-governmental organisations in order to ensure that repatriated objects are, on return, placed in the care of public collections which can provide security and conservation facilities as well as managed access of the public to the artworks and heritage objects. In addition, DAC should liaise with non-governmental organisations and public collections to facilitate negotiations with other interested parties such as the South African Revenue Service to ensure that custom fees are waived for repatriated heritage objects. All repatriated heritage objects must be gazetted as heritage objects and as such be removed from the market as an object of trade.

Heritage objects deemed to be of national historical, traditional or cultural significance should, on successful repatriation, be held in a public collection established under the Cultural Institutions Act (Act 119 of 1998).

Heritage objects deemed to be of significant historical, traditional or cultural importance that are central to the cultural life and continuance of cultural practice of a cultural group in South Africa should, on successful repatriation, be held by a public collection nearest to the relevant cultural group that complies with the following standards:

- The public collection must be a non-profit organisation, i.e. a legally established body whose income (including any surplus or profit) is used solely for the benefit of that body and its operations.
- Responsibility for the public collection must be vested in a formally constituted, autonomous governing body, whose purpose it is to ensure the continued sustainability of the collection.
- The governing body should be appointed in a transparent manner to represent the cultural group or groups it serve and should provide a range of competencies to best serve the interest of the collection.
- The founding document or constitution of the public collection must include a dissolution clause that makes provision for the disposal of the collections.
- Appropriate storage facilities according to SAMA Professional Standards and ICOM Code of Ethics
- Appropriate skilled staff to ensure the conservation and preservation of the object
- Have documentation systems and public programmes in place that provide access to the objects, for example virtual documentation, educational programmes and exhibitions

The relevant public collection may be an existing collection or a collection established by the relevant cultural group to hold the repatriated objects.

### **5.2.2 Repatriation of heritage objects lost to South Africa through illicit export**

In order to submit successful claims for the repatriation of heritage objects against foreign collections, the South African institution or community have to be able to:

- Provide proof of ownership. Poor documentation of early collections and, in many cases, no documentation of heritage objects owned by local communities provides a challenge to attain this requirement.
- The object must have significant cultural value.

- The claimant have to be able to demonstrate the the object will be repatriated to an institution where it can be properly conserved and have sufficient security.

It is proposed that the brief for the Inventory of the South African National Estate should be expanded to support the repatriation process as a fully representative inventory of tangible and intangible heritage is required to enable South African communities and institutions to submit successful claims.

An output of the expanded inventory of the South African National Estate should include a generally accessible database serving the following purposes:

- Allow for stolen and missing objects to be reported
- Allow public institutions and dealers in heritage objects to ascertain the ownership status of a heritage object before acquiring such an object. The database should allow the relevant institution or dealer to print a hard copy of the search. The inability to provide such a print-out would disqualify the institution/dealer to claim that due diligence was followed in acquiring an object and to claim compensation if the object in question turns out to be illegally on the market.

SAHRA should be mandated to investigate, in cooperation with the SAPS and INTERPOL, the location and current possessor of the object.

SAHRA should be mandated to, in cooperation with DAC and DIRCO, submit claims to the appropriate country for the repatriation of stolen heritage objects within three years from the time that the SAHRA or the owner became known of the location of the stolen heritage object.

DAC may establish a fund to pay reasonable compensation to the possessor of a stolen heritage object if the possessor could not reasonably have known that the object was stolen and can prove that he/she exercised due diligence when acquiring the object. It is proposed that a Fund be established for this purpose with funding from the NDLTF and the CARA Account. The Committee consisting of heritage and cultural crime experts as well as evaluators have to be constituted to evaluate claims for compensation. Compensation can only be considered if the victim exercised due diligence in ascertaining the status of the heritage object before acquiring it.

All government funded public collections are required to maintain inventories of the objects in their collections according to standards compatible with INTERPOL's CRIGEN/ART forms.

Public collections have to be encouraged to report thefts and lost heritage objects to enable the recovery and repatriation of heritage objects.

### **5.2.3 Repatriation of heritage objects from private collections to South Africa**

This position paper is to a large extent silent on the issue of the repatriation of heritage objects from private collections to South African public collections. It is argued that some heritage objects have been exported to private collections during the apartheid era as a way of safekeeping and that the objective of the owners have always been to return the objects to a liberated South Africa.

