



Recommendations for the Care of Human Remains in Museums and Collections

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Imprint

Recommendations for the Care of Human Remains in Museums and Collections

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Text: Human Remains Working Group, acting on behalf of the Board of the German Museums Association: Wiebke Ahrndt, Claus Deimel, Michael Geißdorf, Christian Lenk, Susanne Roeßiger, Wilfried Rosendahl, Anja Schaluschke, Markus Schindlbeck, Thomas Schnalke, Carola Thielecke, Claudia von Selle, Anne Wesche, Ursula Wittwer-Backofen

Editor of the German text: Dorothea Deterts

Editor of the English translation: Anne Wesche

Design: *augenstern – Büro für Gestaltung, Kassel

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Foreword

The handling of human remains in museums and collections has increasingly become a matter of international debate since the 1990s. The debate was triggered by growing numbers of claims for the return of human remains, mostly of non-European origin. In many instances, the result is a clash between different value systems and world views. The issue initially gained in relevance in countries which are home to indigenous minorities, such as the USA, Canada, Australia and New Zealand. It was in those countries that in the 1990s the first comprehensive statutory provisions on the handling of human remains originating from indigenous groups living within those national territories were subsequently introduced. As a result of the growing worldwide self-confidence of indigenous peoples, claims for the return of human remains are increasing from former colonial territories in particular, with those claims being made either by the state or state representatives on behalf of indigenous people, by representatives of the indigenous groups themselves or by individuals and descendants.

In Europe, the large former colonial powers of the United Kingdom and France initially formed the focus of the claims for return. The United Kingdom and Australia issued a joint declaration in 2000 which recognised the legality of certain indigenous claims. Later, in 2005, general standards and guidance for the handling of human remains in museums and collections were developed in the United Kingdom in the publication 'Guidance for the Care of Human Remains in Museums' issued by the Department for Culture, Media and Sport; that guidance is not, however, legally binding. France has to date passed two laws (in 2002 and 2010) governing specific, individual cases of returns to South Africa and New Zealand. The laws cannot be applied to other individual cases. The only guidelines available thus far in Germany are the 'Recommendations on the treatment of human remains in collections, museums and public spaces' produced by the 'Working Group on Human Remains in Collections' in 2003; however, those recommendations relate primarily to anatomical, anatomical-pathological, forensic and anthropological collections.

In view of the sensitivity of the issue and the insufficiency of the existing legal provisions, museums and collections want clear regulations and guidance for their day-to-day work, in particular in problematic cases and above all in connection with claims for return. The German Museums Association therefore considers it to be its responsibility to provide assistance to all museums and collections in Germany, in the tradition of the guidelines previously published by the Association.

Following the release of the guidance in the United Kingdom, many British museums are now publishing their own guidelines based on that guidance. Every establishment in Germany which holds human remains in its collections will also have to develop its own guidelines on how it intends to handle such remains in the future. The present 'Recommendations for the Care of Human Remains in Museums and Collections' form the

basis for such guidelines. We view these recommendations not as the end of the debate, but rather as its beginning.

I would like to thank the members of the working group which produced these recommendations and background articles and Dr Dorothea Deterts for her editorial work. Special thanks go to Dr Anne Wesche for the scientific project monitoring. Thanks to the great commitment shown and the focused nature of the discussions, these recommendations have enabled a speedy response to be given to an issue which also has political relevance.

Dr Volker Rodekamp
President of the German Museums Association

1. Introduction

Many German museums and other collections are home to human remains from all over the world. In addition to specimens in anthropological collections and anatomical and pathological preparation, ethnological museums/collections in particular also hold human remains in a variety of forms, for example shrunken heads, tattooed heads, scalp locks, mummies or bone flutes. In addition, human remains such as hair and bones can also be incorporated into (ritual) objects. Furthermore, skeletons, parts of skeletons and bog bodies, for instance, are permanent features of many archaeological collections. Human remains are also occasionally found in other collections.

In the light of the increasing claims for the return of human remains and a growing sensitivity towards the handling of human remains in collections, the 'Human Remains' Working Group of the German Museums Association, supported by the Representative for Cultural and Media Affairs, drew up the present 'Recommendations for the Care of Human Remains in Museums and Collections'. They were developed on the basis of the UK 'Guidance for the Care of Human Remains in Museums' (DCMS 2005)¹ and the 'Recommendations on the treatment of human remains in museums, collections and public spaces' produced by the 'Working Group on Human Remains in Collections' (*Deutsches Ärzteblatt* [German Medical Journal]: 2003). We would like to extend our sincere thanks to the authors of those two publications for their work, which was of great help during the production of the present recommendations.

The members of the interdisciplinary working group of the German Museums Association include ethnologists, archaeologists, anthropologists, medical historians, cultural scientists, lawyers and ethicists. They will be available in the future to assist with any further specialist questions. They can set out potential means of resolving conflicts but will not take any decisions or operate as an ethics commission. The members' names and contact details can be found at the end of this publication. Furthermore, in the case of difficult negotiations regarding the return of remains, museums/collections can make use of a mediation service provided by ICOM. A fee is charged for that service.

These recommendations are intended for the individuals directly responsible for collections and the funding bodies of the establishments concerned both as guidance for the day-to-day handling of human remains, including those originating from outside Europe, and to address questions relating to claims for return. The German Museums Association is primarily focussing on museums. The working group is of the view that the recommendations made below may also be applied equally to other collections, in particular university collections.

A conscious decision has been made to use the German term '*menschliche Überreste*' in the German version of the recommendations instead of the fairly common English

¹ PDF available at <http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/GuidanceHumanRemains11Oct.pdf> (last access 6. März 2013)

term 'human remains'. The German term, which is familiar as it calls to mind the expression '*sterbliche Überreste*' [in English: 'mortal remains'], clearly brings home to the reader what is generally being talked about here: deceased human beings. Unlike the English term, which being in a foreign language, is more remote for the German reader, the term '*menschliche Überreste*' has an emotional resonance, and that was indeed the intention since this contributes to making people more sensitive to this issue.

Efforts to raise awareness of this sensitive issue are particularly necessary in connection with the handling of human remains in all areas of the work of museums and collections, since such items in collections are not items like any other. It is often difficult to strike a balance between the interests concerned. Respect is owed to the deceased individuals and their descendants. The concerns and interests of third parties can be affected to a great degree in this regard. In many non-European indigenous communities, the connection felt to the dead is of a longer duration and shaped by different cultural and religious values to those of our Western European mindset. Since in the majority of cases the items in question are the bodies of deceased human beings or parts of such bodies, questions of ethics and human dignity are omnipresent. At the same time, man's interest in mankind is also the starting point for the great importance of research, which must be reconciled with those questions. Also for this reason the museums/collections are being called upon to retain their collections.

Since the human remains originate from all over the world and from all periods of human history, the museums and collections are faced with a multitude of different cultural ideas and beliefs. Even in the case of claims for return, a good many complex issues have to be considered for which there is often no easy answer. A further factor is heterogeneity of the remains themselves, as was made clear by the short list provided in the first paragraph of the introduction.

The present recommendations apply in principle to all items in collections in German museums and other collections which come under the definition of human remains (Chapter 2). In view of the heterogeneity of the collections, even the answers to the questions formulated in Chapter 4 will vary most significantly.

Very different branches of science are concerned with human remains, and in many cases little information is exchanged between them. Thus, for example, there are gaps in the knowledge of humanities scholars in relation to physical anthropology. The same is true of scientists in relation to ethnological questions. For this reason, the actual recommended actions (Chapter 4) are prefaced by information about the target groups and terms used (Chapter 2) and five background contributions (Chapter 3). The contributions of physical anthropology, ethnology and law provide an overview of the relevant issues in each field. The legal contribution is also concerned in detail with questions relating to return. It may therefore also be of use in connection with the legal assessment of claims for return. Those three background contributions appear between an overview on the history of collections and a contribution on ethical principles.

It is clear just from consideration of the legal issues that, from a purely legal perspective, satisfactory answers cannot be given, in particular in connection with claims for return. It is rather often questions of ethics which are significant when dealing with human remains and descendants.

Relevant questions on the preservation, care and use of human remains are dealt with in Chapter 4 across the four main areas of work of a museum: collecting, preservation, research and exhibiting. In view of the increasing number of claims being made, considerations relating to the return of human remains are also covered. The recommendations are intended to facilitate decision-making with a view to ensuring the responsible handling of human remains in the work of museums and collections.

One particular objective is to raise awareness of the sensitivity of the issue in order to ensure ethical responsibility in the handling of human remains and in dealing with claims for return made by the State of origin, people of origin or individuals. It is in the very nature of the matter that consideration must always be given to the individual case in question. As a general rule, there are no simple answers that can be applied equally to all collections of human remains.

2. Addressees and Terms used

2.1 Target Group for the Recommendations

These recommendations are primarily intended for museums and universities in Germany with collections of human remains, irrespective of their geographical origin and age (both European and non-European), in particular for ethnological museums/collections, natural history museums, museums of history, archaeological museums, museums of European ethnology, museums of cultural history, museums of local history and anatomical-pathological, forensic or anthropological museums/collections.

The recommendations do not cover:

- sacred spaces and monuments to the dead, such as churches, chapels and tombs;
- biological tissue banks;
- post-mortem examination facilities.

Certain provisions of a (legally) binding nature are already in force in relation to the latter two establishments.

2.2 Human Remains

For the purposes of these recommendations, 'human remains' means all physical remains belonging to the biological species *Homo sapiens*.

They include:

- all non-processed, processed or preserved forms of human bodies and parts thereof. This covers particular bones, mummies, bog bodies, soft tissues, organs, tissue sections, embryos, fetuses, skin, hair, fingernails and toenails (the last four even if they originate from living people) and cremated remains²;
- all (ritual) objects into which human remains as defined above have been knowingly incorporated.

They do not include:

- mouldings of human bodies or body parts, death masks, audio recordings of human voices, anthropological photographs;
- (ritual) objects previously associated with human remains, such as for example burial objects.

2.3 Context of Injustice

A key issue in relation to the care of human remains is how to assess the circumstances of the death, the acquisition of the remains and – in the case of the (ritual) objects mentioned above – their circumstances of production in the light of legal and, in particular, ethical considerations. If those circumstances appear to be particularly problematic, the recommendations advise greater sensitivity and offer advice on the special treatment to

² In archaeology, 'cremated remains' is understood in the narrower sense of the term to mean the fragments of inorganic remains (bones, teeth) of a burnt corpse, sometimes mixed with ashes and earth.

be given to the human remains. The circumstances of origin and acquisition are especially problematic when the person from whom the human remains originate was a victim of injustice. The working group uses the term 'context of injustice' to describe that situation.

It is difficult to give a standard and conclusive definition of what constitutes a context of injustice, since very different values applied and apply in different cultures and at different times. The museum or collection in question must rather establish whether in a particular case a context of injustice can be assumed in relation to the origin or acquisition of the item in question. The purpose of the section below is to highlight categories of situations in which the authors presume that such problematic circumstances exist in connection with the origin or acquisition of the item in question and, therefore, that a context of injustice may be assumed.

It is however necessary to explain at this stage that the term 'context of injustice' is not a legal term or an established ethical concept. If, for example, legal proceedings were to be brought in relation to human remains, the rules of the applicable law would alone be decisive.

Category 1:

One indication of a context of injustice within the meaning of these recommendations exists in particular where the person from whom the human remains originate was the victim of an act of violence and/or parts of his body were or are processed and retained against his will.

Exceptions:

Even if the abovementioned indication of a context of injustice within the meaning of these recommendations does exist, additional factors may cause the overall event to be seen in a different light. This may be the case, for instance, in those cultures which were familiar with and practised headhunting (for example, the Iatmul in Papua New Guinea, the Dayak in Borneo and the Konyak in India). Large sections of the indigenous peoples of America also fashioned trophies from the heads of their killed enemies. In so doing, they were honouring both the victor and the person killed as worthy opponents. Killing one's enemy and making use of his physical remains were socially accepted acts in those cultures.

The situation is different where, although the killing or the acquisition was legal at that time, from a present day perspective that act must be classified as wrong. The legal concepts and the values of the people of origin may be, but do not necessarily have to be, the decisive factor when determining whether the origin or the acquisition is to be regarded as problematic. A careful balance must always be struck on a case-by-case basis.

There may be a further exception where the killing and/or subsequent use and preservation of the human remains is so long ago in the past that the injustice which oc-

curred cannot be regarded as continuing to have an effect in the present day. This is likely to be true in any event in the case of killings dating back to prehistoric times and periods of early history, and may on a case-by-case basis also be true of events which occurred in the not quite so distant past.

From an ethnological perspective, memories of a deceased person fade after approximately four to five generations. This equates to approx. 125 years, thus providing a period of time which can also serve as a guide from a physical-anthropological perspective. In the case of people who were killed or whose body was handled in an unlawful manner more than 125 years ago, genealogical mapping to people alive today is usually no longer possible. Consequently, it is no longer possible to identify direct descendants in whose eyes the injustice which occurred could continue to have an effect. It must, however, be borne in mind that memories of injustices perpetrated, in particular in the case of the persecution of certain groups and genocides within a people or State of origin, are likely to remain vivid in people's minds for longer than 125 years. That period of time can therefore be used as a guideline in this context only in the case of individual cases of injustice. In cases of doubt, dialogue should be sought on this point.

Category 2:

A further indication of a context of injustice within the meaning of these recommendations exists where the human remains were added to a collection against the will of the original owner(s) or person(s) entitled to dispose of them, in particular by means of physical violence, coercion, theft, grave robbery or deception.

Exceptions:

As in the case of the second exception in Category 1, it is again possible under this category that the injustice perpetrated in relation to the human remains is so long ago in the past that it no longer continues to have an effect in the present day. The limitation placed upon this exception above applies equally here.

It should be remembered in this connection that during all ages there have been grave openings and the removal of items from graves and sometimes also a trade in the human remains removed, which at the time of the act(s) were not deemed to be wrong. In some cases, the values in the respective peoples or States of origin have now changed, with the result that some such events which occurred in the distant past are now viewed differently.

2.4 People of Origin

The term 'people of origin' is understood to mean the ethnic and indigenous communities which are direct descendants of those peoples from which the human remains originated. These peoples of origin may have transferred the representation of their interests in whole or in part to state political bodies, into which they are today incorporated. However, the peoples of origin are not to be regarded as identical to the higher-level state agencies which represent them.

3. Background Information

3.1 History and Context of the Collection of Human Remains in Germany and Europe

In many cultures, human remains – mostly of ancestors, religious persons, but also of defeated enemies – are deemed to have a particular power, spirituality and active role. In Europe, a continent shaped by Christianity, the public display of human remains has been accepted for a long time. The origin of this practice dates back to the cult of relics in the Middle Ages. The most important relics have traditionally been skulls and skeletons, hair, fingernails, blood and ashes. Large collections of relics of the saints were established in Europe between the 4th and 13th centuries. The collection in Vodnjan (Croatia) with a total of 370 relics, including full-body relics and mummified body parts of 250 saints, is one of the largest relevant collections in Europe. Most relics are stored in sacred buildings, in which human remains are also sometimes available for viewing by the public. In addition to the collections of relics, ‘ossuaries’ began to emerge in the 11th century, which were also mostly accessible to the public and remain so today. They were initially used as collection points for bones from cemeteries and tombs which were excavated in the course of the reconfiguration of burial grounds or during construction works. In later years, the collected human remains were also used to decorate the ossuary or other nearby sacred buildings. For example, the interior of the Capela dos Ossos (Chapel of Bones) in Portugal is completely covered with skulls, bones and hair. Some 40,000 skeletons can be found at the Sedlec Ossuary in the Czech Republic. The bones from around 10,000 skeletons were used to manufacture items such as chandeliers, coats of arms, wall decorations and garlands for the church building. The storage and presentation of human remains in sacred spaces have never formed, and still today do not form, part of the ethical debate, since from both a theological and a socio-cultural perspective the purpose of the presentation lies in devotion and reflection (Sörries 2000). Consecrated places are rather regarded as dignified and at the same time accessible resting places for human remains.

