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The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material
James A.R. Nafziger*

I. INTRODUCTION

The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material ("Principles")\(^1\) provide a substantive framework for helping to avoid and to resolve disputes arising out of requests for the transfer of cultural material, usually involving its return or restitution to countries of origin or indigenous groups. Adopted in 2006 by the International Law Association ("ILA"), the nine Principles were drafted by the ILA’s Committee on Cultural Heritage Law after several years of research, preliminary reports, and review sessions.\(^2\)

The Preamble to the Principles emphasizes the need for a guiding spirit of partnership among private and public actors through international cooperation. The Principles are intended to be used by a broad range of interested parties: governments, museums, other institutions, persons, and groups of persons. To facilitate the desired spirit of partnership among such a broad range of actors and potential issues, the Principles are simple and specific. Their guidance in handling transfer requests is fundamentally a technique for mutual protection of cultural material. The Principles are therefore tools for good stewardship.

The essence of good stewardship, as that concept has evolved in recent years, is responsible care of entrusted affairs or objects. But what do we mean by

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responsible care? The definition lies in the details. The Principles help define the ethos of stewardship in the context of the actual or potential tensions that result from multiple legal claims to culturally important material. By fostering mutually acceptable agreements for the careful disposition and possession of such material, the Principles are intended to avoid the unnecessary litigation of competing claims. They are not intended to replace litigation of issues but simply to facilitate collaboration between competing claimants in a process of first resort. To understand where the Principles fit into the larger regime to protect cultural heritage, it will be helpful to review some legal background.

II. LEGAL BACKGROUND

A. HARD LAW

Until the last few decades, nations—in both international and indigenous senses of the word—have relied largely on their own diverse practices, antiquities laws, export controls, and enforcement mechanisms to deter and respond to losses of their cultural heritage. This reliance has suffered from a lack of rules and procedures to govern the transnational movement and relocation of cultural material. To be sure, throughout the twentieth century there were scattered bilateral agreements, ad hoc arrangements involving indigenous claims, and an emerging humanitarian law applicable in time of armed conflict. But general international law had little to say about threats to cultural heritage until the late 1960s, when the problems of looting and international smuggling reached a critical level of visibility and transnational discourse. What followed was a sort of renaissance of treaty-making and other developments in the 1970s, beginning with the seminal United Nations Educational, Scientific, and Cultural Organization ("UNESCO") convention on illegal trafficking in cultural property ("1970 UNESCO Convention"). These initiatives provided a foundation for

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4 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Property (Nov 14, 1970), 10 ILM 289 (1971). The term “transfer” in the Principles is taken from the 1970 UNESCO Convention, as is the scope of the term “cultural
subsequent UNESCO instruments and other legal developments to protect cultural heritage, including new domestic legislation for responding to claims of indigenous nations.

The resulting legal framework is impressive and growing, but it is still handicapped by several debilities. These include a limited ratification of the treaties (especially among cultural market countries, though they have been gradually becoming parties); inadequate implementation and enforcement of treaty requirements; divergent treaty interpretations and rules governing statutes of limitations; the rights of bona fide purchasers and other secondary issues; over-reliance on expensive and time-consuming litigation to resolve issues; and too little engagement between public and private actors in formulating and applying new rules and procedures.

B. SOFT LAW

As this new regime of international law developed, it became apparent, because of the debilities discussed above, that the hard law of treaties and other instruments would never be sufficient. Several international organizations therefore sought to strengthen the emerging framework of international cooperation by elaborating soft law norms and offering new institutional support. These initiatives were instrumental in shaping what has come to be known as a “caring and sharing” approach to issues involving claims for return and restitution of cultural material, as follows.

In 1976 the General Conference of UNESCO, for example, expressed its support for exchange of cultural material by adopting a Recommendation to Member States on the International Exchange of Cultural Property:

[That instrument] is based on the principle that a systematic policy for the exchange of cultural property will contribute to a better distribution and use of the cultural heritage on a world-wide scale and will be a means of combating illicit traffic and the rise in price of such property, which renders it inaccessible to the least-favoured countries and institutions.