Repatriation of these objects is problematic in terms of international policy as international policy does not make provision for the repatriation of objects that have been removed from a country legally and where the current owner obtained ownership in a legal manner. It would also be very difficult to prove that an



object was taken out of the country with the objective to return it to South Africa if the current owner rejects such a claim as untrue. Repatriation of such objects will therefore depend on the willing cooperation of the legal owner.

However, policy is required to manage the repatriation process where the legal owner does agree to return the object to South Africa to ensure that the relevant object is cared for according to accepted conservation standards (refer to SAMA Professional Standards) and that it is accessible to the general public or particular community according to its origin and use before it was removed from South Africa.

### **5.3 Repatriation of heritage objects from South Africa to claimants outside the borders of South Africa**

In supporting ethical conduct within South African institutions, it is proposed that government-funded public collections in South Africa undertake to consider repatriation of all heritage objects that:

- i. Is deemed to have such significant historical, traditional or cultural significance as to be regarded as of central importance to the country of origin
- ii. An object or objects have significant historical, traditional or cultural importance that are central to the cultural life and continuance of cultural practice of a cultural group.
- iii. have been acquired under circumstance of acquisition are problematic, i.e.
  - a. The object or objects have been acquired without the free and informed consent of the custodian of the time
  - b. Was acquired in contravention of tradition and custom
  - c. Was acquired through a person legally or culturally unauthorised to dispose of the object
  - d. Acquired through an illegal act of war or aggression
  - e. Acquired through a method that is illegal under the law of the country of origin at the time it was acquired and still is illegal at the time of the claim.

In addition, it is proposed that South African heritage authorities and the South African Police Service provide support for foreign claimants where there is proof of illegal conduct according to international conventions where heritage objects are in private ownership.

All claims must be supported by evidence regarding the historical, traditional or cultural significance of the object, proof of ownership as well as information regarding the holding institution, including its collection management and conservation expertise and facilities, to which the object would be repatriated.

South Africa will only consider claims submitted through the official representative of the country of origin.

SAHRA will investigate all claims and advise the Minister of Arts and Culture regarding appropriate action, i.e. whether the heritage objects will be repatriated or not. South Africa may refuse repatriation on the basis of:

- Insufficient evidence regarding the historical, traditional or cultural significance of the object
- Insufficient evidence of the relationship between the claiming group and the object
- Insufficient evidence that the acquisition of the object took place under problematic circumstances
- Inadequate holding arrangements in the country of origin.

All decisions and the grounds on which they were taken will be made public and be communicated to all interested and affected parties.

## 5.4 Sharing of archival resources

South Africa has been both a colonized and colonizing society. As a colonized society, important documentation and other archival resources regarding the heritage of South Africa and its component parts, have been generated in the colonizing countries, for example the Netherlands (including the archives in Java) and the United Kingdom. South Africa should recognize the right of these countries to hold these resources, but request the sharing of the information contained in the documentation and other archival resources.

The South African National Archives should be mandated to investigate which documents and resources that are of historical and cultural significance for South Africa and a process for the digital repatriation of the information should be initiated. The report should include:

- The identification of the documentation and resources
- The location of the documentation and resources
- The costing of digital repatriation.

As a colonizing country and as part of a group of societies colonized by the United Kingdom, South Africa holds large archival and heritage resources related to the history of Namibia, Lesotho, Botswana, Zimbabwe and Swaziland.

South Africa has already repatriated books published in Namibia and which were deposited to South African legal deposit libraries in 2006. In this paper, it is argued that South Africa should recognise:

- The right of Namibia to hold the records of the South West Africa Administration and should initiate the repatriation of these records to the government of South West Africa. In addition, Namibia should have access to the information in South African records related to the administration of South West Africa and South Africa should initiate the digital return of these records when requested by Namibia.
- The right of Botswana, Lesotho, Swaziland and Zimbabwe to access the British High Commission archival records held in South Africa and should initiate the digital return of these records when requested by Botswana, Lesotho, Swaziland or Zimbabwe.