A different purpose was served by the collections which began to appear in Europe from the 14th century, primarily composed of rarities and curiosities, and the ‘cabinets of art and curiosities’ exhibited from the 15th century in which there was no separation between natural objects, artefacts, art and handcrafted items. Although initially the presentation of the cosmic and divine order of the world played a major role, these cabinets of art and curiosities were later also increasingly used for study and teaching purposes. The ‘Art and Natural History Chamber’ of the *Franckesche Stiftungen* in Halle/Saale, which opened in 1698, is regarded as the oldest preserved chamber of art and natural history in Germany (Müller-Bahlke 2004). The specimens collected in the chambers of art and curiosities also sometimes included human remains in the form of skeletons, parts of skeletons or preserved embryos and organs, most of which were however of regional origin. With the progressive specialisation of the sciences, the chambers of art and curiosities were replaced by specialist museums.

A significant boost in this regard was given by a development within the field of medicine: with the reintroduction of a specific form of anatomy involving directly acts upon the dead human body during the Renaissance, by the end of the 15th century the 'anatomical theatre' was already born. From the end of the 16th century, it became a specific place for research, teaching, public education and collecting in permanent buildings and installations at numerous universities and in the larger cities of Europe (Schramm *et al.* 2011). The many findings often made in these facilities were increasingly held and preserved in wet and dried specimens. Some of these specimens remained in the collections of the anatomical theatres and were objects of central importance, in particular for the operation of a museum of medicine during the summer months in which post-mortem examinations were not performed. Other such items supplied private collections, which were established and expanded by ambitious anatomists in the 18th century. Into the 19th century, those items often formed the basis for large-scale university collections, into which items including human remains were intensively incorporated. This collection culture experienced a late high point in 1899 with the opening of the Museum of Pathology on the Charité in Berlin, in which its founder, the Berlin-based pathologist Rudolf Virchow, displayed over 23,000 wet and dried specimens of human pathology both to experts and to the general public (Virchow 1899).

The intensified colonial expansion by European states, including Germany, from the late 17th century led to increased contact with indigenous communities. During the late 18th century, European society's enthusiasm for the 'primitive peoples' grew. The prevailing concept of the 'primitive savages' was mostly fed by scenographic depictions. The 'Physical and Astronomical Art and Nature Animal Cabinet', opened in Vienna in 1797, is regarded as an early example of the inclusion of human specimens of non-European origin in natural history exhibitions; it may, however, also be regarded as an indication of early colonial and scientific racism (Berner *et al.* 2011). After his death in 1796, Angelo Soliman, a gentleman from Africa who during his lifetime was well integrated into Austrian society, was exhibited there almost naked as a 'Princely Moor' in a tropical forest landscape (Sauer 2007). It remains in dispute to this date whether Soliman had, on the advice of his friends at court, previously given his consent to be displayed in that way (see, *inter alia*, Firla 2003) or whether he was treated thus against his will (see, *inter alia*, Sauer 2007). His daughter tried in vain to prevent her dead father being placed on display.

In addition to the portrayal of 'primitive peoples' in museums, shows involving peoples of different ethnicities were becoming more and more popular across Europe. From 1875, Carl Hagenbeck organised regular appearances in Germany of groups of people including 'exotic individuals' from 'foreign lands' (Dreesbach 2005).

With the publication of Darwin's theories of evolution and the theories of human evolution, there began a fundamental shift in the way man and his development were viewed. Human beings were increasingly understood to be natural beings which fol-

lowed the laws of biology just like other species. New approaches to the reconstruction of human evolution were born. Comparisons were drawn between modern and prehistoric man, between different examples of modern human beings and between humans and apes (Fforde 2004). Physical anthropology developed to become a specialist branch of science in the 1860s. Large-scale collections of skulls and bones were established in subsequent years in order to investigate biological ancestries using anatomical and anthropological measurements. Such collections include, for example, the Blumenbach Collection³ (Göttingen), the Alexander Ecker Collection (Freiburg) and the Rudolf Virchow Collection (Berlin).

Although the skulls and skeletons initially came from the surrounding regions, as a result of the growing contact with other cultures human remains of non-European origin, mostly from the colonies of the country in question, were also examined. The humans were grouped into 'races' according to hair and skin colour and the shape and features of the head and the skull and then compared with one another. In that context, the 'primitive races' of the non-European peoples were deemed to be representatives of an earlier stage of evolution. It was accepted that these 'primitive peoples' were inferior to the 'civilised peoples' of Europe and North America (Vierkandt 1896). The former were also regarded as 'nearly extinct tribes' (Darwin 1871), hence the demand for generating a documentation as comprehensive as possible arose, provided that this 'race' had not yet mixed with other races.

At the end of the 19th century, there were clearly defined collection criteria for expeditions to Oceania, Asia and Africa. As far as human remains were concerned, specimens were to be collected from communities which were as 'purebred' as possible, had as many individuals as possible and were as primordial as possible. There was also great interest in the different indigenous pieces of art and cultural objects, which were in demand both from European private individuals and a good many museums and collections. A brisk trade in various objects of non-European origin emerged as a result of the commissioning of merchants, explorers and even sea captains to obtain such objects. For example, the Hamburg-based ship owner and trader Johan Cesar VI Godefroy commissioned his captains to collect, purchase or obtain in exchange for other goods ethnological, zoological and botanical materials during their travels (Scheps 2005).

Private individuals were also commissioned to collect items, most of whom agreed to do so in order to gain standing amongst the scientific community and in society. Scientists drew up specialist collection guidelines and instructions on observations for non-scientists which contained, *inter alia*, clear guidance on the preservation of human remains (see, for example, Neymayer 1888; von Luschan 1899; Martin 1914). In connection with human remains, and in addition to bones, hair samples and specimens of body parts, large quantities of measurement data, physical descriptions, photographs,

³ This significant collection of skulls dates to as far back as 1780.

plaster casts and audio and video recordings of living people were collected, often against the will of the members of the indigenous communities since such contact between their ancestors and other humans did not sit well in their cultural and societal value systems.

The collections were mostly made on the basis of gifts, purchases and bartering. Collectors and traders were required to acquire items lawfully. However, since at that time human beings – and in particular the peoples of colonial territories – were often regarded merely as scientific objects, which is clearly shown by the use of the term ‘research material’, those views also affected the manner in which items were obtained. For example, theft, blackmail and unfair trading took place with the purpose of obtaining the large number of ‘objects’ in demand. As a result of the high demand, members of indigenous communities were also able to offer human remains, primarily skulls, skeletons and (ritual) objects into which human remains had been incorporated, as sought-after goods for bartering. Thus, for example, the Shuar from Ecuador and the Maori from New Zealand intentionally worked on the heads of enemies, slaves and prisoners and sold them to European traders and sailors or exchanged them for weapons. The Maori dealt in tattooed heads (*mokomokai*) and the Shuar in shrunken heads (*tsantsas*). However, diary entries and reports of expeditions also prove that the desecration of graves and theft in the name of science were unquestionably carried out and silently accepted (see, *inter alia*, Abel 1970⁴).

From time to time, situations caused by war in the colonies (such as barracking in concentration camps or direct acts of war) were also exploited to acquire bodily ‘materials’ on a larger scale and to ship those ‘materials’ back to the collecting institutions in far-off Europe. This procurement practice, immoral also by the ethical standards of the colonial powers, was justified by a significance for the world of science on which greater value was placed or simply hushed up (Hund 2009).

Prisoner of war camps were also used by German and Austrian scientists as ‘sources of procurement’ during the First World War with a view to examining a large number of people of different nationalities. As a result of the finding that a ‘race’ can ultimately never be unquestionably identified by anthropometric means, the concept of race lost its significance in later years (with the exception of the concept’s re-emergence during the Nazi era, during which interest in research into genetics shifted to characteristics of living people, such as for example hair and eye colour). With the introduction of population genetics in the 1960s, research on human remains for the purpose of racial typing was finally abandoned.

Many such collections of human remains themselves and of (ritual) objects containing human remains compiled in the ways described above were stored in museums and

4 Starting on page 237, as part of an interview conducted in 1930, Hugo Schavinsland tells of his time on the Chatham Islands in New Zealand in around 1896/97 and the circumstances in which he acquired Moriiori skulls and skeletons.

collections with partially incomplete details about their provenance. The reasons for the incomplete documentation are, firstly, the vastly different collection strategies and interests in documentation of the historical persons responsible for the collections as well as the inadequate opportunities for reappraisal. Secondly, many establishments in Germany sustained significant damage during the war, which resulted in the partial or complete loss of documentation as well as some items of the collections.

The situation is somewhat different where the collections contain human remains in the form of mummies (including bog bodies) or very old skeletons, bones and bone parts. Most of these human remains are over 300 years old. They originate from excavations and chance discoveries. Such items are also covered by the *Denkmalschutzgesetz* [Preservation of Historic Monuments Act].

From the early Middle Ages, materials and, above all, physical remains of human beings, especially of the early advanced civilisations, met with avid interest from European scholars and later also from mainstream society. Mummies have always attracted a particular fascination (Wieczorek *et al.* 2007). In many cultures, the artificial preservation of the dead forms part of the burial ritual (for example, amongst the Egyptians, Guanches (Canary Islands), Paracas and Nazca (Peru)). For Europeans, thousands of years old human remains of non-Christian origin (see relics) tended to have the allure of the exotic. Issues of a cultural and historical nature were scarcely relevant until the 19th century. Mummies were displayed in the chambers of art and curiosities of the 16th and 17th centuries and later in museums. Mummies were also acquired by private individuals. The first mummies to enjoy great renown in Europe were the embalmed, cloth-wrapped mummies of Egypt. A trade in burial objects and mummies had already been operating for a very long period of time: Egyptian graves were looted for such items as far back as during the Ramesses dynasties (1290 BC to 1070 BC).

In the hope of finding further valuable objects under the bandages, many mummies were unwrapped with no scientific purpose in mind. Later, they were still sometimes used as decorative items, but were otherwise of no commercial significance. In order to meet the great demand from the 18th century onwards, forgeries of antique mummies were also increasingly manufactured and sold. Up until the 20th century, the powder made from ground mummies (*Mumia vera aegyptiaca*) was still regarded in Europe as a cure for almost any disease. In North America, the cloth bandages in which the mummies had been wrapped were used to manufacture paper.

Many South American mummies also ended up in European collections as a result of grave robbing and trade. Thus, there is again often no information about their age or origin. Crouching mummies from Peru are particularly typical. The dead were embalmed in a crouched position, wrapped in numerous layers of sometimes richly decorated fabrics and buried in shaft graves in the sandy pampas. The graves were of great interest to grave robbers and antique dealers due to the rich array of burial goods sometimes found therein. Bundles of mummies also continue to turn up today on

the art market or in private individuals' collections. If they are not kept in the required storage conditions the bodies begin to decay, meaning that grave robbers also destroyed human remains. In addition to the damage to the mummy caused by unwrapping it or by wilfully causing its decay, the burial shrouds were also destroyed by being cutting up into decorative pieces of fabric. Pieces of those materials are also still sold to tourists today.

Bog bodies are a further form of mummies. These mummies are human remains which have been preserved in raised bogs. They are mainly found in parts of Northern Europe. The preserved bodies or body parts may be found during peat digging. Some of them were buried straight away without any documentation. They are today held in collections and put on display in exhibitions. The majority of the bog bodies discovered to date are approximately 2,000 years old and are the remains of people who were sacrificed, executed, interred in the bog normally or had a fatal accident there (Brock 2009).

It was not until the development of archaeology and anthropology into sciences in the 19th century that different methods of handling historic and prehistoric human remains were developed. Although initially priority was given to the trade in antiques without any knowledge being acquired for the purposes of socio-cultural development, with the introduction of scientific excavation technology, documentation, evaluation, preservation and archiving it was now possible to obtain extensive knowledge about the history of mankind. In view of the very distant chronological link between archaeological human remains and people alive today, there has been hardly any ethical and moral debate to date about the handling of such remains and their presentation in Europe and such discussions are therefore only in the early stages. In fact, there is the widest possible public acceptance of the exhibition of mummies (including bog bodies) and the bones of prehistoric man as records of human history. Mummies and bodies used for anatomical purposes are today regarded under German law as 'tradeable items' which may be owned, exchanged or given away. They are no longer objects of piety, since the consequences of the rights of the individual are now defunct (Preuß 2007).

There has been debate in certain countries since the 1990s as to whether human remains obtained from archaeological excavations should be reinterred after they have been duly documented (for example, in the UK, the USA and Australia). In particular in the case of human remains of members of indigenous communities, their excavation is regarded as the desecration of burial sites and the exhibition of the remains and associated objects is deemed to be disrespectful. Since around the year 2000, various ethnic groups have been increasingly calling for the return of the human remains of their ancestors which were brought to museums and collections for scientific purposes worldwide. In the light of those demands, which are also made in Germany more and more often, a dialogue has been initiated with the aim of striking a balance between the conflicting values and world views expressed in that debate and thus providing assis-

tance in connection with the handling of specific claims for return. The first stage towards achieving that aim is, however, always to establish the origin and status of the human remains concerned.

Wiebke Ahrndt
Thomas Schnalke
Anne Wesche

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3.2 Methods for the scientific Analysis of Human Remains

The purpose of this section is to provide a summary of the options for analysing human remains and knowledge which can be achieved from the scientific examination of organic human remains. In the vast majority of cases, human hard tissues are used for analysis, since such tissues are less sensitive towards post mortem decomposition processes within the human body (a process conditioned by the environment in which it is stored) in a comparatively stable manner (Grupe et al. 2012). However, soft human tissues can be obtained under particular conditions, e.g. in cases of natural, intentional or artificial mummification (Wieczorek and Rosendahl 2010).

Hard human tissues as biological storage media

As hard tissues, bones and teeth have both a support and a storage function in the body. The support function of the bones is achieved and continually adapted by adjustments to the different loads placed on the body, so that the skeleton reflects the physical demands on the body throughout its entire lifetime.

The bones perform a storage function by means of deposits of bioavailable mineral and organic components. During periods of nutritional deficiency, those components can be remobilised with the result that an optimum adjustment to variable environmental conditions is achieved by the body itself.

The human skeleton can therefore be regarded as a mirror of the environmental conditions human beings were exposed to. Such conditions include, on the one hand, the natural parameters of the habitat, such as the climate and natural food resources, as well as anthropogenic influences. The basic diet, living situation and working conditions can therefore be mapped in the skeleton. If disruptive influences occur which the body is no longer in a position to compensate for, it reacts by means of pathological changes (Larsen 1997). Thus, for example, infectious diseases allow for an interpretation of population density, long periods of food shortage have a particular effect on the health of children, traumata are signs of mortality risks at a younger age, and signs of degeneration of the skeleton point to generally demanding living conditions (Pinhasi and Mays 2008). The number of males and females, based on a sex diagnosis of the skeleton, and the age composition, based on the individual age at death diagnosis, provide significant palaeodemographic population data such as, for example, life expectancy, which in people today is regarded as an indicator of general living conditions as well (Bocquet-Appel 2008).