In 1978 the General Conference of UNESCO established an Intergovernmental Committee for Promoting the Return of Cultural Property to

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Its Countries of Origin or Its Restitution in Case of Illicit Appropriations ("Committee"). The Committee is entrusted with the task of promoting cooperation and settlement of disputes involving claims for the return and restitution of cultural material, including those arising out of colonization and military occupation. The Committee also seeks to assist countries in building representative collections of cultural material, preparing national inventories, informing public opinion, training museum personnel, implementing UNESCO recommendations concerning international exchange, and advising the UNESCO Director General and General Council on pertinent issues.

One of the Committee's recent projects has been to formulate Principles Relating to Cultural Objects Displaced in Relation to the Second World War. A prime motivation behind this effort has been to broaden the Washington Principles of 1998 and to strengthen the regime for restitution of Holocaust-related material. In 2005, the Committee also published several observations to assist in elaborating a more general strategy for the restitution of stolen or illicitly exported cultural property. It should be noted that the Committee's aspiration to assume a stronger role in mediating and conciliating disputes coincides with the Principles. Observing that such procedures could be initiated either by the concerned parties following a recommendation by the Committee or directly by the concerned parties, the Committee urged the development of "rules of conciliation specific to cases of return or restitution of cultural property [drawn from] recognized models for settlement of disputes."


Id, Annex IV at 3.


For criticism of the regime's effectiveness, see, for example, Willi Korte and Mark Masurovsky, Holocaust Restitution: Lack of Funding and Cooperation Have Resulted in Failure and Injustice, Art Newspaper 32 (Dec 2006); Jason Edward Kaufman, Restitution: Six Years Ago, US Museums Pledged to Research the Nazi History of Works in Their Collections, Few Have Fulfilled Their Promises, Art Newspaper 8 (Sept 2006); Alan Riding, Foot Dragging on the Return of Art Stolen by the Nazis, NY Times E1 (May 18, 2004). On the cottage industry of lawyers in the ongoing process, see Georgina Adam, Restitution: The Nazi Bounty Hunters, Art Newspaper 1 (Dec 2006).


The Notes following Principle 9 specifically suggest a role for UNESCO in forming mediation and arbitral panels. See Annex at Principle 9, Notes (cited in note 1).

The United Nations General Assembly has also supported the conventional regime by adopting several resolutions, beginning in 1973. Although these resolutions have differed in wording, their essential provisions have been the following: to encourage international cooperation in the restitution of cultural material to countries of origin; to invite states to take adequate measures to prohibit and prevent illicit trafficking in *objets d'art*; to encourage states to prepare national inventories of cultural material; to invite states to become parties to the 1970 UNESCO Convention on illegal trafficking; to marshal professional expertise and alert the media and public opinion concerning claims for the transfer of cultural material; and to strengthen museum infrastructures.

The work of non-governmental organizations has also been productive in shaping a comprehensive regime of cultural heritage law. For example, the International Council of Museums ("ICOM"), an affiliate of UNESCO, adopted a Study on Principles, Conditions and Means for Restitution or Return of Cultural Property in View of Reconstituting Dispersed Heritages ("Study"). It arrived at a number of interesting and controversial conclusions. One of these conclusions was that the reassembly of dispersed heritage through restitution or return of culturally important objects to countries of origin constituted an ethical principle that had been recognized and affirmed by international organizations. The Study even forecast that this principle would become a peremptory norm of *jus cogens* in international transactions, but that has proven to be illusory.

### C. CODES OF ETHICS AND ETHICAL GUIDELINES

In 1986, the ICOM adopted a Code of Professional Ethics. As amended in 2001 and revised in 2004, the Code establishes basic expectations about the responsibility of museums to communities. It also sets minimum standards of conduct and performance to govern museum staff and collection management. Derivative guidelines have been adopted by many museums, other institutions, and professional associations, generally promoting compliance with the legal requirements for return and restitution of material. These guidelines can also serve to deter doubtful acquisitions that might be subject to such requirements.

In the United States, ethical guidelines originated during the renaissance of cultural heritage law in the 1970s. In 1970, the University of Pennsylvania Museum initiated an "institutional revolt against museum acquisition policies".

