

**INTERNATIONAL LAW ASSOCIATION**

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**CULTURAL HERITAGE LAW COMMITTEE**

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## REPORT

At the 70<sup>th</sup> Conference of the International Law Association (2002), the Committee on Cultural Heritage Law reviewed three projects that have constituted its agenda since the Committee's meeting at Wolfson College, Oxford University, November 8, 2001. The Committee met again during the ILA Regional Conference in Barbados, March 26-29, 2003 – the only ILA Committee to do so – in order to further develop these projects. What follows is a Report on the latest developments.

### 1. UNESCO Convention on the Underwater Cultural Heritage

The first of the Committee's projects is to monitor the development of the UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001). The Committee's preparation of the Buenos Aires Draft Convention (1994) on that topic provided the basis for the UNESCO Convention. Kaare Bangert serves as coordinator of this project.

At present the principal role for the Convention seems to be as available guidance or inspiration for inclusion of cultural heritage law in other regimes such as the IMO convention on salvage of wrecks and the developing regime of a 350-mile continental shelf. Also, the Convention might play a useful role in the development of an integrated coastal zone management plan for the European Union. For example, there might be a reference to the preservation of cultural heritage in the suggested drawing up of national strategies for integrated management, for example. Otherwise, UNESCO has not made additional information readily available about developments under the Convention since its adoption by the UNESCO General Conference in 2001.

To what extent the UNESCO Convention will be widely implemented remains an open question. The impact of an emerging 350-mile continental shelf regime could be a factor in re-addressing questions relating to the seabed. The implementation of such a regime is expected to create two tiers: a 200-mile inner continental shelf overlapping with the EEZ and an outer continental shelf stretching from the 200-mile outer limit of the inner continental shelf to the 350-mile limit. A trend to use the continental shelf as a basis for regulation of issues other

than natural resources could include protection of underwater cultural heritage. This could lead to a new role for both the ILA's Buenos Aires Draft Convention and the UNESCO Convention.

## 2. **Blueprint Project**

The Committee's studies for a Blueprint to guide legal developments in protecting the cultural heritage were published as a symposium in the first issue, volume 9, of *ART, ANTIQUITY AND LAW* (2004). This project was designed to provide a rough blueprint to guide research, progressive development and codification of the law. The Committee was motivated by a perception that the law had developed in an ad hoc manner as a series of reactions to particular crises and other situations. The Committee noted specifically that a lack of research, comparative analysis of issues, and a long-range view has often led to mistakes at both national and international levels. These deficiencies, in turn, have led to undisciplined commitments of resources to protect the cultural heritage under international law. The Committee's principal concern was what was seen to be a reactive and unprioritized approach, overall, to the development of cultural heritage law. The resulting studies do not form a single blueprint for action, but provide a set of suggestions and designs for reform and development of cultural heritage law in the early years of the twenty-first century.

## 3. **Draft Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material**

The Committee's report on this topic follows. It arises from dissatisfaction with the essentially adversarial regime for addressing issues related to the protection of the cultural heritage. The draft principles set forth in this report are intended to serve as a basis for international communications and cooperation, with a view toward more specific implementation in the form of an international agreement or other instrument as a second step in the Committee's work. In preparation for the ILA Conference in 2006, the proposed preparation of such an instrument would therefore form the core of the Committee's work.

### **I. BACKGROUND**

#### **A. The Division of Opinion:**

The cultural property landscape often seems to be sharply divided.<sup>1</sup> On one side are those who resist attempts by countries, groups, entities or individuals to compel the repatriation of objects to their places of origin. This group has often reinforced its position by citing the advantages of the free flow of art objects in licit trade between countries.<sup>2</sup> Such free trade is supported on the basis that it can secure the protection of items from physical harm and have a broader educative effect than if objects remain in their often remote or obscure places of origin. Members of this group often include museums, art dealers and collectors. Increased affluence and the expansion of museum collections have also increased the demand for desirable material. This has reinforced the continuation of a viable international art market.