Where archival material concerns the history of more than one country, the principle that the value of a collection is diminished if divided, should be upheld. In such circumstances, the relevant documents should stay physically intact in one of the countries with all the responsibilities in respect to security and conservation attached. However, the other countries concerned should have equal rights to access to the information as the custodial country.

## 6. Repatriation of human remains of victims of the liberation struggle

Graves of those killed in conflict form a tangible part of the legacy of political conflict and war. This is acknowledged in the NHRA (1999). While the dead of previous wars such as World Wars One and Two remain interred in the countries in which they were killed, it has increasingly become common practice over the last decades for countries to search for and, where necessary, repatriate remains once the conflict ended. This is not just true of wealthy countries, even small nations such as Cuba regard this as a fundamental duty to the dead and their surviving relatives.

Repatriating and reburial of victims of conflict is in accordance with international human rights which confirms the right to receive a culturally appropriate burial and the right of families and friends to know the whereabouts of victims of conflict. Repatriating and reburial of victims of the liberation struggle therefore restores human rights and citizenship to victims of the conflict.

South Africa's casualties of war and political conflict lie scattered in multiple sites both within our borders and in many countries and continents. However, unlike other South African conflicts, the graves of those who died during the liberation struggle – estimated at around 25 000 - have not been identified, marked or protected as stipulated in the NHRA (1999).

The grave sites of around 3 000 of these remain unknown to their families and communities. They include:

- Combatants who have died in skirmishes or ambushes in South Africa and were buried as paupers
- Judicial executions inside South Africa
- Extra-judicial executions by security forces inside South Africa
- Persons who went missing inside South Africa as a result of political circumstances
- Persons who died in exile and were buried in informal cemeteries or without the knowledge of their families
- Deaths arising from combat in Angola
- Executions by liberation movement.

A small number of the above categories have been exhumed and repatriated, mainly by the TRC, MPTT or by individual families, often with the support of political organisations or local government. A small number of these were repatriated from outside South Africa. However, in the absence of policy or a national programme, with the exception of those organised by the MPTT, these exhumations and repatriations have been taking place on an *ad hoc* basis, a situation that raises the following concerns:

- Inequity: Many of the exhumations and repatriations that have been initiated in an *ad hoc* way outside official structures have tended to be associated with high profile cases or by families with connections to political or financial resources, resulting in bitterness from excluded families.
- Lack of closure for relatives and friends of victims of the liberation struggle, especially those whose whereabouts or fate are unknown.
- Loss of information: With the exception of exhumations conducted by the MPTT, most exhumations have occurred outside the parameters of SAHRA and there has been a consequent loss of information regarding where the body was exhumed and repatriated from, who took possession of the remains and where the body was re-interred. This poses problems for SAHRA's obligation to protect and conserve burial sites as part of the National Estate.
- Lack of forensic expertise: A large number of exhumations have been conducted by untrained personnel and have not included appropriate forensic expertise. This raises the worrying possibility of misidentification of remains or incomplete exhumations where bones have been left behind.

## **6.1 Ethical and professional standards**

It is proposed that the DAC should adopt and implement a special project in order to identify, exhume and repatriate the remains of victims who died during the liberation struggle whether they died inside the borders of South Africa or in exile. This project should be overseen by a National Task Team involving

representatives of DAC, the TRU, the MPTT and other stakeholders such as affected political parties, victims and veteran associations and other persons or organisations with particular expertise in this area.

The policy should promote sound heritage principles, in particular the need to develop the particular historical legacy that grave sites and human remains embody.

The policy should adopt a victim-centred approach in line with the ethos of the TRC and the need for post-conflict reconstruction. It should be comprehensive, equitable and politically inclusive. Therefore the policy should address the creation of a government-aided fund to ensure that identification, exhumation and repatriation is affordable to all. This should be in line with the assistance provided in terms of the regulations applying to TRC victims.

Exhumation and repatriation are not the end goal, but should be accompanied by forms of memorialisation as well as psychological support for families and friends of victims of the liberation struggle.

Exhumations must be conducted with appropriated professional expertise in terms of both heritage and forensic practice. In this regard, the involvement of the MPTT and the network of forensic archaeologists and anthropologists who have been specifically trained to deal with such cases will be critical.