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14 See *Return and Restitution of Cultural Property*, 31 Museum Intl at 62 (cited in note 6), and discussion in Nafziger, 15 NYU J Intl L & Pol at 803–06 (cited in note 5).


that had contributed to the looting and destruction of archaeological sites by turning a blind eye to the details of an object’s provenance. The Pennsylvania Declaration, as it became known, insisted on a pedigree for every acquisition and on full disclosure of details about the acquisition to the public. Leading museums—the Metropolitan Museum of Art, Harvard University, the Brooklyn Museum, the Field Museum of Natural History, and the Smithsonian Institution—soon adopted their own policy declarations and guidelines to similar effect. Many, if not most, other museums have followed these initiatives.

In 2006, the Getty Museum in Los Angeles, under severe pressure from home and abroad to respond to claims that it had acquired stolen and illegally exported material, adopted stricter acquisition guidelines. The new guidelines largely bring the Getty Museum’s policy into conformity with international legal requirements. Accordingly, the acquisition of any ancient work of art or archaeological material requires documentation or substantial evidence to the effect that the work was in the United States by November 17, 1970 (the date the 1970 UNESCO Convention was opened for signature), and that there is no reason to suspect it was illegally exported from its country of origin. Alternatively, there must be either (i) documentation or substantial evidence that the work was out of its country of origin before November 17, 1970 and that it has been, or will be, legally imported into the United States; or (ii) documentation of substantial evidence that the item was legally exported from its country of origin after November 17, 1970, and that it has been, or will be, legally imported into the United States. Further, the Getty Museum’s policy provides that

no object will be acquired that, to the knowledge of the museum, has been stolen, removed in contravention of treaties and international conventions of which the United States is a signatory, illegally exported from its country of origin or the country where it was last legally owned, or illegally imported into the United States.

Professional associations have also adopted codes and policies to define expectations of stewardship. For example, the Code of Ethics of the Archaeological Institute of America instructs its members, inter alia, to:

Refuse to participate in the trade in undocumented antiquities and refrain from activities that enhance the commercial value of such objects. Undocumented antiquities are those which are not documented as

\[\text{Id at 76.}\]


\[\text{J. Paul Getty Trust, Policy Statement (cited in note 18).}\]
belonging to a public or private collection before December 30, 1970 ... or which have not been excavated and exported from the country of origin in accordance with the laws of that country. [Members also agree to] inform appropriate authorities of threats to, or plunder of archaeological sites, and illegal import or export of archaeological material.\textsuperscript{20}

Unfortunately, the myriad codes of ethics, guidelines, and policies vary greatly in content and scope. Some have been roundly criticized. The 2004 guidelines of the Association of Art Museum Directors (“AAMD”),\textsuperscript{21} for example, have been famously controversial in allowing member institutions to acquire aesthetically significant objects with insufficient provenance—for example, when the material may have been taken (as is likely) from unrecorded or unexcavated sites. Directors of the Metropolitan Museum of Art and the Chicago Art Institute, in particular, have vigorously promoted this view in professional statements and media interviews. A related problem is that the various pronouncements are often revised, making it difficult to know what they require at a given point in time and also making it difficult to properly structure institutional practice.

Another problem in relying on the ethical pronouncements is that they may not always be properly applied, or applied with integrity. For example, the Ethics Commission of the Netherlands Museum Association advised the Brabant Museum Foundation that it should feel free to subsidize a purchase by the Carillon Museum in Asten of a second-century BC bronze bell from a Cambodian temple.\textsuperscript{22} In doing so, the Ethics Commission’s advice was contrary to that of a UNESCO expert and of the National Museum of Cambodia that Cambodian law prohibited the export of such bells as part of the country’s cultural heritage. Despite institutional and professional commitments to ethical constraints, “[i]t is remarkable that the dealer, the museum curator, and the Ethics Commission never asked the opinion of the government of origin, Cambodia.”\textsuperscript{23}

Even if an ethical prescription is faithfully applied, it may be ineffective. Normally, codes are not legally binding, not even within an institution or


\textsuperscript{23} Id at 317.
association and only rarely in formal dispute resolution. For example, in Kingdom of Spain v Christie, Manson & Woods Ltd, an English court ruled that the United Kingdom's Code of Practice for the Control of International Trading in Works of Art was inapplicable. Spain had brought the underlying action against the defendant auction house, which was offering a Goya painting for sale. Even though the Spanish government produced persuasive evidence that export documents that had accompanied the painting had been forged, the auction went on.