On the other side are those seeking to enforce demands for the return of cultural property, often removed from its places of origin during colonial times or in periods of unrest or armed conflict.<sup>3</sup> Many states in Africa, the Americas and the Pacific experienced colonial periods in their histories when their populations were vulnerable to the removal of cultural objects to metropolitan powers. This situation can have an internal dimension as well, such as where minority indigenous groups seek the return of objects located in national museums of the same country. Such claims, whether directed against national museums or not, are usually based on an argument that colonial powers or national governments took advantage of native groups in acquiring material as part of a general policy of

<sup>1</sup> The term "cultural property" as used in this report can be understood according to the definition contained in Article 1 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property 14 November 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 (hereafter referred to as "UNESCO 1970").

<sup>2</sup> See, e.g., J.H. Merryman, "Two Ways of Thinking About Cultural Property", 80 Am. J. of Int'l. Law 831 (1986).

<sup>3</sup> See, e.g., T. Janke, Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights (1998). Well known contemporary source countries include China, Cambodia, Indonesia, countries in Mayan Central America and elsewhere. See K.W. Tubb (ed.), Antiquities: Trade or Betrayed: Legal, Ethical and Conservation Issues (Archetype, London, 1995), K.E. Meyer, The Plundered Past: The Traffic in Art Treasures (Readers' Union, London, 1974) and P.J. O'Keefe, Trade in Antiquities, Reducing Destruction and Theft (Archetype, London, 1997).

domination or exploitation. Similarly, many states have lost control of cultural property as a result of war or other situations that facilitate illicit trafficking.<sup>4</sup> The current situation in Iraq is a good example.

Jewish and other owners of art stolen or appropriated before or during World War II and its aftermath by the Nazis and others have made claims in recent times for the return of objects now in the possession of museums or private collectors. Like some indigenous peoples, these owners assert that material was wrongfully taken in situations of forced appropriation and outright theft. When those now in possession of such material have argued that such claims should have been made decades ago, original owners have claimed that it was not possible for them to locate their lost property earlier because of the circumstances of its loss and the lack of means to properly document claims. Like many indigenous peoples, Jewish and other victims of outright misappropriation of objects argue that past wrongdoing should not be excused because of factors outside the control of its victims.<sup>5</sup>

Those who oppose the repatriation of cultural material have benefited from various national laws. For example, the laws of many states refuse to recognize or enforce the cultural property export controls of other states.<sup>6</sup> This refusal is based on concepts of sovereignty, territoriality of law and public policy. These reasons mirror those usually developed to deny recognition or enforcement of foreign income and other taxes. In the case of well-supported claims to recover fine art stolen by the Nazis and others, courts have sometimes been willing to apply statutes of limitation or repose to resist claims by prior owners.<sup>7</sup> These laws bar civil actions after the expiration of a given period of time. They are based on considerations of certainty, problems of collecting reliable evidence after the passage of time, and equity.

On the other hand, many states have become parties to the 1970 UNESCO Convention.<sup>8</sup> Some of these states recognize an obligation under that treaty to enforce the cultural material export controls of other parties on a reciprocal basis (e.g., Canada and Australia). This is akin to recognition of foreign tax laws under double taxation agreements between countries. In the case of claims by owners of stolen art, some courts in the United States have interpreted statutes of limitation to require due diligence on the part of owners of stolen objects.<sup>9</sup> If the original owner has done everything reasonably possible to determine the whereabouts of lost art, the limitation period may not start to run until the whereabouts of an object has actually been discovered and even until a request for return has been made to the current possessor of the object.<sup>10</sup>

## **B. A More Balanced Approach:**

Many, including this Committee, sense an impasse between these two approaches and argue for more balanced approaches to demands for the return of cultural property by those claiming prior rights or possession. Sometimes described as “caring and sharing”, this approach strives for a middle-ground between insistence on

<sup>4</sup> See C. Renfrew, Loot, Legitimacy and Ownership: The Ethical Crisis in Archaeology (Duckworth, London, 2000), N. Brodie, J. Doole and C. Renfrew (eds.), Trade in Illicit Antiquities: The Destruction of the World’s Archaeological Heritage (Cambridge, 2001). The origin of modern scholarly concern about pillaged art was an article by Professor Clemency Coggins: “Illicit Traffic of Pre-Columbian Antiquities”, 29 Art Journal 94 (1969).