Culturally related procedures and operations carried out on the human body, such as medical care, trepanations, skull deformations and mutilations of the body, can also be diagnosed in the human skeleton.

Burial and memorial rites and treatment of body trophies

Human remains can also give an insight into the way how the dead were treated in different cultures and at different times. The state of preservation of the human remains can provide clues about burial traditions and means of disposal. Special treatment of or artificial modifications in human bodies and body parts (hard and soft tissues) enable conclusions about cultural traditions, such as the worship of ancestors and belief in the afterlife, or headhunting and the treatment of skull trophies (Wieczorek and Rosendahl 2011).

Methodological approaches

Over the past few decades, a multitude of analytical methods have been developed in the field of the anthropological sciences from which it is possible to reconstruct life his-

tory parameters. The more information can be gained, the easier it is to detect human environmental situations and to reconstruct the former living conditions of the dead. The responsibility of the curator requires that a distinction is made between invasive and non-invasive methods of analysis. It is always necessary to verify whether the underlying question and the results to be expected justify an invasive and thus structurally destructive involvement. This holds true in particular in cases of provenance tests of human remains which are scheduled for repatriation.

Non-invasive methods

New imaging processes are increasingly being used for the non-invasive analysis of human remains. Digital data obtained from surface scanning, computed tomography and magnetic resonance imaging provide three-dimensional images which enable very detailed analysis without destructive effects (Chhem and Brothwell 2008). As a result of such processes, invasive measures to clarify anatomical, morphological and histological findings, particularly in the case of mummies and soft tissue samples, are obsolete. When objects such as skulls are fragmented virtual reconstructions can be produced without having to glue together the original pieces. In addition, the scanned human remains are stored for scientific purposes as permanent digital data records, which will create the basis for a virtual collection. For example, scans could be used to carry out craniometric examinations, which provide indications of geographic origin, with greater precision and more reproducible than is possible with the conventional, manual methods. The skull measurements taken are analysed using the computer program FOR-DISC⁵, which was developed within the field of forensic anthropology to determine the identity of unknown dead bodies.

Furthermore, virtual 3D data can be used for the contact-free, precise and colourfast manufacture of replicas of fragile remains, such as skulls (Rosendahl *et al.* 2011). Using the 3D data obtained or replicas, traditional morphometric analyses can be conducted with care and reproducibility. 3D data and replicas are used to analyse the provenance of objects, in paleopathology, in mummy research and in museum documentation procedures (Slice 2005).

Morphological methods continue to include the diagnosis of sex, which also enables statements to be made about robusticity and therefore the body's adjustment to its living conditions (White and Folkens 2005). Quantitative sex compositions are investigated at population level, and this constitutes a key palaeodemographic measure. Although the non-invasive methods of determining the age at death by morphological means provide less precise estimates than invasive methods, they are in many cases sufficient to answer general questions about 'age at death' distributions. The palaeopathological diagnosis is also based on noticeable morphological changes, the differential diagnosis of which has to be proved by means of invasive histological analyses

5 Stephen D. **Ousley** and Richard L. **Jantz** (2005), *FORDISC 3: Computerized Forensic Discriminant Functions. Version 3.0.* University of Tennessee, Knoxville

additionally. Those changes allow the interpretation to which extent populations or sections of populations were affected by burdens of disease. The morphometric reconstruction of growth ratios and heights can be regarded as a key indicator of general living conditions. In recent years, great importance has been attached to the 'stress markers' on skeletons which are viewed as sensitive indicators of particular stresses in defined age groups (Grupe *et al.* 2012).

Invasive methods

Where it is not possible to place human remains within a specific time period using datable goods and/or documents, radio carbon dating (AMS 14C analysis) offers the ability to date objects which are up to 50,000 years old (Geyh 2005). A sample weighing 1g is normally sufficient for dating. The collagen is extracted from the sample in the laboratory, and from that collagen 1mg of carbon is used for data analysis. It must be remembered that age-related data obtained by radiometric means comes with a standard error (standard deviation +/- depending on the age in tens and hundreds of years) and can never provide an age exact to a particular year.

Nutritional conditions can be reconstructed and origin and migration determined by analysing stable isotopes in the bones (see, for example, Grupe *et al.* 2012). This method has increasingly established itself in recent years. It is based on the deposits of stable isotopes, such as those of strontium or oxygen, in the storage medium, i.e. the bone. Depending on the geo-chemical composition of the region's soil, the isotopes are present in a certain proportion to one another ('a signature') and reach humans via the food chain. The region of origin can be narrowed down through the use of appropriate soil maps.

By contrast, the isotopes of carbon and nitrogen to be examined in the collagen are ingested via the food chain in different quantities, such that these data can be used to reconstruct nutritional patterns. People with a vegetarian diet can be distinguished from those with high protein intake by diet, and the age of weaning and the proportions of marine and land-based nutritional components in coastal settlements can also be determined.

Collagen tests can in principle be performed on bones, fingernails and hair samples. The results of analyses conducted on bones cover longer sections of the individual's lifetime than those conducted on hair samples.

Toxicological analyses of hair samples can also prove very interesting. For example, such tests can indicate consumption of, for example, drugs (nicotine, cocaine, alcohol) or certain medications (Musshoff *et al.* 2009).

Analysis of mitochondrial DNA (mtDNA) can reveal genetic kinships and through their purely maternal inheritance indicate lineage (Komar and Buikstra 2008; Grupe *et al.* 2012). On account of the large number of copies of the mtDNA in the cells, it can often be successfully extracted from human remains. DNA which is free of contamination

is most likely to be obtained from the root canals of the teeth, but samples taken from bone or soft tissues can also give valid results. Membership to population groups can be interpreted on the basis of the distribution of analysed haplotypes⁶, the genetic alleles⁷ of which vary in a manner specific to certain populations.

A range of further invasive methods (*inter alia* dental cement annulation to determine the precise age at death and stress marker density, histological tests as part of palaeopathology) are available.

Potential conclusions

A paradigm shift has occurred in the past few decades: a shift from the typological view, the consequence of which was the systematic collection of human skeletons, and in particular skulls, from the second half of the 19th century onwards, to a genetic concept of populations prevalent since the 1960s. As a result of that paradigm shift, and supported by the new methods of analysis, the questions about and potential to comment on human remains have changed.

Whereas before that time the spectrum of types was deemed to be evidence of an obsolete model for human races, today the adaptations to the human natural environment and cultural traditions as anthropogenic mechanisms are being examined concerning global variability. Skeleton collections are of great significance in this context, since they often show the broad biological variation of anatomically modern humans.

An interdisciplinary reflection (i.e. from the perspectives of natural and cultural sciences) of adaptation processes in the past can provide findings which can also be used to better explain recent ethnological and biological structures. This is an essential basis for attempts to understand the biological diversity of mankind and a pre-requisite for being able to assess and track future developments with a critical eye. In addition, the reconstruction of individual life histories shows the extent to which, in specific circumstances, human beings react to their environment and how use is made of their biological capacity.

Accordingly, in addition to knowledge of provenance, a key condition for the use of human skeletal collections for research is an information basis which is as sound as possible. This is particularly the case with skeletal collections with comprehensive documentation of personal data. Such collections have an enormous potential for natural sciences and history. They represent an invaluable source of information for all scientific disciplines concerned with questions of human biology. These skeletal collections can be viewed as genuine research laboratories. Since they consist of individuals with known biographical data, they offer the opportunity to validate different osteological or palaeodemographic methods, such as for example sex or age death estimations, the essential basis of any anthropological examination. Furthermore, these skeletons repre-

6 Variant of a base sequence on one and the same chromosome of a living creature

7 A possible variant form of a gene

sent also a realistic, three-dimensional textbook of palaeopathology. Their scientific value is therefore indisputable.

However, collections of human remains are to be used for scientific purposes only in so far as they have the necessary information content (this is a problem when there is no documentation pertaining to the collections) and they were not acquired in a 'context of injustice' ('Rules of Good Scientific Practice').

Finally, and by way of example, one project is mentioned which makes comprehensive use of the information available pertaining to several skeletal collections: the Global History of Health project asks questions about the evolution of health of human populations and, to that end, uses a combination of the anthropological data collected from skeletal traits with the corresponding data gathered from the disciplines of archaeology, climate history, geography and history. The aim is to test two hypotheses: is the general state of health essentially dependent on geographical features such as the natural environment, climate, natural resources and other geographical parameters, or is human creativity – manifested in the form of institutions, culture and political structures – the most significant factor? In the course of a European-wide cooperation initiative, anthropological data from European skeleton series were collected in a standardised format and interpreted in conjunction with additional contextual information, biochemical analyses, quantifiable environmental features and measurable, socio-economic conditions. Detailed information about the project and regular updates can be found on the project website [<http://global.sbs.ohio-state.edu>]. The project offers a unique opportunity to bring together anthropological diagnoses collected from numerous European skeleton series and to combine them within a contextually defined and multi-disciplinary framework, as has already been achieved and demonstrated in relation to the American continent (Steckel 2002).

Wilfried Rosendahl
Ursula Wittwer-Backofen

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3.3 The ethnological Relevance of Human Remains – Social, religious and scientific-historical Perspectives

Relationship between human beings and the remains of their own ancestors

The relationship between human beings and the bones, and remains in general, of their own ancestors differs between cultures and is unique in every instance. For example, there are differences based on beliefs and the ritual observance of those beliefs. They are phenomena associated with a religion and a specially defined consciousness of the importance of ancestors. Common features can however be identified which have their basis in the essentially identical attitude of all human beings to the question of life and death.

The affinity with the skeleton of the deceased person or with other human remains requires ritualised pious conduct. A key feature of such conduct is the ritualisation of the fear of death felt by the living. Human remains symbolise this mystical relationship which exists in all cultures. People of all cultures qualify their relationship to the bones of their ancestors on the basis of their beliefs and in so doing make the concepts of life and death understandable. The living have to suffer the genuine power of the coincidence of life and death and demonstrate that conflict in its myths and individual views on death.

Human remains of ancestors can be ritualised in many ways. For example, certain remains of the dead are carried lovingly by the living as a talisman, a relic, to bring luck during a hunt. The small amounts of bone or hair act as reminders of the omnipresence of their ancestors. Such phenomena have varying degrees of significance in each individual culture. Human remains are generally buried, with the manner of such burial potentially varying greatly, and particularly in cases of a second burial there are multiple opportunities for reusing human remains. There are also however exceptions in this regard. Graves or tombs are in many cases places of worship and remembrance. Human remains are also treated cosmetically and artificially for display amongst the living and are presented to family members, members of a certain group or guests on particular festive occasions.

In many cultures, an encounter with the human remains of one's ancestors is a key event for the living. It is a means of engaging with the history of the group or family in question and generally coming to terms with man's mortality, which shapes the thoughts of all of us. For example, the (presumptive respectful) public understand a decorated skull to be a representation of death. In many cultures, human remains are decorated and give a more aesthetically pleasing depiction of death and the legacy of the deceased person.

Worship of ancestors

The worship of ancestors is often linked to the manifestation of their human remains. Those remains literally embody the spiritual presence of the ancestors. Myths often tell of the transformation of human remains into other forms, such as for example plants or animals (which is also carried through into European culture by Ovid's 'Metamorphoses': Adonis etc.). Mythical concepts are significant in every culture and, through the worship of ancestors, support the integration of a cultural group.

Use of human remains as a substance or material

Showing respect for human remains does not preclude the material substance of the bones or other human remains from being appropriated and used as a magical product or remedy, for example bone fragments or bone meal. From a Western perspective, the ingestion of substances acquired from the dead such as ashes or parts of bones, for example as part of initiation ceremonies, is often regarded as endocannibalism. Since the colonial administrations prohibited all ritual acts connected with cannibalism, information about such events is only very piecemeal.

By this sharing of the substance of the human remains, the distance between person X and person Y is closed and the human remains become cult objects with allegedly healing properties (i.e. the physical is sublimated into the spiritual). The belief that human remains have healing properties is a worldwide phenomenon. Human remains are used symbolically as religious items and also serve political interests.

Presentation of human remains

Ancestors are integrated into the present day *inter alia* by the presence of individual parts of them, their skeletons, skulls etc., in traditional religious rites. Interpreting human remains free from any religious views is, by contrast, a modern-day approach. It can be clearly seen in all communities around the globe: the presentation and theatrical transformation of death and its primary manifestation, human bones (skull, skeleton) primarily, but also other body parts, shape the cultural awareness of a group. The presence of human remains makes clear the presence of ancestors at festivals remembering the dead. Although the presence of ancestors, particularly at night, is regarded as a perpetual state, they are nevertheless invoked for particular rituals. The aesthetic styling of skulls using paints, as still currently practised in New Guinea, and their incorporation into figures are ways of bringing ancestors to life.

Aesthetics of human remains

Over the course of time, the performative character of the use of human remains has led to their aestheticisation, a trend still very much in force today. Thus, for example, the skeleton, preferably the skull, was decorated and adorned: diamond-encrusted skulls, skulls covered in a skin made of earth, artistically painted skulls and skulls bearing written messages. As in the case of other works of art, for example those manufactured from wood or other materials, similar principles govern the artistic use of human remains. In order to give new life to the remains through ritual, death must be understood to be a part of life.

Ethnological perspective

The ethnological view of human remains also encompasses the attitudes towards death of – in this case – Western cultures. On the one hand, consideration must be given to Christian/Western tradition, for example the cult of relics, which played a significant role when religious missionaries encountered indigenous peoples. It is mentioned as a related point that Western travellers and explorers rejected certain behaviours by indigenous groups in connection with human remains. On the other hand, the following questions are relevant today: Was the unique character of the cultural presentation of human remains respected by the Western explorers? Under what circumstances were graves opened to remove human remains? Was resistance ignored or suppressed? Were people murdered for their bones? Where did indigenous groups assist the explorers and collectors (from the 15th century onwards)? In the context of the colonial period, the cooperation with the explorers has it been an action marked by mutual misunderstanding? Were and are the human remains collected and kept in archives manifestations of racism? What steps were taken to document the human remains and substantiate their origin? How, in the context of history, did human remains influence ethnological theories, Western conceptions of the world, philosophical thought and the mysticism surrounding death? For what does ethnological and cultural-historical research have to make amends towards members of other cultures?

Human remains as part of the history of science

Research on human remains played a significant role in the history of science, in particular that of the 19th century. For example, many explorers were trained as physicians and as result of their expeditions became ethnologists: Adolf Bastian, Augustin Krämer and Richard Karutz to name a few. Accordingly, the first ethnographic collections at the end of the 18th century and in the 19th century were often compiled by physicians or other natural scientists. They therefore established a discipline with a strong focus on the natural sciences, a discipline which only later in the 20th century became a cultural and social science. Those close links could still be seen until recent times *inter alia* by the way in which many natural history and ethnological collections were housed, for example in Bremen, Freiburg and Chicago. In addition, from a current ethnological perspective, there has been an emphasis placed on 'evolutionary' questions since the mid-19th century. It was held to be necessary to investigate not just the origins of nature but also systems of social organisation and religion. The treatment of the dead thus received greater attention, since there was a desire to find there an original form of religion on the basis of the various forms of conduct observed. However, recent research has been focussed on investigations which analyse the interconnection between the body as a whole and, in particular, indigenous views on specific body parts, such as for example blood, semen and hair. For instance, beliefs that bones are the component of human beings which symbolise the paternal line can also be of great relevance in this context. The substance of the human remains thus acquires significance in relation to mankind's views on society and creation.