D. AN EXAMPLE OF GAPS IN THE LAW: THE SCHØYEN COLLECTION

During the 1990s, a Norwegian collector, Martin Schøyen, began purchasing manuscripts, manuscript fragments, and microfragments from the Bamiyan Valley in Afghanistan. These items, dating from the late first to the early eighth century AD and written on palm leaves, birch bark, and vellum, constitute an important source of information about the spread of Buddhism on the Silk Road. They have been dubbed the “Buddhist Dead Sea Scrolls.” Together they are “one of the jewels” of what is thought to be the world’s largest private collection of manuscripts assembled in the past century.

Despite well-documented objections that the provenance of the material was seriously tainted, the Norwegian National Library and University of Oslo cooperated with the Schøyen Collection in conducting research on the manuscripts, storing some of the material, and publishing an online presentation of selected objects in the collection. Vigorous lobbying against retention of the material in Norway prompted those institutions to suspend the cooperation and also led to a restitution of seven manuscripts to Afghanistan, with the promise of some forty-three or forty-four more fragments by the end of 2007. Most of the thousands of items in contention have remained in place, however, not so much because their return to Afghanistan has been risky, but rather because of the priority given to ownership entitlements and research opportunities. Even more to the point, it became clear by early 2007 that the owner of the collection wished to sell his entire manuscript collection to Norway, almost certainly for repose in the Norwegian National Library if the requisite funding were available.

25 1 WLR 1120 (CA 1986) (UK).
26 See Atle Omland, Claiming Gandhara: Legitimizing Ownership of Buddhist Manuscripts in the Schøyen Collection, Norway, in van Krieken-Pieters, ed, Art and Archaeology of Afghanistan 227 (cited in note 22).
27 Id at 229.
Neither hard law nor soft law proved to be very effective in challenging the retention of the controversial manuscripts in the Schoyen collection. As to hard law, Norway was not a party to the 1970 UNESCO Convention. Even though it was a party to the 1954 Hague Convention to Protect Cultural Property in Time of Armed Conflict, the Norwegian government apparently failed to undertake a thorough investigation of the material's provenance, despite the chaotic armed conflict in Afghanistan for many years. Nor did Oslo exercise its investigative or restitutive authority as a matter of international comity. Soft law proved to be disappointing, too. Because the Norwegian National Library (the intended purchaser of the Schoyen collection) was not a member of ICOM, it was not bound by ICOM's ethical code. Thus, when the vice chancellor of the University of Oslo asked for guidance from the National Committees for Research Ethics ("Ethics Committee"), that body expressed disagreement with the zero tolerance of the ICOM Code and criticized the university for provisionally stopping research in response to media debate concerning the Schoyen collection. To be sure, the Ethics Committee did set forth recommendations to improve research ethics and reminded Norwegian institutions of their obligation to exercise due diligence in deciding whether to associate themselves with questionable material. The Ethics Committee's bottom line, however, was to prioritize autonomous research above caution in responding to the serious claims that had been leveled against the integrity of the Schoyen collection. Had the research focused on the provenance of the manuscripts rather than a general historical inquiry, the Ethics Committee's criticism of the decision by the university to suspend the inquiry would have been commendable.

This controversy demonstrates the difficulty of applying norms, rules, and procedures in the absence of a collaborative ethos. The ILA Principles help define this ethos.

III. THE PRINCIPLES

A wry observer has itemized some common arguments made by museums in response to transfer claims, as follows:

We acquired these items a long time ago.... Statutes of limitation apply.... If these had stayed in their country of origin, they would have

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29 Omland, Claiming Gandhara at 236 (cited in note 26).