<sup>5</sup> For background to this debate see, *inter alia*, L.H. Nicholas, The Rape of Europa (New York, 1994), E. Simpson, ed. The Spoils of War: World War II and Its Aftermath: The Loss, Reappearance and Recovery of Cultural Property, (New York, 1995) and H. Feliciano, The Lost Museum: The Nazi Conspiracy to Steal the World’s Greatest Works of Art (New York, 1997).

<sup>6</sup> See, for example, Attorney-General of New Zealand v. Ortiz and Others [1982] 3 WLR 571 (C.A.) applying the principle of English conflict of laws that foreign penal legislation will not be recognized and enforced in the *lex fori*; Huntington v. Attrill [1893] A.C. 150. In Ortiz the English Court of Appeal based its decision not to enforce the New Zealand cultural property export controls on this principle. The House of Lords also found against New Zealand but on the alternative ground that the New Zealand law did not apply unless the object was seized before it left New Zealand territory.

<sup>7</sup> See DeWeerth v. Baldinger 836 F. 2d 103 (USCA 2<sup>nd</sup> Cir. 1987).

<sup>8</sup> *Supra*, note 1.

<sup>9</sup> E.g., O’Keefe v. Snyder, 416 A 2d., 862 (NJ, 1980).

<sup>10</sup> See Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg Feldman Fine Arts, Inc., 917 F. 2<sup>nd</sup> (7<sup>th</sup> Cir. 1990).

outright return of cultural property and an unqualified assertion of the right to possess or transfer cultural property to others.

Origins of a less adversarial, more balanced approach to cultural heritage law may be found in the Committee's Interim Report on Heritage Law Creation (1996), in which the Committee emphasized "the inadequacy of the current framework of international cultural heritage law, within which claims of retention and return of cultural patrimony are dominant (p. 3)". The Committee's Second Report on Heritage Law Creation (1998), which examined the role of nongovernmental organizations and the processes of intergovernmental organizations in formulating cultural heritage law, noted (p. 3) that:

the current framework remains polarized and weakened by a fundamental tension between principles of retention and return. These principles are, of course, fundamental and perhaps inescapable. They must be taken into account fully by a viable legal regime. But it is their dominance in defining the regime that has inhibited the development of a more effective, cooperative regime.

"In seeking a more collaborative and eclectic approach to developing international cultural heritage law (p. 3)", the Committee's 1998 Report advocated an "improved regime based substantially on collaboration and sharing of heritage (p. 12)" Toward that end, the Committee, in one of its four Recommendations, called upon UNESCO to adopt guidelines for international cooperation. These guidelines would be designed to encourage "[c]operative, rather than unrealistically restrictive legislation" (p. 17) and offer "support for expanded programs of loans and exchanges of objects on either a short-term or long-term basis" (p. 17). Sadly, it is not apparent that UNESCO ever considered this or any of the Committee's four Recommendations in its 1998 Report.

Now is a propitious time to move the issue beyond generalities and state some general principles that could be a workable basis for dealing with repatriation requests without the need to seek assistance from the courts. These principles would be especially valuable in breaking the deadlock that arises when unequivocal demands are made by source countries for the return of world famous items such as the Rosetta Stone or the bust of Queen Nefertiti. Such demands are usually responded to with equally blunt refusals, and the outcome is often a kind of tense stalemate. By agreeing to abide by a set of pre-existing formulae to resolve their conflict, parties would be able to turn their frustration into cooperating on reaching a viable solution to their repatriation dilemma. Resort to the courts could still be an option, but only as a last resort.