Colonial history

Human remains were of no relevance when Europeans first encountered other cultures; in fact, they became relevant only in the course of longer contact with those cultures, a phenomenon which has as yet not been examined in any detail. Very often, indigenous groups, for example those in Melanesia (Oceania), were prepared to trade human remains with collectors in exchange for other goods. This suggests that indigenous groups saw the white-skinned collectors as representatives of a world of the dead to whom they were entrusting the bones of their ancestors. In addition, it is possible to establish a strong tendency towards acquiring innovative items, which people were prepared to acquire by any means. It must, however, be pointed out that in a very large number of cases indigenous people offered the skulls of their ancestors or those of their enemies to collectors in considerable numbers by way of exchange. The ideas and experiences of indigenous groups and the documentation of those ideas and experiences reveal their generally negative associations of 19th century explorers with colonialism. The colonial administrations prohibited warfare and headhunting and interfered in burial rites. As a general rule, second burials were banned, despite such ceremonies being important for the ritual handling of the bones. In addition, bodies had to be buried outside settlements in cemeteries. Burials on private land were therefore also often no longer possible. Of the various forms of burial, interment in the ground was generally the only form allowed. In this way, the colonial rulers altered the relationship between

indigenous peoples and the human remains of members of their communities. Missions and other efforts to spread major religions (such as Christianity and Islam) changed the beliefs of indigenous cultures. They introduced new rites, redefined the language of mysticism and today often form part of the professions of faith and ethics of many indigenous groups.

Human remains in minority politics and as part of necessary efforts to make amends It is clear in the present day, in particular in view of the arguments supporting claims for the return of human remains, how dominant social groups exploit human remains. The examination of fundamentalist views and their political effect are fields of research of ethnologists and social scientists. The right of a family or an ethnic group to call for the return of the human remains of their ancestors from the inventories of existing collections in Europe or elsewhere in order to bury them or keep them safe in accordance with ritual must be recognised. The limits of that right are not as yet clearly defined.

Human remains and their classification

One important task for ethnologists in the coming years and decades will be to classify human remains in existing collections. This is not a research process which is determined by political interests since science is meant to be free of political pressure, but it should be guided by the concept of an academic and moral or ethical need, a concept developed from the recent discussions. This includes considerations relating to the repatriation of human remains, even in cases in which those remains cannot be traced to a specific family or ethnic group but rather to a political entity or State. As a result, this raises issues relating to the history of the collection, the ethical standards by which such collections were compiled and the significance of the human remains in the history of science. Consideration will have to be given to ethics (e.g. injustice and violence, human rights), the spirit and purpose of the collection (the history of Enlightenment, system of world knowledge which, although developed from a European perspective, is nevertheless universally valid), archiving by museums and the principles governing such archiving (preserving, research, exhibiting) and the political use of the symbol of 'human remains' over the course of history.

Bipolar assessment

The human remains contained in European collections can be viewed on two different levels: firstly from the perspective of the individuals and groups from whom the items originate, and secondly from that of those explorers and collectors who compiled, researched, published and systematised the related collections. Research in the future will therefore have the special task of ensuring that appropriate justice is done to both parties.

Claus Deimel
Markus Schindlbeck

We would like to thank Prof Bernhard Maaz (Staatliche Kunstsammlungen Dresden) for his comments and for producing the last aspect.

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3.4 Relevant legal Provisions for Museums and Collections in dealing with Human Remains

A good many legal questions may arise when working with human remains in museums/collections. Unfortunately, German law does not provide any clear answers to many of those questions. Rules relating directly and explicitly to the legal status of, or permissible manner of handling, the human corpse or other human remains exist only in isolated cases and never relate expressly to the operation of a museum or work in university collections. Case-law has sought to answer the key fundamental questions through the interpretation of general legal provisions. However, since case-law is always concerned with individual cases, often only individual points are clarified.

The purpose of the section below is, firstly, to attempt to bring together the existing legal framework governing the work of museums/collections containing human remains. In a second stage, consideration will be given to whether legally substantiated claims for return may be made against museums/collections.

A Legal framework governing the work of museums/collections containing human remains

1. The human corpse in German constitutional law: the protection of the human dignity of the dead under Article 1(1) of the Basic Law

The foundation of the German legal system is the Basic Law. The fundamental rights, in which the core of inalienable rights enjoyed by individuals is enshrined, form the first part of that constitution. It has long been recognised that at least Article 1(1) of the Basic Law is also applicable to the dead. That paragraph reads:

‘Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.’

The Basic Law itself neither defines nor explains what is to be understood by “human dignity”. Instead, the drafters of the constitution left the interpretation of that legal concept to the courts. With regard to the protection of human dignity after a person’s death, case-law has been focussed on two points:

- a) The corpse must be treated in a manner consistent with the protection of human dignity guaranteed by the Basic Law, and in particular it must not be degraded to the status of an object. This means that the corpse must not be treated simply as dead matter, i.e. it may not, for example, be used for industrial purposes or commercialised.

This point played a significant role in the rulings on the ‘Body Worlds’ exhibitions, at which Gunther von Hagens’ “plastinates” – corpses prepared by means of a special process – were and are displayed. In all their decisions, the courts explained that such an exhibition is permissible only for scientific educational purposes. It was held to be permissible to aestheticise the plastinates, but only where this served to impart knowledge of popular sciences. Thus, for example, one plastinate was exhibited in the pose of a footballer taking a shot at goal complete with a football. The court still found this to be compatible with the concept of human dignity, since the presence of this plastinate made the scientific content of the exhibition more accessible to lay people. If, however, the creative will of the artist or even commercial interests are the dominant influences, the limits of what is permissible are deemed to be exceeded. In this connection, it is also insignificant whether the deceased persons consented to the presentation. It is not the values of the individuals in question which are decisive factor but rather those of the general public. Von Hagens was therefore prohibited *inter alia* from selling certain items of merchandise.

For museums and collections, this is likely to mean that the exhibition of anatomical specimens in a scientific context is, in principle, unproblematic for the purposes of constitutional law. Similarly, for example, the exhibition of human remains in the context of archaeological collections does not constitute an offence against human dignity if the purpose of the presentation is to impart scientific knowledge. However, it

must be ensured that the human remains are exhibited in a respectful context, meaning for instance that any humorous touches must be avoided absolutely. It would probably be problematic if, for example, a contemporary artist were to use body parts in his or her art. Great care must also be exercised with regard to the sale of products in museum shops which incorporate exhibits made of human remains. Scientific publications, in particular catalogues, are of course no cause for concern, but 'souvenirs' may run into legal restrictions.

- b) The memory of the deceased and personality of the individual must be protected. In this connection, the Federal Constitutional Court has developed the legal concept of the 'post-mortem rights of the individual'. The right to defend the remembrance of the deceased person against defamation and false representations is derived from that legal concept. However, it is permissible, for example, to (re)interpret the deceased's role in society, provided that that (re)interpretation is not disparaging. Fundamental in this regard is the 'Mephisto' judgment of 1971, in which the Federal Constitutional Court was required to consider the novel of the same name by Klaus Mann. The protagonist in that novel was based on the actor Gustaf Gründgens, whose proximity to the Nazi regime was depicted in a way which portrayed him as unprincipled. At the trial, the court found in favour of Gründgens' relatives, who had viewed that portrayal as an attack on his reputation. Post-mortem protection does not, however, last for ever. Rather, the Federal Constitutional Court assumes that the 'post-mortem rights of the individual' lapse in line with the remembrance of the deceased person, the period during which 'the dead are commemorated'. That period has no fixed time-limit. In some cases the protection may expire as early as after 25 years, in other cases (Friedrich II of Prussia is one such example) it may endure for considerably longer. However, a higher level of protection for high-ranking individuals is scarcely compatible with the right to equal respect for the dignity of all and the idea that every human life is an end itself, an idea guaranteed by the concept of human dignity

With a view to the work of museums/collections it is in any case possible to say that the 'nameless dead' in the ancient history collections are not protected under the 'post-mortem rights of the individual'. Accordingly, when handling the mortal remains of such deceased persons, consideration must be given only to the points set out under a) above in relation to the corpse. This is also true, for example, of bones to which a name is indeed attached but otherwise little or nothing else is known. The protection of the individual should also be borne in mind in the case of human remains originating from dead people who are still remembered; *inter alia* also in the form of the ancestor worship. This could be a relevant factor in the case of the remains of leaders of indigenous groups from the 19th and early 20th centuries for example. Care must also be taken in those cases that the life of the individuals in question is not 'belittled' by the exhibition of the human remains. However, it is not

absolutely essential to abide by the wishes of the relatives or descendants, for example that the individual be honoured as a hero, if that is not historically verifiable.

As a final point, it should be noted that the provisions of the Basic Law are very seldom directly applied. Accordingly, there will be very few cases in which a claimant – who, for example, would like to see changes to the presentation of human remains in the museum/in a collection – relies directly on Article 1 of the Basic Law in the course of the proceedings.

Of considerably greater significance in practice are the indirect effects of the fundamental rights. The fundamental rights are binding on ‘all state bodies and authorities’. This means that all public institutions and authorities – i.e. including public museums/collections – must ‘directly’ observe the fundamental rights in their work. This could mean, for example, that a museum/collection must interpret and apply rules governing access to collections differently depending on whether or not the collections concerned contain human remains. By so doing, the museum/collection can guarantee that account is taken of the fundamental right of human dignity. The courts must also interpret all laws ‘in a manner consistent with the constitution’. The judgments relating to the plastinate exhibitions referred to above were given in proceedings before administrative courts concerned with the official authorisation for the exhibition. The court had to interpret the relevant provisions of administrative law ‘in the light of constitutional law’.

Side Note: human tissue from living ‘donors’ and the fundamental rights

The comments under a) and b) above also apply with some modifications to tissue taken from people who are still alive. This would include the sculptures by Marc Quinn or artefacts containing, for example, the hair of living people. A key difference from the comments made above is that, in the case of tissue from living people, the subject of fundamental rights can still enforce his/her rights himself if s/he learns of any infringements. Furthermore, additional and different legal rules apply in the case of living persons (above all, the general freedom to act under Article 2(1) of the Basic Law). However, detailed discussion of such cases is not necessary here, since it is probably rarer to find such items in collections than it is to find human remains of the dead.

Where the principles set out under a) and b) above are likewise observed in these cases, the museum/collection in question is – from legal perspective – acting on the safe side. In cases in which it is known that the person from whom the tissue originates ‘donated’ that tissue without negative consequences for his health (hair, fingernails and toenails and blood in particular), did so willingly and was aware that they would be put to further use, procedures are likely to be less rigid than those involving the handling of human remains of deceased persons. Accordingly, the industrial exploitation of hair which is sold voluntarily is clearly compatible with the concept of human dignity. By contrast, the standards laid down under

a) and b) above are likely to apply without restriction to the hair of concentration camp prisoners removed by force, even if the prisoners were still alive at the time the hair was cut off.

2. Human remains in German civil law

a) Is it possible to own human remains?

The *Bürgerliches Gesetzbuch* [German Civil Code] lays down a series of rights which allow the holder of the right to deal with a thing in a particular way, referred to as 'property rights'.

Those property rights include, in particular, the rights of ownership and possession, two rights which must be distinguished from one another in a legal context. The right of ownership is the most powerful property right. It is enshrined in s. 903 of the Civil Code and affords the owner the right to deal with the thing in question at his discretion. The owner of a thing can therefore, in principle, sell, loan, modify or even destroy that thing. There may, however, be other laws in individual cases which prohibit such acts. For example, the owner of a historic monument or building may not destroy it because its destruction is prohibited under the *Denkmalschutzgesetz* [Law on the protection of historic monuments].

The legal concept of possession is laid down in s. 854 of the Civil Code. In legal terminology, the possession of a thing means simply to have that thing, to exercise control over it. Possession affords only limited rights. For example, a person who rents a thing does not have possession of that thing but s/he is not its owner. Unlike the owner, s/he may for example therefore neither destroy nor sell it.

The property rights laid down in the Civil Code, and therefore including the right of ownership, exist only in relation to 'things' within the meaning of s. 90 of the Civil Code. There is no express legal provision governing whether a corpse constitutes such a 'thing'; this is rather a question of statutory interpretation. Some legal experts are of the view that the corpse of a recently deceased person is definitely not a 'thing'. The now likely prevailing opinion amongst such experts is that such a corpse is indeed a 'thing' within the meaning of s. 90 of the Civil Code, but – exceptionally – it is a thing not covered by legal dealings (*res extra commercium*). However, both groups conclude that property rights cannot exist in relation to the corpse of a recently deceased person and therefore ownership of such a corpse in a legal sense is not possible.

At the same time, it is generally accepted amongst legal experts that the human remains of persons who died a long time ago are 'tradeable items' for the purposes of civil law in respect of which rights of ownership may therefore exist.

The civil law offers no more precise or meaningful answer than constitutional law to the question of when a thing shifts from being a '*res extra commercium*' to a 'tradeable item'. It is also assumed in this connection that, once the post-mortem rights of the individual lapse and the dead are no longer commemorated, the human remains – and

thus also human tissue – may be traded, but no precise statement is made as to when that point is reached. Furthermore, there has also been no satisfactory explanation as to when the commemoration of the dead may be deemed to have ended.

Since the German courts have never yet had to rule on such a case, it has not been definitively explained whether that question must be determined by reference to the common practices and customs in Germany or whether account must also be taken of the rites of other cultures in this regard. When assessing this question, the German courts will of course not be able to disregard the values of the legal and cultural group, of which they are a part. At the same time, human dignity is held to be universal. It therefore appears possible that the courts will also include the values of other cultures in its considerations where there is a sufficient link to the facts of the case.

The legal position is, however, clear in the case of body parts removed from living people, such as hair and blood as well as, for example, extracted teeth. On their removal, such items became the property of the 'donor', who can therefore deal with them at his discretion and, for example, sell them.

It can be stated in summary that an Egyptian mummy, a North German bog body or bones dating back to ancient times in Europe can thus be owned by a museum/collection for the purposes of civil law and be listed in its inventory. The same is true of artefacts made using the human tissue of living people, for example pictures created from hair, which may be acquired by museums/collections as property without this raising any problems. By contrast, the situation is considerably less clear in the case of the tissues of dead people whose memory might still be being honoured, for example in the case of anatomical specimens from the Nazi era. There may clearly be doubts in some such cases as to whether those remains are the property of the museum/collection.

In the case of the corpses of the dead who are still being commemorated, and therefore in respect of which a right of ownership cannot exist, there is instead a (very heavily restricted) right to care for the dead person, which is afforded to certain authorised persons (generally the dead person's relatives). That right allows, for example, decisions to be taken about the funeral or about the use of the corpse for scientific purposes. The relatives are not at complete liberty to make such decisions, but are rather bound by the (presumed) wishes of the deceased.

The right to care for the dead person is recognised in civil law as a legal position deserving of protection. As lawful holders of that right, relatives can therefore raise a defence by civil means if their rights are being interfered with, for example if a third party is attempting to exert influence over the burial. In addition, persons authorised to care for the dead person may enforce the rights of that person under civil law. For example, proceedings can be brought under s. 823 of the Civil Code where the honour of a person is offended; this also applies to the honour deceased persons. Relatives can therefore bring an action in the civil courts against acts offending the honour of the deceased person. That provision must then be interpreted by the court, which must again give

consideration to the 'post-mortem rights of the individual' under Article 1 of the Basic Law. The right to the protection of a person's honour under civil law therefore 'lapses' in the same way as the period during which 'the dead are deemed to be commemorated' for the purposes of constitutional law, a period in respect of which no time-limit is laid down.