30 Id at 245–46.
There is no proof that any of these were stolen—maybe they were given as gifts . . . . No, you may not inspect our basements, but you should take our word for it that these objects are not in our museum . . . . Our national legislation prohibits the return of the items even if we would rather return them . . . . These may have come from your soil, but they were not created by your ancestors. They are yours by conquest, by default, by your illegitimate acts . . . . They appear to be yours, but we excavated them, we did the scholarly work on them, we did all the scientific publications.31

To respond to questions raised by such observations, the ILA’s Committee on Cultural Heritage Law began its work on the Principles by publishing several background reports. These reports, their conclusions, summaries of ensuing discussions, and the first draft of the Principles have been described in existing literature and will not be discussed in this Article.32

At the seventy-first conference of the ILA in 2004, the Committee on Cultural Heritage Law focused its working session on a first draft of the Principles. The Cultural Heritage Committee’s background report on that initiative and its first draft, as amended after the 2004 Conference, appear in the Report of the Seventy-First Conference, together with a summary of the working session.33 The Cultural Heritage Committee held a second session to review the draft Principles. It took place September 2–3, 2005 in the Hague and resulted in substantial modification of the draft Principles and accompanying notes. After further review by Cultural Heritage Committee members and incorporation of additional changes, a final, annotated version of the Principles was approved, with minor changes, at the ILA’s Seventy-second Conference in 2006.34

The Principles begin with a preamble, followed by definitions of “requesting party” or “requesting parties,” for the transfer of cultural material, and “recipient” or “recipients” of requests for such transfers. The topics of the nine Principles are as follows: Requests and Responses to Requests for the Transfer of Cultural Material; Alternatives to the Transfer of Cultural Material; Cultural Material of Indigenous Peoples and Cultural Minorities; Human Remains; Registers of Cultural Material; Notification of New Found Cultural Material; Missing Cultural Material; Laws, Codes, Policy Statements, and Regulations; Management of Cultural Material; and General Issues.35

Material; Considerations for Negotiations Concerning Requests; Dispute Resolution; and a concluding Principle taking the form of a reservation-of-rights clause entitled “Other Rights and Obligations.” All but the concluding Principle are followed by explanatory notes.

The final version of the Principles represents a substantial reworking of the first (2004) and second (2005) principal drafts. The ILA Cultural Heritage Committee made numerous changes of style and content. The most important changes at the concluding stage of preparation included the addition of the Preamble and the two definitions; elimination of a provision for repose from legal claims for return or restitution of cultural material after a stipulated period of time; elimination of a provision for applying the principle of *rebus sic stantibus* or fundamental change of circumstances under public international law; recognition of the special rights of cultural minorities as well as indigenous peoples (Principle 4); a new provision on registers of cultural material (Principle 6); a new provision on considerations for negotiations concerning requests (Principle 8, with reference to Principle 2(iii)); and a reservation-of-rights clause (Principle 10).

**IV. CONCLUSION**

As the 2006 ILA Report makes clear, the jurisprudential basis for the Principles is current practice. The Preamble to the Principles emphasizes that they build on established practice with the aim of facilitating non-confrontational solutions to requests for transfer of cultural material. They therefore purport to codify the “caring and sharing” approach to illegal trafficking and transfer issues. But the Principles are innovative in seeking to improve customary practice by establishing a more stable foundation for negotiations, ongoing cooperation, and third-party settlements of competing claims. As such, they represent a progressive development of norms based on a codification of custom. The Principles therefore are not to be interpreted strictly as evidence of custom or general international law.

Given a meaningful choice, disputing parties normally prefer more informal methods for resolving disputes, including negotiation, consultation, mediation, and conciliation. The Principles endorse this preference without purporting to displace arbitration and litigation as necessary options. As we have seen, many museums, other institutions, and professional associations have had enough experience with claims involving cultural material to have developed their own ethical guidelines and policies for dealing with them in the future. They require practices characterized by a sensitivity to the delicate moral and cultural issues often involved and to the value of a collaborative approach that helps minimize confrontation between disputing parties.
A major benefit of the Principles will 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 country. By establishing a resolution process that is available to both local and foreign claimants, the Principles are intended to minimize the legal advantages local claimants presently enjoy. A collaborative approach to avoiding and resolving disputes should lead to more productive and lasting relationships among a broad range of claimants and possessors. If so, they will deepen global efforts to encourage responsible care of cultural material.
Annex

PRINCIPLES FOR COOPERATION IN THE MUTUAL PROTECTION AND TRANSFER OF CULTURAL MATERIAL

Preamble

Conscious that cultural material forms a part of the world heritage and should be cherished and preserved for the benefit of all;