The seeds for this approach can be found around the world in some developments related to the repatriation of cultural property. In the United States the Native American Graves Protection and Repatriation Act creates qualified rights of return in respect of American Indian and Native Hawaiian cultural property in most American museums, broadly defined.<sup>11</sup> While human remains and grave goods must be returned as of right, the legislation is more nuanced regarding material of less cultural sensitivity. In Canada, the Task Force Report on Museums and First Peoples developed a blueprint for developing an ongoing partnership that would provide criteria applicable to repatriation requests and facilitate negotiated settlements of claims.<sup>12</sup> This has reshaped the management of museum collections and the sharing of objects with First Nations, including the division of collections into representative parts for display in different locations. In a similar vein, many instances of claims concerning valuable art objects pillaged during World War II have been resolved by extra-judicial solutions whereby original owners or their heirs receive some compensation and recognition but museums retain possession of works of art.<sup>13</sup> These types of idiosyncratic outcomes suggest that the optimum solution to many repatriation cases may not lie in choosing between retention, on the one hand, and repatriation or return, on the other, but in exploring alternative

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<sup>11</sup> 25 U.S.C. ss. 3301-3313 (1994). See also J.A.R. Nafziger & R. J. Dobkins, "The Native American Graves Protection and Repatriation Act in its First Decade", 8 *Int. J. of Cultural Property*, 77 (1999).

<sup>12</sup> Task Force Report on Museums and First Peoples. Turning the Page: Forging New Partnerships Between Museums and First Peoples (2<sup>nd</sup> ed., 1992). On the development of such partnerships as evidence of an emerging fiduciary duty of museums and similar institutions, see J.A.R. Nafziger, "The New Fiduciary Duty of United States Museums to Repatriate Cultural Heritage: The Oregon Experience", [1990] Special Issue, UBC Law Rev. 37.

<sup>13</sup> N. Palmer, "Museums and the Holocaust: The Futility of Litigation", 5 *Art. Antiquity and Law* 233 (2000).

courses of action that will ensure the proper conservation and protection of cultural material while not hiding past facts and any sense of material and spiritual loss arising from them.

As mentioned at the beginning of this report, at its November 2001 meeting in Wolfson College, Oxford University, the Committee decided to pursue a new study and possibly a draft instrument on the accommodation of shared interests in cultural heritage. Committee members agreed that solutions to particular repatriation claims are already widespread. While it is unlikely that solutions can be found in every case that will satisfy everyone, a set of principles and guidelines might form a useful starting point from which the parties involved could proceed to fashion an appropriate and workable solution to their particular cultural property dilemma. This approach was affirmed at a meeting of the Cultural Heritage Law Committee on March 26, 2003 in Bridgetown, Barbados on the occasion of the Caribbean Regional Meeting of the International Law Association. With the adoption of these principles as the basis to resolve disputes, parties could then reach compromise solutions to their own unique repatriation dilemmas. Agreed-upon guidelines for dispute resolution would ameliorate the extremities of retention and repatriation or return.

## **II. JURISPRUDENTIAL FOUNDATIONS**

The focus of this report is to establish principles and guidelines that represent a workable framework for dealing with future claims for the repatriation or return of cultural material. Many claims occur against a background of media attention and moral indignation that can appear to pre-judge the merits of a particular case. This can lead to polarization that either prevents any hope of an object's return or dictates an inappropriate solution. The Committee suggests that voluntary adherence to these principles and guidelines by both sides might lead to a collaborative resolution of disputes.

An important aspect of any set of principles is the potential scope of their application. There may be less need for the application of these principles and guidelines to objects that have been the subject of theft or conversion within the recent past, say, ten years. Putting aside issues of proof, cases of recently stolen or misappropriated cultural material, whether taken in a midnight heist at a museum or from a remote archeological site, can thus be adequately resolved under current laws. A good example is the English case of Bumper Development Corporation v. Commissioner of Police for the Metropolis,<sup>14</sup> which involved a bronze statue of the God Siva that had been recently stolen from a temple in the Indian state of Tamil Nadu. The English proceedings were to recover the statue from a bona fide purchaser in England. The civil law tradition of furnishing good title to bona fide purchases of stolen property in certain circumstances can be contrasted to the common law rule by which no good title can arise in such cases. Under English and American legal principles, victims of theft can sue to recover possession of their properties from bona fide purchasers. This is what happened in Bumper though the judgments are remarkably opaque as to this fundamental point of law. As there were no statute of limitation issues in Bumper, the case mainly revolved around recognition of the legal personality of one of the plaintiffs by the English courts.