It has already been stated in section 1 above that the corpse itself may never be used for commercial purposes. However, use may indeed still be made of the character/personality of the deceased person for commercial purposes even after death; a familiar example is the use of images of dead film stars in advertising. In accordance with civil case-law, the right to make commercial use of images in that way forms part of the deceased person's estate, and is therefore a right held by his/her heirs (i.e. in this case not necessarily the deceased person's relatives). This legal position also does not last forever. A degree of caution is required at least in the case of people who have died within the past hundred years. Problems could arise for museums and collections for example in relation to items of merchandise (in turn not catalogues and the like) on which the image of the deceased person appears.

b) Legal problems when acquiring ownership of human remains:

Even though rights of ownership may exist in relation to human remains or (ritual) objects into which human remains have been incorporated, this does not mean that ownership of those remains or objects must always have been effectively transferred to the museum or collection in which they are held. The general rules of civil law contained in the Civil Code apply here (s. 929 et seq.). Those sections provide how ownership is transferred from one owner to another and when defects in the transfer of the thing in question means that the transfer of ownership is not effective and the thing in question remains the property of the original owner. If ownership has not been transferred effectively, the last lawful owner may have a legally enforceable claim for the return of the thing in question against the person in possession of that thing.

Not all the possible scenarios can be covered in the space available here. It is therefore mentioned only by way of example that a thief does not acquire ownership of items stolen by him (e.g. a corpse or human remains) and cannot therefore transfer ownership of those items (s. 935 of the Civil Code). If a museum/collection purchases a stolen item (e.g. a corpse or human remains) from a thief, the museum/collection cannot therefore acquire ownership of that item immediately. The item is initially simply in the possession of the museum/collection. Ownership may however pass to the museum/collection at a later stage under other provisions of the Civil Code. One example of how ownership may be passed involves the legal concept of prescription (s. 937 et seq. of the Civil Code). In order to rely on that legal concept, the museum/collection must have known nothing about the illegal 'acquisition' of the item by the thief. The museum/collection must have acted 'in good faith'. If the museum/collection did act 'in good faith', it can become the owner of the item after a period of ten years even if that

item (e.g. a corpse or human remains) was stolen. If the museum acquired the item more than 30 years previously, an earlier owner can generally no longer enforce his claim before the courts. In cases of doubt as to whether the museum or collection has acquired ownership, the matter should be examined by a legal expert.

3. Other relevant legal provisions German law

For the sake of completeness, there follows a brief explanation of the law governing burial and the provisions of criminal law concerned with the protection of the human corpse.

The law governing burial differs from federal state to federal state. In principle, the corpses of deceased persons must be buried within a short period of time. However, under the law governing burial, the term 'corpse' is understood to mean only the essentially complete human body, the coherence of which has not already ceased as a result of the onset of natural processes. Corpses intended for scientific use, e.g. those intended for anatomical purposes, are always exceptions to the burial requirement. For example, it was held in relation to the plastinates at the 'Body Worlds' exhibition that they did not have to be buried because they were being used for the purposes of anatomy. The law governing burial does not therefore generally apply to the human remains found in museum and university collections.

Criminal law provides for two situations which may be relevant here. The first is s. 168 of the *Strafgesetzbuch* [German Criminal Code], which prohibits the desecration of graves and therefore protects human remains. However, in the view of the majority of legal experts, this provision is applicable only for as long as the corpse, the 'object of the crime' under criminal law, is still the 'subject of feelings of reverence', i.e. during the period in which 'the dead person is deemed to be commemorated'. It must therefore still be possible to attribute the remains to a specific individual. Section 189 of the Criminal Code, under which violating the memory of the dead is a punishable offence, might also be relevant. However, not every negative assessment of the deceased person constitutes sufficient grounds for the commission of that offence. A particularly serious insult to the memory of the deceased person is in fact required. Acts on the part of employees of museums/collections or exhibitions in museums/collections which would satisfy the requirements of this offence are difficult to imagine.

4. Human remains in international law

International law also contains few provisions containing any direct reference to the handling of human remains.

The 2007 UN Declaration on the Rights of Indigenous Peoples contains one express provision on human remains. Under Article 12 of the Declaration, indigenous peoples are to have the right to the repatriation of the remains of members of their communities.

In addition, international law on armed conflict (humanitarian international law) recognises the principle of customary law that parties to a conflict must give each other the opportunity to give their dead a proper burial.

The two provisions mentioned above are most likely to be of relevance in connection with requests for the return of human remains.

B. Legal provisions which allow claims for the return of human remains made against museums/collections

There are no actions for recovery laid down in law which are specifically intended to obtain the return of human remains. Claims for return appear conceivable in individual cases under general provisions. The conceivable legal rights to the return of human remains which may exist on a case-by-case basis will be set out below. However, in practice, legal proceedings for the return of such remains will seldom in fact be brought. In the vast majority of cases, the decision on claims for return will be made on the basis of the ethical standards applied by the museum/collection or within the political context. The recommendations compiled under point 4.5 of this publication are intended to provide guidance in particular in those cases in which there is no legally substantiated right of return.

1. Possible claims for return under German law

First of all, there are potential claims under the Civil Code. That code contains specific legal provisions on which the holder of property rights, such as the right of ownership, may rely to defend himself against infringements and restrictions.

Section 985 et seq. of the Civil Code affords the owner, *inter alia*, the right to demand that others return things belonging to him. For example, under that provision, an owner from whom something has been stolen may demand that the person currently in possession of that item return it to him. To the extent that human remains are 'tradeable items' under s. 90 of the Civil Code (see A. 2 above) and rights of ownership can exist in relation to them, s. 985 et seq. of the Civil Code may be applied to them. However, the rules which apply to human remains are the same rules that apply to anything else. As far as the application of rights of return under property law is concerned, it is irrelevant whether the claim for return relates to a painting or to a mummy. The legitimacy of those two claims must be examined in accordance with the same rules.

Where a human corpse is still being commemorated as a deceased person and is not therefore capable of being property, the rules of property law do not apply. As explained above, the corpse is subject to the rules governing the right to care for the dead, which is recognised as a separate legal position by the Civil Code. This also means that people who are authorised to make arrangements for the care of the dead are able to use provisions of civil law as a defence against interference with that right, for example if the corpse is taken away from them (ss. 858(1), 861(1), 862(1) and

864(1) of the Civil Code). Those provisions are then to be applied in a manner consistent with the guarantee of human dignity laid down in Article 1(1) of the Basic Law. It is thus conceivable that members of indigenous peoples could demand the return of human remains from an ethnological or natural history collection on the basis of the right to care for the dead. However, in order to do so, they would have to prove that they are relatives of the individual from whom those remains originate. Furthermore, there would therefore have to be a close familial relationship in order for it to be assumed that the commemoration of the dead person has not yet ended and that the claimants are also persons entitled to exercise the right to care for the dead. Those requirements would likely still be satisfied in the case of great-grandchildren and great-grandparents. The question as to who are the persons entitled to care for the dead where the dead person comes from a non-European culture with an understanding of family and relationships which differs from the European understanding can prove difficult and must be examined on a case-by-case basis. It is conceivable that the decisive factor in such cases is who buries the dead in the community in question. The German courts have not as yet ruled on such matters. However, simply being a member of the same indigenous group is unlikely to be sufficient as far as the right to care for the dead is concerned. Ultimately, proof would have to be provided that the corpse was taken away from the persons entitled to make arrangements for the care of the dead.

A right to return cannot, in principle, be based directly on the post-mortem rights of the individual under Article 1(1) of the Basic Law. Only in very exceptional cases might it be conceivable that the post-mortem protection of the rights of the individual under the Basic Law 'condenses' to form an obligation to return human remains. In addition, such a claim could be brought only by the persons entitled to make arrangements for the care of the dead person, i.e. generally that person's relatives. They would have to show and, where appropriate, prove that it is incompatible with the human dignity of the deceased person for the human remains to stay in the collection. In practice, the enforcement of such a claim before the courts is scarcely conceivable.

2. Claims for return under international law

Mention has already been made of the United Nations Declaration on the Rights of Indigenous Peoples. By approving that declaration, the Federal Republic of Germany announced its intention 'to 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 the indigenous peoples concerned' (Article 12(2) of the Declaration). Legally binding rights of return cannot however be inferred from the Declaration. In addition, there are no agreements of international law which expressly provide for the return of human remains. Nor has a right to the return of human remains been established in international law as a matter of customary law.

There may also be rights under specific agreements of international law in individual cases. Solely for the sake of completeness, mention should be made here of the legal provisions that may be relevant:

The primary potential legal basis is the UNESCO Convention of 14 November 1970 on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The convention was transposed into German law by the *Kulturgüterrückgabegesetz* [Law on the return of cultural goods] of 18 May 2007 and, *inter alia*, rights of return under public law were created (ss. 6(2), 4 and 5 of the Law).

However, an enforceable claim for return exists only where the object in question was imported into the Federal Republic after a particular reference date. For objects originating from Member States of the European Union that date is 31 December 1992, for objects from other countries signatories to the UNESCO convention it is 26 April 2007. Accordingly, the relevance for the return of human remains (on the basis of the German implementing law) to other states is likely to be very limited, since the number of objects in German museums/collections which contain human remains and were illegally exported from their countries of origin after those reference dates is sure to be very limited.

The human remains forming the subject of claims for return must also be cultural property within the meaning of the abovementioned provisions. Claims made under the German Law on the return of cultural goods can be made only by the contracting state from whose territory the cultural property was unlawfully exported, and not by private individuals or indigenous groups. In accordance with the current legal situation, the action must be brought against the person actually in possession of the cultural property. Proceedings could therefore be brought before the administrative courts against a museum or collection which holds the unlawfully exported human remains.

With regard to cultural property illegally exported before 1970, there is some discussion in legal literature as to whether a right of return may be presumed under international customary law. Legally enforceable claims for return against individual museums or collections cannot, in principle, be derived from such law. If the human remains were acquired in breach of rules of international criminal law (genocide, crimes against humanity or war crimes), it appears conceivable that a right of return under international law may exist on the part of the country of origin against the State in which the remains are located. However, there is as yet insufficient clarity on this point in international law, with the result that at present no right exists under international customary law.

Further claims under international law may exist on the basis of specific treaties which govern the return of remains of combatants from various wars. For example, in the Treaty of Saint-Germain-en-Laye of 1919, provision was made for the return of the re-

mains of soldiers who died during the First World War. The USA also always endeavours to repatriate the remains of its deceased military personnel.

3. Claims for return and the law governing property of the state

Finally, it must be pointed out that the relevant public law does not, in principle, prohibit the handing over of items in collections to third parties. In cases in which there is in fact a right of return which is enforceable by judicial means, this is self-explanatory. However, even in cases in which items are returned solely on ethical grounds, this will often be compatible with legislation on public property. This is because that legislation seeks solely to prevent those measures taken by public authorities which are simply incompatible with the principles of sensible economic management. However, in some federal states, it is prohibited to give away public property without consideration or payment. Since the law governing budgets therefore differs considerably between the various museum and collection funding bodies, it is necessary to examine carefully and on a case-by-case basis whether the disposal is permissible under public law provisions. In most cases, the museum/collection must obtain a decision on this matter from the responsible funding body, a decision in which the relevant specialist ministry and finance ministry will also be involved. In some cases, a decision by the responsible body which legislates on the budget may also be required.

Carola Thielecke
Claudia von Selle
Michael Geißdorf

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3.5 Ethical Principles for Museums and Collections containing Human Remains

The relationship between ethics and law in connection with human remains in collections

Ethics is generally understood as the systematic reflection on human action, in particular in relation to other people. In modern-day ethics, action is seen as the intentional behaviour of autonomous individuals, who are in principle able to adhere to normative (ethical) principles in the pursuit of their goals. Already in antiquity, a distinction was drawn between, on the one hand, ethos in the sense of beliefs and traditional customs and, on the other hand, systematic reflections on what constitutes the right conduct. However, considerations of ethos are of particular significance in relation to the handling of human remains, namely as a requirement that all human remains from deceased persons are treated in a respectful and reverential manner.

In connection with the assessment of specimens of human remains in museums and collections, the problem arises that, in some of the historical situations in which the specimens were produced or acquired, the legal regulation of such acts was unacceptable (e.g. colonial) or insufficient viewed from a modern-day perspective. There is also in Germany today no separate law which governs the handling of human remains in collections. In view of certain paradigmatic cases, such as the return of Herero skulls to Namibia from the Charité collection or the debate on the origin of the skeletons of aborigines in the Amalie Dietrich collection, there is clearly a need to formulate ethical considerations in relation to the handling of human remains in museums and collections which go beyond the existing legal provisions. Such considerations do not represent a final commentary on the issues described, but are rather a snapshot of the ethical debate on the handling of human remains.

The question of how to deal with human remains in museums and collections can be answered only by bringing together the various branches of science and the humanities concerned (ethnology, medicine, history, politics, law, ethics, physical anthropology and archaeology), which alone are not able to provide satisfactory answers. This is particularly true as far as legal assessments are concerned, since in the case of processes which span a long period of time, such as the collection of human remains, an assessment on the basis of the historically changeable legal position is insufficient. The decisive assessment criteria, such as 'human dignity' and the 'post-mortem rights of the individual', must be embraced not simply by an application of the law; they fall within the broader sphere of (legal) ethics.

Formal, legal criteria, such as the question of limitation periods, cannot be applied in isolation from ethical principles. When dealing with cultural property lost during the

persecution perpetrated between 1933 and 1945, public establishments in Germany are advised to waive the statute of limitations. By so doing, account is taken of the fact that Germany bears a particular responsibility for the loss of that cultural property and that for a long time the victims of Nazi persecution only had limited opportunities to search for lost works of art. Accordingly, in such cases, on account of the severity of the breach of the law, the legal certainty intended to be achieved by a limitation period, as a social principle of order, was ranked as secondary to the principle of material justice.

Handling of human remains for collection purposes

As Michael Barilan has stated, the use of the dead human body without the consent of the person concerned or his/her relatives for purposes other than burial is usually regarded as a serious offence against human dignity. However, contrary to that general rule, anatomy and science enjoy a certain degree of 'immunity' in the Western world which allows them, potentially even without that consent, to use the bodies of deceased persons for scientific purposes (Barilan 2011: 3). It was thus in particular Western culture and with its various human sciences (anatomy, anthropology and medicine) which changed how the human corpse was treated, a process previously governed by tradition and religious practices (Lenk 2011: 22 et seq.). The breaking of taboos in the 18th century, such as the preparation of the 'The Irish Giant' Charles Byrne, whose skeleton is still on display today – contrary to his declared will – in the Hunterian Museum in London, are testament to drastic shifts in the relationship to the dead human body. Methods of handling the human body shaped primarily by religious belief came into conflict with the ethically-motivated view that human remains may or even must be used as part of scientific experiments in order to advance knowledge and for the good of the whole society. Such a philosophy of utilitarianism places the interests of the living in knowledge and research above the religious sentiments of the people concerned and their relatives, those from both European and non-European cultures.