Remains must be handled with dignity and the appropriate skill.

The policy should adhere to the International Red Cross Committee's best practice guidelines which stress the need for accountability to families, ensuring that there is ongoing interaction, consultation and provision of information. Where possible families should be present during exhumations and should be provided with the necessary psychological and political support.

The remains of those who do not have living family should be reburied in a memorial cemetery.

Symbolic repatriation of remains could be considered if no physical remains can be traced.

## **6.2 Repatriation of remains of victims who died during the liberation struggle inside South Africa**

- i. The National Task Team should develop a plan for intra-national repatriation within a period of twelve months of this policy being implemented . Such a plan will:
  - a. Be based on the principles and ethos as outlined above.
  - b. Provide a clear definition of victims who died during the political conflict/ liberation struggle.
  - c. Establish a database of gravesites of victims who died in the course of the liberation struggle inside South Africa. This database will need to collate the information already collected by SAHRA, the MPTT, the TRC and Freedom Park. It should also consult with structures such as Special Pensions who may be in possession of such information.
  - d. Identify and set in motion a process to establish the necessary legislative and regulatory framework, as well as identify budgetary requirements.
  - e. Appoint a work team that will need to include the following expertise: project management, research and investigation, forensic and heritage expertise.
  - f. Establish an application process, as well as procedures to liaise with families and affected parties as well as a process to deal with disputes.

- g. Establish a list of priorities in relation to gravesites that have been identified. This may include for example the graves of executed prisoners or combatants buried in paupers graves where persons are buried often three to a grave. Prioritisation should happen with due regard to urgency and cost effectiveness.
- h. Determine an appropriate and realistic time period.
- ii. Once this plan has been approved, the National Task Team will oversee its operations.

### **6.3 Repatriation of remains of victims of the liberation struggle who died outside the borders of South Africa**

The National Task Team should develop a plan for repatriation within a period of twelve years of this policy being implemented . In addition to the steps outlined above (7.2(i)-(ii)), the National Task Team will need to set up procedures to liaise with foreign governments and organisations.

## **7. Stakeholders in implementation**

The NHC has prepared this position paper in order to advise the Minister of Arts and Culture regarding the need for a coherent policy regarding the repatriation of heritage resources. Several governmental stakeholders have been identified as role players if the proposals in this paper is accepted. These stakeholders have to officially endorse such a policy framework on repatriation of heritage resources and the impact on their strategic plans and organisational capacity should be investigated before it can be adopted and implemented. These stakeholders are:

- Department of Arts and Culture and its agencies, the NHC and SAHRA
- Department of International Relations and Cooperation
- Department of Justice and Constitutional Development the TRU and MPTT
- Department of Defence and Military Veterans
- Interpol
- SA Police Service
- Freedom Park.

In addition, the establishment of several task teams and committees are being proposed. Again, a detailed operational plan should be developed and costed before completing and implementing a policy framework. These teams and committees are:

- National Committee on the Repatriation of Human Remains
- A research task team to identify and document human remains of South African origin in foreign collections.
- A research task team to identify, locate and document heritage objects of South African origin in foreign collections that should be repatriated.
- The extension of the mandate of the National Inventory.
- A national task team to develop a plan for the repatriation of the remains of victims who died during the liberation struggle.

## 8. Sources

The following documentation and persons have been consulted:

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- UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995
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Wurz, Sarah, Pre-colonial Archaeologist, Iziko Museums of Cape Town, 28 May 2009, Iziko Museums of Cape Town

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**NHC Policy Development Workshop, 11 February 2010, Midrand**

Invited speakers and facilitators:

- Prof Ciraj Rassool
- Dr Coen Nienaber
- Priscilla de Wet
- Tshiamo Moela
- Philemon Norushe
- Ishmail Mbhokodo
- Capt Ben Janse van Rensburg

Scribes:

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In addition to the transcripts and reports of scribes of the proceedings, submissions have been received from:

- Rooksana Omar, Luthuli Museum
- Benjamin Saccaggi, University of the Witwatersrand.
- Nicky Rousseau, University of Western Cape.