A more controversial situation involves the removal of cultural material from one country, contrary to its export controls, for sale in another. As noted earlier, most legal systems do not recognize or enforce the cultural property export control laws of other countries.<sup>15</sup> Return of illegally exported property in such cases will usually then depend on the presence of an international agreement binding the states involved. The 1970 UNESCO Convention has been implemented in Canada, Australia and other states in such a way as to enable the export controls of one state to be recognized and enforced in another.<sup>16</sup> In the United States and elsewhere, recognition depends on additional bilateral agreements. The resulting uncertainty and unevenness of application suggests that there could be scope for the application of an alternative set of principles to some of these cases of smuggled objects.

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<sup>14</sup> [1991] 1 W.L.R. 1362; [1991] 4 All E.R. 638 (C.A.) The case had an interesting Canadian spin-off in the form of a successful enforcement of a large judgment for costs in favour of the plaintiffs: see R.K. Paterson, "The "Curse of the London Nataraja" ", (1996) 5 Int. J. of Cult Prop. 330.

<sup>15</sup> Supra, note 6.

<sup>16</sup> For information on the status of the 1970 UNESCO Convention and an up-to-date list of parties, see [http://www.unesco.org/culture/laws/1970/html\\_eng/page3.shtml](http://www.unesco.org/culture/laws/1970/html_eng/page3.shtml).

Finally, another example of controls already in existence involves an infraction of the customs laws of the country of import, such as when goods have been misdescribed or undervalued or when their country of origin has been wrongly identified. These sorts of cases are usually adequately dealt with under the customs laws of most importing countries. The sanctions in place are usually adequate as well, such as fines or forfeiture. In U.S. v. An Antique Platter of Gold, the U.S. Second Circuit Court of Appeals upheld forfeiture of a Sicilian antiquity on the basis of a misstatement to US Customs as to its country of origin.<sup>17</sup>

What is interesting about the above examples is that, with the exception of cultural property export controls, they consist of rules applicable to personal property generally and not cultural material in particular. It is the unique characteristics of cultural material, however, that present additional challenges which legal systems have largely failed to meet. The circumstances of the acquisition of cultural objects during colonial periods or wartime are also often unprovable so that, even if separate rules were developed for cultural material, their application would often be difficult for courts.

Contemporary claims for the return of cultural objects are often premised on moral rather than legal bases.<sup>18</sup> This makes them more appropriately addressed outside the courts. Possessors of cultural material are often sympathetic to the motives for their return to others but are conflicted by other constraints, such as fiduciary responsibilities in the case of museums.

For these reasons the Committee has developed principles to assist in the successful resolution of repatriation requests. These principles could be adopted into domestic law for certain types of repatriation claims or voluntarily adhered to by parties to a repatriation claim, whether the parties reside in the same or different countries. So used, they would form a valuable alternative to adversarial court proceedings.

### **III. DRAFT PRINCIPLES FOR COOPERATION IN THE MUTUAL PROTECTION AND TRANSFER OF CULTURAL MATERIAL**

#### **1. Making and Responding to Requests for the Return of Cultural Material**

**(i) A person, institution, group of persons, government or other public authority making a request for the return of cultural material from a state, museum or other institution must make such request in writing, with a detailed description of the object or objects whose return is requested, and include reasons for making such a request as well as detailed information regarding such matters as the place of origin.**

**(ii) States, museums or other institutions that receive written requests for the return of cultural material in their collections must respond in writing to such requests within a reasonable time, either setting out reasons for any disagreement concerning such requests or proposing a timeframe for negotiations.**

**(iii) States, museums and other institutions that receive written requests for the return of cultural material in their collections are obliged, upon being requested to do so, to enter into good faith negotiations concerning the cultural material at issue.**

#### **Notes**

States, museums or other institutions that receive requests for the return of an object should ensure that they have correctly identified the party seeking the return and that party's authority to act on behalf of his or her principal. This can be especially problematic in the case of indigenous cultural property where material may be seen as communally owned. Requested parties should not be responsible for resolving disagreements over ownership claims that are internal to the group making the request.