An exponent of contemporary utilitarianism such as Jeremy Bentham affirmed the persuasive force of such materialistic utilitarian thinking not least by his own decision to allow his body to be dissected and handed over to the world of science; it can still be viewed to this day at University College London. The underlying views that the body of the deceased can and should be of use to the living are today widely recognised in the fields of science and medicine, for example in the post-mortem donation of organs and tissue. The corpses of those who donate their bodies are not just used for the teaching of anatomy at universities; they are also used for research studies. Once duly processed and prepared, bodily materials of the deceased are today also used to manufacture implants for medical therapy. In this connection, acceptance of such procedures is achieved in modern ethics and law through the consent given by the person concerned or his/her relatives. However, such a solution does not normally exist in relation to the human remains in historical collections. Ethical views on the matter are

therefore faced with the difficulty of adopting a binding position on the handling of human remains, even without a declaration of the will of the person whose remains are at issue. Adopting such a position is also made more difficult by the fact that it is not just the products of and objects from our own cultural and scientific traditions that are at issue, but also specimens from other cultures.

Fundamental ethical and legal considerations

- 1.1. Dead human remains are equivalent to objects to the extent that they cannot hold rights. They are legal objects not legal subjects (people) and, as a result, irrespective of the legal origin of the distinction between legal subjects and legal objects (see s. 1 et seq. and s. 90 et seq. of the Civil Code), have no ethical rights or entitlements.
 - 1.2. Although dead human remains are not legal subjects, they do enjoy protection under the concept of human dignity. In accordance with the rulings of the Federal Constitutional Court, a human being does not lose his right to human dignity after death.
 - 1.3. It follows from 1.1. and 1.2. that if we view the inappropriate treatment of dead people and human remains as an offence against human dignity, then in reality we must complain of an offence against the inalienable human dignity of us all (see in particular Kant, *Metaphysische Anfangsgründe der Tugendlehre*, 1797, § 38: 'Humanity itself is a dignity'; see also Fichte, *Grundlage des Naturrechts* usw., 1796, § 19; H. Hofmann, *Die versprochene Menschenwürde*, HFR 1996, Rn. 36; and, in detail, B. Kretschmer, *Der Grab- und Leichenfrevl als strafwürdige Missetat*, 2002, p. 243 et seq.). The dignity of the dead as former human beings is guaranteed by the living and must also be guaranteed by them, hence the references to the guarantee of human dignity. (On the question of the limits on the post-mortem rights of the individual, see the legal background article, specifically 'A. Legal framework governing the work of museums/collections containing human remains, 1. The human corpse in German constitutional law: the protection of the human dignity of the dead under Article 1(1) of the Basic Law', p. 31)
2. As a key ethical value from which other ethical values are derived, human dignity must not be placed on a par with those other ethical values. Since human dignity is guaranteed absolutely, high requirements must be imposed on a finding of an offence against it.
- 3.1. In accordance with the dictum which dates back to Kant (op. cit.) and later became part of thought on the subject of human dignity as the 'object formula', a human being may never 'be used merely as a means but must always be used at the same time as an end, and therein lies its dignity'.
 - 3.2. Notwithstanding all the haziness associated with the object formula, it may at least be concluded from it that dead people and human remains must not be treated like other objects. Accordingly, a person cannot therefore deal with them

at his discretion, as an owner may otherwise do in principle (s. 903 of the Civil Code).

More specifically, the respectful handling of the dead and of human remains of archaeological interest (this includes primarily mummies) is due on the basis of the concept of human dignity. Indeed, this requirement must be observed when displaying human remains in museums (see, in detail, Kretschmer, *op. cit.*, p. 539 et seq.). Even where there is nobody authorised to dispose of who is still alive, the museum/collection is obliged to do so on the basis of the guarantee of human dignity which transcends the individual. Contrary to the approach often taken in the past, human remains of this kind cannot be excluded from the guarantee of human dignity solely on the basis of their age.

4. The human life as an end in itself, a concept expressed in the object formula, is inconceivable without freedom, since a human being would otherwise be treated 'merely as the means' of others (principle of autonomy). It can be concluded from this that the expressed or presumed will of the human being as to how his body should be dealt with after his death – to the extent that reliable information exists in that regard – must in principle be respected. That wish should form the reason for and the limits on the treatment of the dead and their human remains. In practice, that principle means that, for example, archaeologists are to define precisely the purpose behind the desired excavations, be aware of the potential for interference with the human dignity of the dead and assess the legally protected rights at issue in advance. The legal recognition of the principle of autonomy - in areas of regulation as various as inheritance law, transplant medicine or anatomical research - is testament to the binding nature of the principle as an element of natural law and, therefore, as a standard of ethics.
5. Cultural claims of dominance are incompatible with the universal application of the concept of human dignity. The European 'enlightened' interest in knowledge and science is not automatically entitled to take precedence over the historically or culturally foreign. That interest must itself rather be placed in context as a possible cultural practice (see Wittgenstein, *Bemerkungen zu Frazers Golden Bough*). In cases of conflict, that practice or the ideas about the care of the dead of those from whose culture the dead person or human remains originate must be followed. The choice made will essentially depend upon whether and to what extent those beliefs survive in the people of origin, i.e. whether they may (still) be said to be a culturally significant practice. This is because, in such a case, the interest in knowledge and science is satisfied at the expense of those who feel obligated to care for their dead, and, possibly, feel existentially so obligated.

The problem of the pluralism of values when handling human remains

The collection and exhibition of human remains with a cultural, religious and spiritual significance from a plethora of different cultures presents the responsible persons and

institutions with a problem that is difficult to solve, namely of finding an acceptable balance between the objectives and missions of museums and collections and the world views of the peoples of origin. It is at the same time clear that a solution on the model of the 'lowest common denominator' in this area must entail further problems and cannot do justice to the interests of all parties concerned.

However, in view of the existing problems, possible points of agreement should also not be forgotten: firstly, there is an interculturally widespread consensus that human remains are to be treated with respect and dignity and that degrading treatment in the course of research, collection or exhibition is prohibited ('Working Group on Human Remains in Collections' 2003: 379). There are several reference points of the debate's current status in Germany on the treatment of the human body in this area, like the courts' consideration of Gunther von Hagens' Body Worlds exhibition (see also Chapter 3.4 Relevant legal Provisions, p. 31). Secondly, there is strong convergence in the international debate that ethnic groups have a privileged right to the return of human remains in the possession of museums and collections (see Article 12(2) of the UN Declaration on the Rights of Indigenous Peoples) in so far as a close cultural connection to those remains actually exists.

As the International Council of Museums (ICOM 2006) stresses in Section 6 of its Code of Ethics, in the case of international collections, the values and needs of other ethnic groups must be treated with respect in all circumstances and 'museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin'.

Claudia von Selle
Christian Lenk

Sources and further reading

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4. Recommendations for the Care of Human Remains

The recommendations are intended to serve as guidance for those directly responsible for collections and the funding bodies of institutions, both in their day-to-day handling of with human remains, including those of non-European origin, and when handling and assessing claims for return. The recommendations are to be viewed as guidelines and not as (legally) binding rules.

As a result of the significant heterogeneity of the human remains and the complexity of the associated issues, generally applicable solutions are hardly ever possible.

The assessment of (ritual) objects into which human remains have been incorporated can be particularly difficult. Where reference is made to human remains in the recommendations below, consideration is also always to be given to objects of that kind, save in the case of an explicit statement to the contrary (see definition in Chapter 2.2, p. 9).

In general terms, the people in charge are advised to examine all questions relating to the handling of human remains as critically as possible, objectively and with respect for ethical principles.

4.1 Collecting

In general terms, museums/collections should develop a collection concept as well as a complete and standardised inventory system which is accessible to all staff, coupled with the careful documentation of items.

From a legal perspective, human remains held in museums/collections in Germany are as a general rule regarded as things, in respect of which ownership may be acquired or transferred. The legal provisions are discussed in detail in Chapter 3.4 'Relevant legal Provisions for Museums and Collection in dealing with Human Remains' (from p. 30). The following questions must always be considered thoroughly and evaluated where human remains are collected:

Does the age of human remains have any significance for collecting purposes?

As far as collecting of human remains is concerned, the age of the exhibits is, in principle, irrelevant. However, the people in charge of the museum/collection should always be aware that genealogical matches can be made to human remains and that the interests of third parties, in the narrower sense of relatives of the deceased person or, possibly, other members of the people of origin, may be affected. From an ethnological perspective, memories of a deceased person fade after approximately four to five generations. This equates to approx. 125 years, thus providing a period of time which can also serve as a guide from a physical-anthropological perspective. In the case of people who died more than 125 years ago, genealogical mapping to people alive today is usually no longer possible. Consequently, it is no longer possible to identify direct descendants who could apply to exercise the right to care for the dead or in whose eyes any injustice which occurred could continue. Accordingly, this time factor should be taken into account in particular in the case of human remains which are less than

125 years old. It must, however, be borne in mind that memories of injustices perpetrated, in particular in the case of the persecution of certain groups and genocides within a people or State of origin, are likely to remain vivid in people's minds for longer than 125 years. That period of time can therefore be used as a guideline in this context only in individual cases. In cases of doubt, dialogue should be sought on this point.

With regard to (ritual) objects into which human remains are incorporated, no information is usually provided regarding the individual from whom those remains originate. Nevertheless, such human remains may also be of equal significance for the people of origin.

Which criteria should apply to collecting of human remains?

- Existing collections

Generally speaking, there are no arguments against maintaining a collection which contains human remains where:

- those remains were acquired legally (not only from the perspective of the time of collecting but also from a present-day perspective); and
- there is no associated context of injustice (for indications of when such a context of injustice may exist, see Chapter 2.3, p. 9 et seq.).

- Active collecting

Human remains may be obtained or acquired from other museums/collections or donors if:

- collecting of human remains falls within the collection concept of the museum/collection;
- their provenance has been determined as carefully as possible;
- there are no indications of a context of injustice and the donor/transferor provides convincing assurance that no such indications are known to him;
- where appropriate, the legal exportation from another State has been proven by a related confirmation; and
- the remains have a justifiable value for the museum, the collection or for science.

In the case of newly produced specimens in anatomical-pathological collections, the deceased person or his/her relatives must generally have given consent to the preparation and the collection of the body.

How should human remains be handled where details of their provenance are incomplete or non-existent?

Human remains can be handled in a respectful and appropriate manner only with knowledge of the origin and person(s) formerly in possession of the human remains. Accordingly, where details of their provenance are incomplete or non-existent, a high priority should be placed on promptly conducting further investigations. From a legal perspective, where it is proven that the human remains were unlawfully moved and are in someone's unlawful possession (for example as a result of theft), ownership of the re-

mains may in many cases be precluded under German law. The exceptions are dealt with briefly in Chapter 3.4 `Relevant legal Provisions` (p. 36 et seq.).

In the case of human remains offered from other museums/collections or by donors, the provenance of those remains should be clearly determined and/or investigated as carefully as possible. However, the issue of how to proceed where the details of their provenance are incomplete or non-existent is a matter for the discretion of the museum/collection in question. A museum/collection should refuse to accept human remains on ethical grounds where there is undoubtedly or high likely to be an associated context of injustice (for example, remains obtained from grave robbing, executions and genocides, in particular those with a colonial context or those dating back to the Nazi era). Such items should be accepted only in exceptional circumstances, i.e. where the sole reason for so doing is the subsequent return of the remains or an active search for potential claimants and where the related research has no negative impact on the other capacity of the museum/collection.

Can human remains be transferred from the collection of one institution to another museum/collection by a proactive deaccession process?

As a general rule, museums/other institutions should retain their collections. However, in accordance with its own guidelines and collection concept, every institution can decide whether human remains should continue to be held within their collections. The decision-making criteria and the procedure should always be documented.

Possible reasons for deaccession include:

- the human remains are not (or are no longer) consistent with the collection concept; or
- the ethically appropriate storage and proper preservation of the items in question cannot be guaranteed in the long term.

A detailed overview of the general procedure for the removal of items from a collection is provided by the German Museums Association publication *‘Nachhaltiges Sammeln. Ein Leitfadens zum Sammeln und Abgeben von Museumsgut’* [‘Sustainable Collection. Guidance for Collecting and Removal of Museum Items’] (2011).

From a legal perspective, given the various funding body arrangements with museums/collections, questions of ownership must be examined before any item is removed. A deaccession procedure must be opened in every case.

The responsibility for the quality of the future whereabouts of the human remains should not rest solely with the institution prepared to take over those remains. Where human remains are removed from a collection, the general conditions at the new institution should be responsibly examined and assessed by the institution handing over the remains. At the same time, a legally binding declaration about the maintenance of those

conditions and adequate storage of the human remains should be requested. That declaration should also include the obligation on the part of the new institution to return the human remains unconditionally if a hitherto unknown context of injustice is subsequently determined.

Information about the proactive return of human remains to direct descendants, a people of origin or a country of origin can be found in Chapter 4.5 'Return' (from p. 60).

What steps should be taken where the human remains are clearly associated with a context of injustice but it is not possible to return them to direct descendants or the people of origin?

Human remains falling into this category should be given a respectful burial.

4.2 Preserving

Collections of human remains should, in so far as possible, be carefully inventoried and documented. The digitisation of related data is advisable to enable speedy access and to allow further work to be carried out. Good collection management is closely linked to guaranteeing that items are stored and maintained properly. The care of human remains should be ensured and monitored by trained members of staff. Regular assessments using standardised documentation are recommended in order to prevent deterioration or damage in both the short term and the long term.

Which criteria should a basic inventory system satisfy?

A basic inventory system for human remains should include the following:

- the allocation of inventory numbers;
- the placement of the inventory number in as unobtrusive a place as possible;
- the sorting and (clear) identification of the human remains with, in so far as possible, standardised markers;
- the viewing and examination of the related archive material;
- research on the context in which the remains were acquired and on other possible sources of information (named people, companies etc.) and the filing of the additional information acquired as archive material;
- the production of status reports;
- the production of taphonomic reports by the museum (detailing all handling and restoration since the human remains were first stored in the museum, in so far as is known); and
- the documentation of all findings (if possible in a database).

Which criteria should a comprehensive system of documentation satisfy?

In principle, the documentation of the items in collections is an essential requirement for the proper storage of those items. The museum/collection should always endeavour to maintain a complete inventory along with the corresponding documentation.

With regard to the documentation of objects, reference may be made to the *Leitfaden für die Dokumentation von Museumsobjekten* [Guidelines for the Documentation of Museum Items] (2011) published by the German Museums Association. Such documentation of the items includes documentation on entry into the collection, taking inventory and scientific catalogisation.

Ideally, a trained member of staff produces digital records of the human remains using a standardised basic inventory system and documents any events which affect those human remains. Capturing data in this way is a process which is easy to understand and guarantees speedy access to those data. The descriptive documentation of human remains and associated research using other sources are, in principle, no cause for concern.

When documenting human remains, care should always be taken to ensure the neutral processing of those remains and the objective evaluation of any sources. If there is no information available or no comments can be made, this should also be documented.

Can and should human remains be converted into virtual and media formats?

Given the technical possibilities available today, it is advisable to convert human remains into virtual and media formats not only for the purposes of documentation but also to allow further research to be conducted (e.g. x-rays, CT scans, MRT and 3D scanning). However, consideration must always be given to the expedience of such procedures. Since documentation of this kind may raise concerns in a small number of peoples of origin, it should, where appropriate, be agreed with the appropriate representatives of those communities in advance.

Which criteria should be satisfied to ensure the proper storage of human remains (in the short term and/or the long term)?