Requested parties should also seek to understand the concerns and perceptions of the group on whose behalf a claim is made. Gaining such an understanding will make a successful resolution of any claim more likely. Otherwise the spiritual, ceremonial or other uniquely cultural aspects of requested objects may not be adequately understood or appreciated, particularly internationally.

The burden of costs associated with return of property may be controversial. Ordinarily, these should fall to the party that has been successful in negotiating the repatriation, but there may be room for variations on this

<sup>17</sup> 184 F. 3d 131 (2<sup>nd</sup> Cir. 1999)

<sup>18</sup> The civil law does extend separate treatment to cultural property in certain cases but this depends on the laws of a particular state. See K. Siehr, International Art Trade and the Law (1993), at pp. 64-66.

presumption, such as where the requesting person or institution lacks sufficient resources, for example, in the case of a small indigenous group or a developing country.

Requested parties may be subject to specific legal constraints, such as their ability to return objects, or such non-legal constraints as collection management or deaccessioning policies may impose. These constraints should be identified and communicated at the outset.

## **2. Principle of Repose**

**Cultural material that has reposed in the territory of a state for at least 250 years shall be exempt from return to its place of origin. The state where cultural material is presently located must nevertheless consider, in good faith, requests from the state of the place of origin for loan of such cultural material, unless a loan would not be possible because of considerations relating to the size or condition of the object or its extraordinary significance to the state where the object is presently located.**

### **Notes**

The principle of repose for cultural objects that have been removed from the territory of the country of origin for at least 250 years is intended to introduce a threshold of certainty for repatriation requests in the hope that by clarifying the situation for recipients of repatriation requests, such museums and institutions will be encouraged to adopt a more liberal and flexible attitude towards requests. For instance, the United States agreed to recognize Italian cultural property export controls on the basis that Italy will make available cultural objects for study and exhibition in the United States.

In deciding whether there are valid considerations for not agreeing to lend material, the conservation, management and display standards of the International Council of Museums could be an appropriate measure.

## **3. Alternatives to the Return of Cultural Material**

**(i) Museums and other institutions must develop guidelines for responding to requests for the return of cultural material. These may include alternatives to outright return such as loans, the making of copies, and shared management and control.**

**(ii) When a museum or other institution has conservation, management, and display standards that meet or exceed those prescribed by the International Council of Museums (ICOM), requests by that museum or institution for the loan of such cultural material must be accepted by the requested state in the absence of extraordinary circumstances.**

**(iii) Museums and other institutions must prepare and publish detailed inventories of their collections, with the assistance of UNESCO and other sources where they lack sufficient resources to do so.**

**(iv) Where a substantial portion of the collection of a museum or other institution is not on public display or is otherwise inaccessible, that institution must agree to lend or otherwise make available portions of the material to a requesting state of the place of origin of the collection or part thereof in the absence of compelling reasons to the contrary.**

### **Notes**

As an alternative to return, repatriation or restitution of cultural property on request, museums may be able to reach agreements that objects be retained but on a basis that addresses the various concerns of the requesting party. These could include, but not be limited to, the following:

(i) Partnership arrangements between museums and requesting parties that would ensure the appropriate access, display, conservation and storage of material. These arrangements could include the employment or other form of involvement of representatives of the requesting party in the ongoing mission of the museum. Future collaboration on research, loans, and other museum activities could be part of a continuing partnership arrangement.