Generally speaking, the same applies to the storage of human remains as applies to the storage of other items in collections. Preventive conservation measures are the primary means of ensuring that items in collections are stored appropriately and preserved for the long term. Optimum storage and the proper handling of items during transportation, display and other uses in particular prevent the worsening of pre-existing damage and the emergence of any new damage. Factors such as climate, light, the storage furniture and materials used and the use and display of items – including their loan – which are reasonable from the perspective of conservation, are crucial. In order to prevent damage caused by acids, human remains should only be stored in wood-free boxes/containers. If human remains have been transferred to other boxes/containers, it should also be noted if boxes/containers used previously contained wood. High lignin levels can release an acid which destroys DNA and proteins.

Where items in collections are made from a combination of materials and consideration must be given to the needs of all those materials, compromise solutions must be sought. Fluctuations in climate are in principle to be avoided or minimised.

It is advisable to use the services of specialists, i.e. restorers and taxidermists, in connection with preventive conservation measures. Active conservation measures and restoration work should be carried out by specialists only.

What rules should be in place governing access to the items stored?

Rules governing access to the items stored in a museum/collection exist in principle for security reasons. In addition, every museum/collection which holds human remains should also lay down separate rules governing access to such items which take into account their specific nature. Those special rules should be in writing, be approved by management at the museum/collection and state who has access to the human remains and for what purposes.

What ethical considerations are relevant in relation to the appropriate storage of human remains?

From an ethical perspective, it is advisable that human remains and (ritual) objects into which human remains have been consciously incorporated are stored in separate rooms. However, in practice, circumstances do not always allow such items to be stored in separate rooms. Separate storage areas should therefore be created, at least for human remains and for (ritual) objects primarily composed of human remains. If minimal space is available, human remains may be stored each in their own wood-free boxes/containers. Ideally, each box would store the remains of a different individual. However, separate compartments within the box can help to ensure that the remains are stored in a more fitting manner.

In particular when dealing with human remains of non-European origin, it should always be remembered in connection with the respectful treatment and storage of such remains that some non-European cultures view human remains and the dead differently and treat them in a manner which is different to European cultures.

In the case of natural history collections in which the storage system follows a zoological system of classification, consideration should also be given to how account may be taken of the abovementioned views of non-European cultures. It should further be borne in mind in that connection that some cultures view the storage of human remains from their community together with animal remains as derogatory treatment.

What rules should be in place governing the loan of human remains?

In the same way as other items, human remains may be loaned to other institutions for exhibition-related or scientific purposes given the appropriate legal safeguards (loan agreement). Consideration must be given in this connection both to the fragility of the

items and to their appropriate handling. The lender covers itself contractually by making detailed demands regarding the necessary legal, conservation and ethical requirements in the loan agreement.

It is recommended that both lender and borrower ensure that the item loaned does not originate from a context of injustice.

What approach should be taken to public communications?

Generally speaking, a transparent communication strategy relating to the human remains held in the museum/collection is recommended. Reactions, enquiries and criticism should meet with a timely and respectful response. In this connection, consideration must always be given to cultural and individual differences.

The museum/collection should decide on the basis of its own guiding principles whether and to what extent it makes inventory lists which include human remains accessible to academics and to the general public (for example, via online databases).

For reasons of respect, careful consideration should be given to whether photographs of human remains should be made public, in particular in the case of non-European collections.

4.3 Research

Research on human remains offers the academic world and the general public knowledge about anthropology, palaeopathology, the history of science and cultural and social issues. However, in some peoples of origin, research of that kind on human remains is alien to their world view and value system. Imaging processes, and in particular invasive methods of examination, are not accepted.

Accordingly, as preparation for research, sufficient information should be known or have been previously ascertained about the origins of the human remains, the relevant collectors, the specific methods of collection and the provenance of the human remains. This applies equally to human remains of European origin and those of non-European origin. In particular in the case of remains of non-European origin, the current cultural, social and political situation in the peoples of origin and their relationship to the State officially representing them should be known so that, where appropriate, special conditions for possible research may be defined and mutually agreed.

Research on human remains is always subject to general standards of scientific ethics. As a general rule, research should be allowed to be conducted on human remains only where the circumstances of the production or acquisition of those remains has been examined and found to be no cause for concern.

Does the age of human remains have any significance for research purposes?

Account should be taken of this time factor particularly in the case of human remains which are less than 125 years old, since in such cases memories of the deceased person may still exist and genealogical matches are generally possible (for further details, see p. 48). Peoples or States of origin from which the human remains originate may

oppose research projects. Where possible, open dialogue should take place in advance of the planned research work.

In the case of mummies (including bog bodies) and very old skeletons or bones, objections against research projects from peoples or States of origin are not generally to be expected. If there are no known objections and there is also no context of injustice, research can be conducted on such human remains applying the general standards of scientific ethics.

What factors should be considered prior to the research?

Consideration should be given in advance to the scientific and historical value of the research on human remains. The benefits brought by the research should be assessed on the basis of strict and comprehensible criteria which are also respectful of the world views/value systems concerned. In this connection, it is ultimately the responsibility of the museums/collections in which the human remains designated for research are housed to weigh up and evaluate those individual factors.

What requirements should be satisfied in terms of specialist access in connection with research on human remains?

Scientific research is conducted in accordance with current scientific standards and exclusively by qualified individuals. The benefits of the research must be set out in an explicit and comprehensible manner and then assessed. Those benefits must also be disclosed in response to legitimate enquiries. It is always necessary to evaluate with a critical eye and in advance which new findings that research will provide and, where appropriate, whether this also justifies invasive access. Procedures affecting the organic substance of the human remains are to be kept to an absolute minimum. As a general rule, preference should be given to non-invasive methods. All procedures and results should be documented comprehensively and archived. Should invasive methods prove necessary, particular care must be taken to document the original condition prior to research.

Research on human remains should be conducted only where:

- there is an overriding scientific interest;
- the provenance of the remains has been established; and
- the status of the human remains in the historical context in which they were acquired is no cause for concern.

If those criteria are not met, research should be conducted only if it can be expected that the findings may provide important clues to determining the identity of the individual in question and his cultural environment (this is true, for example, in relation to research in archives).

How should account be taken of the concerns and interests of the societies of origin in the case of research on human remains?

Subject to observance of principles of scientific ethics, research may in principle be freely conducted. Nevertheless, it is advisable to establish special standards, particularly in the case of research on human remains originating from peoples of origin who oppose such research. In particular, the researchers should take note of and give consideration to the concerns, interests and expectations of the peoples of origin in so far as possible, and, where appropriate, assess the relevant interests in direct dialogue with the representatives of the peoples of origin. Possible areas of conflict arise *inter alia* in connection with research on human remains using invasive methods, but also in relation to the use of imaging procedures of all kinds. It is important to communicate to the peoples of origin the interest behind the research, the possibilities offered by and limits of modern scientific and technical procedures, arts and humanities-oriented research methods and the findings of such methods. Particular care must be taken that the research findings are presented in a fundamentally impartial manner and do not provide a basis for discriminatory interpretations.

Beyond clear contexts of injustice, there may be clashes between extremely different culture and science-bound world views/value systems as far as archiving, exhibition in museums and, in particular, research on human remains are concerned. It is necessary to state as a matter of principle that the world views/value systems involved can never be negotiated or offset against one another, and therefore no view can claim or be given precedence *per se*. Accordingly, at this juncture, a process should be launched which communicates all the related concerns, interests and expectations. Ideally, this leads to a mutual agreement on the handling of human remains and, in particular, on their use in scientific practices.

Is the authorisation of the people of origin/relatives necessary to conduct research on human remains and, if so, when?

Research on human remains cannot be made conditional upon the express authorisation of the related peoples of origin, since there is no internationally binding system of law which governs such authorisations, lays down conditions and, where appropriate, punishes infringements. However, research may tend to be accepted if the research interests are explained in close consultation with representatives of the peoples of origin and in a context of mutual respect for the world views/value systems involved and for cultural customs, and if both parties thus arrive at a responsible, pragmatic agreement. In the case of newly produced specimens in anatomical-pathological collections, the deceased person or his/her relatives must generally have given consent to the preparation and the collection of the body. In some federal states, relatives may also give the necessary consent if the deceased person did not express any wish in this regard during his lifetime.

No general statement can be made in cases with an international dimension in view of the different legal systems involved. In such cases, it is in principle necessary to consider the individual circumstances.

Are there circumstances which preclude research on human remains absolutely?

As soon as there is clear proof that the human remains archived in a museum/collection originate from a context of injustice, all further research on or with those human remains is prohibited. If such a context of injustice is suspected, no further research should be conducted on the human remains in question; rather, the provenance of those remains should first be determined by means of intensive investigations.

In particular in the case of human remains removed from graves, it should be borne in mind that during all ages there have been grave openings and removal of items from graves and sometimes also a trade in the human remains removed. However, in some cases, values have changed in the respective people or State of origin, such that some such events which occurred in the distant past are today viewed in a different light. If necessary, a dialogue must be opened in relation to this issue.

If information or documents exist which clearly prove that objects were removed from a grave was contrary to the express will of the people of origin or persons authorised to care for the dead and the grave robber was aware of that fact, a context of injustice exists. This has consequences for research on the human remains thus excavated.

If a context of injustice may be ruled out in connection with the human remains on which research is to be conducted, research on those remains may in principle be continued applying the general principles of scientific ethics.

What steps should be taken when human remains cannot or cannot irrefutably be assigned to a people of origin?

If the human remains cannot or cannot irrefutably be assigned to a people of origin, they should remain in the museum/collection inventory but be not used for research purposes. This is because if they cannot be assigned to a particular people or their assignment is open to question, no meaningful research can be conducted and a context of injustice cannot be ruled out with regard to the provenance of those remains. Where a definitive analysis of provenance is not possible using the methods currently available, the institution holding the remains in question should endeavour to ensure the adequate storage of those remains with a view to being able to analyse their provenance using analytical and research methods which may be available in the future.

What rules should be in place governing the loan of human remains in the context of research cooperation?

In addition to the general requirements governing loans, additional rules governing the nature and scope of any research should be laid down. Both lender and borrower are responsible for clarifying in advance whether and which forms of analysis are accept-

ed by the people of origin (where the purpose of the research is not to clarify the provenance of remains). That requirement must be observed in a respectful manner and must not be ignored. In addition, the research schedule, the structure of the publications and documentation and the accessibility of the research findings should also be agreed in the loan agreement.

4.4 Exhibiting

The presentation of human remains in museums/collections has already enjoyed the widest cultural and social acceptance possible in Germany and Europe both by the general public and in professional circles for a very long period of time. Nevertheless, it can never be ruled out that the interests and concerns of third parties will not be affected by the presentation of human remains, in particular where a direct link to those remains exists. There should always be an awareness of other cultural views and such matters should be handled with sensitivity. The museum/collection is to be responsible for handling human remains with sensitivity, consider itself to be morally obliged to do so and contribute to raising awareness of this issue. In the case of a public display, human remains should always be treated with respect and the public should be made aware in an appropriate manner of the special status of the exhibits, in particular where the human remains are identifiable as such (e.g. skulls, mummies, skeletons). This can be achieved by means of an accompanying text or by the arrangement of the room (positioning, lighting, and colour). Human remains which are often difficult to identify for observers (e.g. hair or fingernails and toenails incorporated into (ritual) objects) should also be presented in a sensitive manner.

Does the age of human remains have any significance for exhibiting purposes?

There is no time limit connected to age of human remains which has any bearing on the presentation of those remains or the study of them. The people in charge of the museum/collection should always be aware in connection with human remains that the interests of third parties, in the narrow sense of relatives of the deceased person or, potentially, members of his/her people of origin, may be affected (for further details, see p. 48). Some peoples of origin oppose the (public) display of deceased members of their community (see below). In cases of doubt, dialogue should be sought on this point.

In the case of newly produced specimens (preparations) in anatomical-pathological collections, the deceased person or his/her relatives must generally have given consent to the presentation of the body.

What criteria should be taken into account when exhibiting human remains?

The content, context and aim of the presentation of human remains should always be scrutinised with a critical eye. Some peoples of origin consider the public display of the deceased or their body parts as disrespectful. An open dialogue about this issue should be conducted in advance. The views of the people of origin regarding the unre-

stricted viewing of human remains may have to be incorporated into the assessment: in some peoples of origin, for example the Iatmul and other ethnic groups in Papua New Guinea, access to and the viewing of human remains is reserved for certain groups of people (such as members of the clan or initiated men) or restricted to particular situations (such as specific festivals of the dead, death ceremonies or other rites).

The task of the museum/collection in exhibiting the remains is not to satisfy the curiosity of observers. However, from an overall perspective, the museum/collection has little influence as to the reason why people visit the museum/collection, the attitude of visitors when faced with the exhibits and the effect which those exhibits have on those visitors. Accordingly, it cannot be ruled out that the human remains displayed will have an emotional impact to a greater or lesser degree, and account should be taken of this factor when designing the exhibition. A serious approach should always be a key consideration when displaying human remains. With regard to the concept of the exhibition, consideration must be given, where appropriate, as to whether its scientific content could also be exhibited without the presentation of the human remains. The information content should also be properly examined and evaluated.

If human remains are placed on public display, it is self-evident that the presentation must be respectful, scientifically accurate and raise no concerns from the perspective of conservation. In this connection, cultural differences must also be considered and assessed. Efforts should always be made to make the visitors aware of the sensitive nature of such exhibits by providing appropriate information.

The individual criteria governing the purpose and benefits of a presentation must be assessed on the basis of the guidelines and exhibition concept of the museum/collection in question. It is always a curatorial decision and that decision should satisfy ethical considerations and be comprehensible.

May human remains be used for scientific teaching?

Many university collections containing human remains were compiled for the purpose of scientific education and are also still used for that purpose today. Human remains in museums/collections should be accessible for the purpose of the scientific education of students within a defined framework. The students can acquire not just specialist scientific experience and knowledge, but can also gain an understanding of and discuss ethical considerations by seeing how human remains are handled and how account is taken of the concerns of descendants.

The museum/collection is to lay down the guidelines governing access and ensure that the human remains are treated with respect.

What rules pertaining to the exhibition of human remains should be in place governing loans?

In addition to the general requirements governing the loans, the museum/collection is to check whether the exhibition concept envisaged is compatible with its own guidelines pertaining to exhibitions and conservation and with ethical considerations. The

content, context and aim of the presentation (see above) must observe the criteria laid down. Preserving the dignity of the human remains is always paramount.

4.5 Return

Museums and collections, also increasingly including those in Germany, are facing ever more claims for the return of human remains, mostly those of non-European origin. There are generally cultural, religious, ritual and sometimes also political reasons for those claims made by direct descendants (individuals), peoples of origin or countries of origin (States). In many cases, the circumstances in which the human remains were acquired is an additional reason for the claims of return, since those circumstances were at odds with the legal and ethical standards at the time of acquisition or are contrary to current standards, even if in some cases this is true only from the perspective of certain interested parties.

Claims for the return of human remains pose particular challenges for museums/collections. On the one hand, the museum/collection is required to retain its collections and must therefore examine such claims with care. On the other hand, the interests of the claimants have high emotional and sometimes spiritual significance, which can have a lasting effect on the related talks.

Museums and collections are expected, in so far as possible, to evaluate the differences between the ethical and political concerns and between the world views and value systems of the claimants and of the museums/collections.

If a museum/collection establishes when examining its stock that the return of human remains, for example to the people of origin, appears to be required, the museum/collection or the related funding body can of course proactively set the return in motion, even if the return of those remains has not been requested.