(ii) Compromise solutions to outright return such as making copies of objects, making objects available for long or short-term loans or even the division of a collection so as to enable a museum to retain a portion of the material while returning the remainder to a requesting party. In the recent bilateral agreement between Italy and the United States, the latter agreed to recognize the former's cultural material export restrictions on the export of significant Italian antiquities and other important classical material. The agreement itself specifies significant programs of cultural exchange between the two countries, including long-term loans of archaeological material for research and exhibition and a framework for scholarly and

scientific co-operation between the two countries.<sup>19</sup> This will allow antiquities not on display in Italy due to a lack of resources to reach a substantial foreign public.

(iii) The extension of the museum into the community or entity requesting the return could take the form of assistance in establishing museum or display facilities, training programs, or assistance in discovering the whereabouts of similar objects to those whose return was requested. Such cooperation would be particularly appropriate in the case of claims by indigenous groups inside a country with a museum collection of their heritage.

In the interests of predictability and uniformity, it would be desirable to develop a standard agreement for adoption by museums and other institutions in member countries setting out detailed standards for responding to requests for the return of cultural material including alternatives to returning such material.

#### **4. Fundamental Change of Circumstances**

**Parties to an agreement for the return of cultural material should take account of the possibility of a fundamental change of circumstances, as that term is established under international law.**

##### **Notes**

This provision is designed to apply the principle of rebus sic stantibus, as set out in Article 62 of the Vienna Convention on the Law of Treaties, to agreements pursuant to requests for the return of cultural property. Whether or not objects are eventually returned pursuant to a request, parties should therefore agree, wherever possible, on the effect of future changes in the circumstances surrounding the custody of the material. Specifically, they should address these questions:

- (i) What should occur if the person or group to whom objects are to be returned becomes unable or unwilling to continue to provide proper care and display of them?
- (ii) What should be the responsibilities (if any) of those persons to make objects accessible to community or family members and researchers?
- (iii) In the event of a change which is seen as fundamental, such as a risk of deterioration or loss of objects, would mediation best resolve any consequential disputes?

#### **5. Cultural Heritage of Indigenous Peoples**

**Consistent with the rights of indigenous peoples under the Draft United Nations Declaration on the Rights of Indigenous Peoples, museums and other institutions recognize an obligation to respond in good faith to a request for the return of cultural heritage originating with such peoples. Even when such a request is not supported by the government of the state in whose territory such peoples are principally domiciled or organized, the obligation applies.**

##### **Notes**

The return of cultural material often involves claims by indigenous groups against museums in their own country or other countries. These claims often involve objects removed during colonial times or before the rights of such groups received any sort of recognition under national or international law.

Claims to indigenous material made against national institutions have been addressed through either legislation (such as NAGPRA in the United States), negotiation (such as the Task Force Report on Museums and First Peoples in Canada) or litigation (see, e.g., Mohawk Bands v. Glenbow Alberta Institute).<sup>20</sup> Claims across national boundaries are problematic since the governing law will usually be that of the country where the object presently resides. Most successful transnational repatriations have been based on negotiations between the parties, without the involvement of courts or other institutionalized processes of dispute resolution.

The proposed guideline is informed by this past practice and obliges a requested museum or other institution to respond in good faith and to recognize claims by minority indigenous groups whose demands are not supported by their national governments.

<sup>19</sup> See <http://exchanges.state.gov/culprop/itfact.html>

<sup>20</sup> [1988] 3 C.N.L.R. 70 (Alta. Q.B.).

### **6. Notification of Newly Discovered Cultural Material**

**Whenever feasible, museums and other institutions possessing significant, newly-discovered cultural material should promptly notify appropriate government authorities and international institutions of their discovery, together with as complete as possible a description of the material, including its provenance.**

#### **Notes**

Notification of newly discovered cultural property is an important aspect of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. Many governments require notification of discoveries under the provisions of their finders' laws.

### **7. Human Remains**

**Museums and other institutions possessing human remains affirm their recognition of the sanctity of such material and agree to return such material upon request to any persons or people who provide evidence of the closest demonstrable affiliation with the remains.**

#### **Notes**

Most legislative and non-binding codes dealing with the repatriation of human remains dictate their return in all cases from museums and other collections upon the request of culturally affiliated persons or groups. Such material may have been collected for scientific purposes that are now regarded with skepticism or indifference. There is little reason to suggest any response except return of remains so long as affiliation with the requesting group is clear. The problem of very old remains unaffiliated with a particular group or tribe has led to court rulings such as that in the highly publicized "Kennewick Man" case in the United States. The court there upheld the right of scientific access to the remains.<sup>21</sup> Sometimes an arrangement short of the outright return of human remains is agreed to, but this is usually only where the museum is the preferred place of rest for the remains and access is heavily restricted.<sup>22</sup>

### **8. Dispute Resolution**

**If parties to a request for the return of cultural material are unable to reach a mutually satisfactory resolution of any dispute related to the request within a period of two years from the time of the request, they will attempt in good faith to resolve the dispute by consultation, mediation, conciliation, ad hoc arbitration or institutional arbitration.**

#### **Notes**

Unsuccessful attempts to negotiate solutions to requests for return of cultural material should require alternate dispute resolution (ADR) in preference to litigation. For example, parties to a dispute might be required to stipulate ADR should negotiations be unsuccessful after a specified period of time. This could take the form of recourse to a pre-existing set of rules or be based on rules and procedures of the parties' own invention. The Native American Graves Protection and Repatriation Act in the United States establishes an expert committee with statutory powers to determine such issues as the categorization of objects and the identification of culturally affiliated groups.<sup>23</sup> Such a body could also be invoked to deal with any unexpected events that may have occurred after the parties' initial resolution of a requested return. Many museums and other institutions have established repatriation committees to deal with and recommend solutions to return requests. UNESCO might expand its catalytic role by expanding its present role in the formation of mediation and arbitral panels whenever the parties themselves are unable to do so. Some institutions may lack the resources to engage in protracted ADR. UNESCO and other suitable bodies might be asked to consider providing assistance, both monetary and professional, in such

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<sup>21</sup> Bonnichsen v. United States, No. 02-35994 (9<sup>th</sup> Cir., Feb. 4, 2004). See also L.J. Zimmerman and R.N. Clinton, "Kennewick Man and Native American Graves Protection and Repatriation Act Woes", 8 Int. J. of Cultural Property, 212 (1999).

<sup>22</sup> See, e.g., R.J. Watt, "Museums Can Never Own the Remains of Other People But They Can Care for Them", [1995] Special Issue, U.B.C.L. Rev. 77. For a detailed examination of the issues surrounding human remains in museum collections in the U.K., see Report of Working Group on Human Remains in Museum Collections (2003).

<sup>23</sup> Supra, note 11. In their article, Nafziger and Dobkins analyze this process and conclude that it works to reach agreement without resort to the courts.

situations. There might also be a provision barring the bringing of another request for, say, a period of five years after an unsuccessful initial request.

#### **IV. CONCLUSION**

The basis for the approach contained in this report is current practice. Disputing parties normally prefer negotiation to litigation – often with considerable success. Many museums and other institutions have had enough experience with claims to develop their own criteria and guidelines for dealing with them in the future. These practices are characterized by a sensitivity to the delicate moral and cultural issues often involved and to the value of a co-operative approach that helps minimize a posture of confrontation between disputing parties. This report recommends building on this practice in the form of the proposed principles and guidelines to facilitate non-confrontational solutions to requests for repatriation or return of cultural property.

A major benefit of the proposed scheme would be to eliminate the significant practical and legal problems that may arise when a claim is made by a person or group in one country against a museum or other institution in another. Among other attributes, by establishing a resolution process that is available to both local and foreign claimants, the proposed principles would eliminate the legal advantages local claimants presently enjoy. A collaborative approach to claims, such as that outlined in this report, should lead to better, more productive relationships between claimants and possessors.

Respectfully submitted,

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