The section below is intended to assist with the processing of claims for return and provide a number of related recommendations. A considerable number of those recommendations could also serve as guidance where museums/collections make a proactive decision to return human remains. However, the guidance can under no circumstances be applied equally or systematically to all cases.

How, in principle, should claims for return be handled?

Since the questions relating to the care of human remains always go to the very essence and core of a culture, particular sensitivity is required on the part of museums/collections when responding to claims for return. This is also the reason for the requirement on the part of museums/collections to cast a critical eye over the human remains that they hold and, where appropriate, to offer to return human remains to the entitled persons. Such an offer must be made even where the entitled persons have not request-

ed the return of those remains, since such persons have to first determine, at considerably greater expense, where the human remains are located.

Museums/collections should therefore abide by the following points when dealing with claimants and their claims:

- Mutual respect and equal communication

The museums/collections should make clear that they are open to discussion, that they take the concerns seriously and that they will deal with the matter with the necessary care.

Different views on the cultural, religious and scientific handling of human remains must be considered and should be discussed openly. The claimant must be treated with the same degree of respect that the representatives of the museums/collections demand for themselves and for their culture.

- Transparency

Where they are not made in writing, communications should be carefully documented, for example in the form of minutes of discussions or notes of telephone conversations.

The drawing up and application of internal guidelines on the handling of claims for return, which clearly set out the procedure and processes for claimants, has been a positive experience for some museums/collections.

It is advisable to lay down guidelines governing the following aspects:

- the formal requirements which a claim for return must satisfy;
- the criteria by which the claim for return is assessed;
- the time in which the enquiry can be processed;
- the appointment of contacts, decision-makers and, where appropriate, external experts; and
- the costs of processing claims and the responsibility for bearing the costs.

The related recommendations produced by Germany⁸ and other countries⁹ can be used as a guide when drawing up such guidelines.

- Professional and timely examination of the claim

In view of the complexity of surrounding circumstances and issues, each individual case must always be examined on its own merits. The costs of the examination should not prevent the timely processing of a claim for return. Where possible, the funding body of the museum/collection, as the owner of the items in the collections, should make available both the financial and the necessary material resources to guarantee that the claim is processed speedily and the museum/collection continues

8 For example, the recommendations on the website www.lostart.de, recommendations in the federal states of the former East Germany on the procedure for the application of the *Ausgleichsleistungsgesetz* [Law on Compensation] and on the handling of art and cultural property.

9 For example, Australia: Australian Government Indigenous Repatriation Policy, New Zealand: Karanga Aotearoa Repatriation Programme, United Kingdom: Guidance for the Care of Human Remains in Museums.

to be able to operate. This research work should be carried out as quickly as possible but also as thoroughly as necessary. Museums and collections should not be forced into making hasty decisions.

In order to guarantee the swift processing of claims, attempts should also be made as quickly as possible to determine who has responsibility for taking the decision and, in cases in which that responsibility does not rest with the museum/collection, to involve the competent bodies.

With regard to the investigation of the facts, examination of the individual case also includes, *inter alia*, the consultation of experts (ethnologists, lawyers, medical experts, anthropologists, ethicists etc.) if the necessary expertise does not exist within the institution in question. It also includes the exercise of discretion and decision-making on the basis of objective criteria and both ethical and moral requirements. In this connection, ethics means the theoretical examination of what is the right thing to do when handling with human remains. In this regard, practical guidance can then stem from a moral evaluation.

- An open attempt to find a solution
Alternative solutions to the return of human remains (such as permanent loan, joint ownership, joint research projects, exchange for objects of similar value etc.) should be considered on a case-by-case basis. In cases in which the legal position or the facts are complicated, recourse may be had to further conflict resolution options such as mediation (e.g. via the ICOM).

What key considerations and stages must be observed when examining claims for return?

The two main issues when examining claims for return are whether the claimants in question are entitled to request the return of the human remains and whether the claim is substantiated and legally enforceable. Those two factors will be considered in further detail below.

- Preliminary remarks
In view of the various funding body arrangements to which museums/collections are subject, questions of ownership and decision-making powers must be carefully examined in advance. If the museum/collection is not itself the owner or not authorised to make decisions independently, the competent funding body should be involved in the process at the earliest stage possible.

It must be agreed with the funding body of the museum/collection whether and how any competent authority within the federal state in question must be notified. In the case of foreign claimants, the Federal Foreign Office must also always be notified as soon as possible, again in agreement with the funding

body/owner. The Federal Foreign Office then informs the competent German diplomatic mission. In addition, the German mission of the foreign State concerned, where appropriate the competent federal or state finance ministry and, as a matter of course, the Federal Government's Representative for Cultural and Media Affairs must also be notified so that the next steps can be agreed upon in a timely manner.

Special circumstances may potentially arise in individual cases where the return of the human remains may be demanded on several grounds, such as expropriation of property from the victims of National Socialism, as part of the land reforms in the Soviet occupied zone or as a result of subsequent injustices in the former East Germany (for example, where parts of the skeleton of an indigenous Australian originate either from a Jewish collection seized before 8 May 1945 or the collection of an aristocrat seized after 8 May 1945 in East Germany). However, examination of those additional possible claims is outside the scope of the present recommendations.

The age of the human remains is particularly relevant when examining the legitimacy of a claim for return. If the human remains are less than 125 years old, the deceased person may still be remembered in his/her people of origin and genealogical matches to direct descendants are possible (for further details, see p. 48). The latter may apply to exercise the right to care for the dead. It must be borne in mind that memories of injustices perpetrated, in particular in the case of the persecution of certain groups and genocides within a people or State of origin, are likely to remain vivid in people's minds for longer than 125 years. However, this can be proven only if there is a very close and continuing geographical, religious, spiritual and cultural connection. That period of time can therefore be used as a guideline in this context only in individual cases. The age of the human remains is also relevant as far as their legal classification is concerned, since it will be decided on the basis of that age whether rights of ownership can exist in relation to the human remains, whether those remains may be traded and whether – in the case of recent remains – their trading is prohibited. Even if they may be traded, it is always necessary to check whether they were acquired in a context of injustice.

- Claimant eligibility

In the joint interests of the claimant and the museum/collection, the claimant should provide the following information:

- details of his/her identity and, where appropriate, written powers of attorney in favour of the claimant's representative(s);
- details of the claimant's 'link'/'relationship' to the human remains; and
- where known, information about other possible claimants.

As mentioned at the beginning of this Chapter, individuals, peoples of origin and States are all potential claimants. Their eligibility to make a claim can therefore also be proven in a variety of ways.

- Individuals

Individuals may bring claims as persons authorised to care for the dead or as owners depending on the legal status of the human remains.

In the case of human remains which cannot be owned (see also Chapter 3.4, Relevant legal Provisions, p. 34 et seq.), the family relationship must be determined. This is because the persons authorised to care for the dead are generally relatives, irrespective of whether they qualify as heirs. In this connection, the law of the State in which the deceased person last lived must generally be applied. Where the human remains may be regarded as objects which may be the subject of economic trade (i.e. they are capable of being owned in the narrower sense), ownership or legal succession (inheritance, purchase, gift etc.) must be verified.

Within the European legal context, questions of ownership and entitlement to exercise the right to care for the dead are generally determined by certificates, extracts from registers held at registry offices and probate courts and, in the alternative, church records. The museum/collection should ask the claimant to submit those documents, since this research could be beyond the capacities of a museum/collection. If a different legal and/or cultural understanding of relatives and family exists in the claimant's home country, the claimant should state that this is the case and provide related proof. Anything can be used as proof of the relationship between members of the people of origin and the deceased person from whom the human remains originate (affidavits, scientific literature, expert reports, photographs etc.). If the museum/collection is unable to assess the quality of such evidence, external assistance must be sought.

In addition, in order to prove his relationship or status as heir, the claimant should show that the other living relatives or heirs have authorised him to act as the representative. This avoids the museum/collection being drawn into conflicts within a group of entitled persons.

In the case of individual foreign claimants, the museum/collection should insist in cases of doubt that the respective German embassy legalises and certifies the foreign documents (ss. 13 and 14 of the *Konsulargesetz* [Law on Consular Affairs]).

In the absence of any family relationship or the status as owner, talks may be held with an individual only in very exceptional individual cases.

- Peoples of origin

In order to verify the eligibility of the claimant, an expert must generally examine the ethnic and genetic link and the legal connections to the deceased person

within the people of origin in question.

From the perspective of a museum/collection, preferential treatment must always be given where (leaving aside individual claimants) the claimant in question is a recognised legal subject under international law, i.e. generally a State or an association of States. Where a claim made by a people of origin may be assigned to a State, the talks should be held or at least legalised through the offices of that State in order to ensure a higher level of legal certainty.

However, if a museum/collection decides to enter into talks with the ethnic group or people of origin in question, very careful checks must be made to establish who within that group is authorised to make decisions.

- States of origin

If the claimant is a foreign State, it is necessary to determine whether other States are also potentially eligible claimants, for example because the ethnic group in question is native to several States. It must further be ascertained whether the State is at least one of the parties authorised to assert claims in respect of the human remains.

- Examination of the claim for return

It is important to ensure that the written claim for return made by the claimant contains the following information:

- precise details of the human remains in question (the museum/collection should help to provide a precise identification); and
- the substantive grounds for the claim (both legal and non-legal grounds, in each case with references to the legal sources or sufficient documentation).

Where appropriate, the museum/collection must determine:

- the age of the human remains;
- their origin and how they were acquired (provenance);
- their legal status in the museum/collection;
- the scientific, educational and historical value of the human remains to the museum/collection, i.e. their use to date in the museum/collection; and
- whether similar resolved or ongoing cases exist.

On that basis, it should first of all be established whether a legally enforceable claim for the return of the specific item in the collection exists. We recommend that the services of an expert be engaged for this purpose (legal adviser at the museum/collection or the responsible funding body or a lawyer specialised in this field).

If there is a clear legal claim, the human remains must be returned. The museum/collection and the owner have no discretion in such circumstances. For fur-

ther details on such legal claims, see the section on Relevant legal Provisions in Chapter 3.4 (p. 30 et seq.) of this publication.

If no legal claim exists, it is necessary to establish whether there are other possible grounds, in particular those of an ethical nature, for the return of the human remains or another mutually agreed solution. In such cases, the decision for or against the return of the human remains or an alternative solution is at the discretion of the museum/collection or its funding body.

It must be remembered in this regard that public bodies are in principle bound by the applicable laws. Property and asserts may be given away only where there is a legal ground for so doing. The return of human remains on the basis of purely ethical considerations is thus considered only in specific exceptional cases. Accordingly, for example, not every colonial context can automatically form the grounds for return. The return of human remains on the basis of ethical principles is conceivable in particular where those remains were acquired in contexts of injustice, i.e. in circumstances which constitute a particularly serious breach of the concept of justice or represent unspeakable acts against humanity. In that connection, that context of injustice does not have to have been caused by the actions of employees of the museum/collection itself or by German nationals. There are also potential cases where major injustices were committed within the peoples of origin. One example would be people who were killed within the people of origin for the purposes of conducting trade in their human remains. It must be decided on a case-by-case basis when the threshold is reached which suggests that the return of human remains is necessary, even where there is no legal basis for return. If that threshold is not reached, efforts may be made to strike a balance between the interests concerned by means of alternative solutions.

For further information about Ethical Principles, see Chapter 3.5 (p. 42 et seq.).

What steps must be followed if a decision has been made to return human remains?

If the museum/collection has decided to return human remains, that return should be agreed with the claimant in writing. In this connection, the question of the costs of repatriation would also have to be resolved and all claims to the specific human remains settled.

A ceremony is often organised to mark the return of human remains. The content and course of that ceremony should be devised and organised in conjunction with the claimant/people of origin/State of origin as an equal party. The holding of a return ceremony can be a highly controversial political event, particularly where the matter is handled at government level.

In order to avoid disagreements, the expectations of all parties concerned regarding the content and course of the handover of the human remains should be clarified in advance.

In that context, consideration should be given to the following questions:

- Which parties exactly are responsible for and are organising the handover of the human remains? Are they the museum/collection on the one hand and an individual or an ethnic group on the other hand? Or are they the Federal Republic of Germany and the State in which the people of origin is now resident?
- Are other interested parties involved in addition to the parties to the handover, for example representatives of the people of origin in addition to the State of origin? How are those other interested parties to be involved? What role will they have in the context of the handover?
- What expectations exist regarding statements/speeches by the parties? Is perhaps an apology or an admission of guilt expected? And, in this connection, who can in fact apologise or admit to guilt in whose name (what is the political angle in this regard)?

Return ceremonies are often attended by political figures, who are assisted in their work by officials. Those political representatives and their officials can also assist the representatives of the museum/collection with the preparations for the handover.

Members of the 'Human Remains' Working Group at the *Deutscher Museumsbund e.V.*

Prof Wiebke Ahrndt

Director of the Übersee-Museum Bremen
Vice President of the *Deutscher Museumsbund e.V.*
Chair of the Working Group
Bahnhofsplatz 13, 28195 Bremen
w.ahrndt@uebersee-museum.de

Dr Claus Deimel

Director of the Staatliche Ethnographische Sammlungen Sachsen/
Staatliche Kunstsammlungen Dresden
Johannisplatz 5–11, 04103 Leipzig
claus.deimel@ses.museum

Michael Geißdorf

Legal Adviser to the Staatliche Kunstsammlungen Dresden
Residenzschloss
Taschenberg 2, 01067 Dresden
michael.geissdorf@skd.museum

Dr Christian Lenk

Managing Director of the Ethics Commission at the Universität Ulm
Institute of Medical History, Theory and Ethics
Frauensteige 6, 89075 Ulm
christian.lenk@uni-ulm.de

Susanne Roeißiger

Head of the 'Collections' Department
Stiftung Deutsches Hygiene-Museum
Lingnerplatz 1, 01069 Dresden
susanne.roessiger@dhmd.de

Dr Wilfried Rosendahl

Deputy Director of Archaeology and World Cultures
Head of 'World Cultures and Environment' Department
Reiss-Engelhorn-Museen
Zeughaus C5, 68159 Mannheim
wilfried.rosendahl@mannheim.de

Anja Schaluschke

Managing Director of the *Deutscher Museumsbund e.V.*
In der Halde 1, 14195 Berlin
schaluschke@museumsbund.de

Dr Markus Schindlbeck

Head of the 'Oceania and Australia' Department
Ethnologisches Museum der staatlichen Museen zu Berlin
Arnimallee 27, 14195 Berlin
m.schindlbeck@smb.spk-berlin.de

Prof Thomas Schnalke

Director of the Berliner Medizinhistorisches Museum der Charité
Charitéplatz 1, 10117 Berlin
thomas.schnalke@charite.de

Carola Thielecke

Legal Adviser Presidential Department – HV J1
Stiftung Preußischer Kulturbesitz
Von-der-Heydt-Str. 16–18, 10785 Berlin
c.thielecke@hv.spk-berlin.de

Claudia von Selle

Lawyer Paris-Berlin
Chausseestraße 14, 10115 Berlin
c.vonselle@vonselle.de

Dr Anne Wesche

Project Coordinator
Hemmstraße 103, 28215 Bremen
info@wissen-und-werk.de

Prof Ursula Wittwer-Backofen

Head of the 'Biological Anthropology' Department
Albert-Ludwigs-Universität Freiburg
Hebelstr. 29, 79104 Freiburg
ursula.wittwer-backofen@uniklinik-freiburg.de
office@museumsbund.de