Taking into account the significance of cultural material for cultural identity and diversity as well as of territorial affiliation;

Reaffirming the link between culture and sustainable development;

Being aware of the significant moral, legal, and practical issues concerning requests for the international transfer of cultural material;

Convinced of the need for a collaborative approach to requests for transfer of cultural material, in order to establish a more productive relationship between and among parties;

Emphasizing the need for a spirit of partnership among private and public actors through international cooperation;

Also emphasizing the need for a cooperative approach to caring for cultural material;

Expressing the hope that these Principles will provide an incentive for improving collaboration in the mutual protection and transfer of cultural material;

Recognizing as well the need to develop a more collaborative framework for avoiding and settling disputes concerning cultural material;

Building on current practice when articulating the following Principles to facilitate non-confrontational agreements:

1. Definitions

(i) “Requesting party” or “requesting parties” refers to persons; groups of persons; museums and other institutions, however legally constitutioned; and governments or other public authorities that request the transfer of cultural material.

(ii) “Recipient” or “recipients” refers to states, museums, and other institutions that receive a request for the transfer of cultural material.
2. Requests and Responses to Requests for the Transfer of Cultural Material

(i) A requesting party should make its request in writing, addressed to the recipient, with a detailed description of the material whose transfer is requested, including detailed information and reasons sufficient to substantiate the request.

(ii) A recipient shall respond in good faith and in writing to a request within a reasonable time, either agreeing with it or setting out reasons for disagreement with it and, in any event, proposing a timeframe for implementation or negotiations.

(iii) In the event of disagreement, the requesting party and recipient shall enter into good-faith negotiations concerning the cultural material at issue in accordance with principle 8.

Notes

Recipients should ensure that they have accurately identified the party seeking the transfer and that party’s lawful authority to act on behalf of a principal, if any. This can be problematic in situations such as when cultural material may be regarded by an indigenous group or cultural minority as communally owned. Recipients are not responsible for resolving disagreements over ownership claims that are internal to a requesting party.

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

In addition to understanding the basis of a claim for the transfer of the cultural material, it is also necessary to anticipate future problems, particularly when a proposed issue arising out of a request requires a period of time for its resolution.

The burden of costs associated with the transfer of cultural material may be controversial. Ordinarily, such costs should fall to a requesting party that has successfully effected a transfer, but there may be room for varying this presumption, for example, when the requesting party lacks sufficient resources such as in the case of an indigenous population or a developing country.

Recipients may be subject to specific legal constraints such as their ability to transfer cultural material or such non-legal constraints as those
imposed by collection management or deaccessioning policies. These constraints should be identified and communicated in the written response to a request for transfer of cultural material.

3. Alternatives to the Transfer of Cultural Material

(i) Museums and other institutions shall develop guidelines consistent with those of the International Council of Museums (ICOM) for responding to requests for the transfer of cultural material. These guidelines may include alternatives to outright transfer such as loans, production of copies, and shared management and control.

(ii) Museums and other institutions shall prepare and publish detailed inventories of their collections, with the assistance of ICOM and other sources when they lack sufficient resources of their own to do so.

(iii) Whenever a substantial portion of the collection of a museum or other institution is seldom or never on public display or is otherwise inaccessible, that museum or other institution should agree to lend or otherwise make available cultural material not on display to a requesting party, particularly a party at the place of origin, in the absence of compelling reasons to the contrary.

Notes

As an alternative to returning cultural material upon request, a recipient may be able to reach an agreement with a requesting party for retention of cultural material on a basis that such retention addresses the concerns of a requesting party. Such an agreement could include, but is not limited to, the following:

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

(ii) Compromise solutions to outright transfer such as making copies of cultural material, making material available for long or short-term loans or dividing a collection so as to enable a museum or other institution to retain a portion of the material while transferring the remainder to a requesting party.

In a bilateral cultural property agreement between Italy and the United States, for example, the latter agreed to recognize the former’s
cultural material export restrictions concerning significant Italian antiquities and other important classical material. In addition, however, the agreement specified 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. These programs allow the antiquities not displayed in Italy, perhaps due to a lack of resources, to reach a substantial foreign audience.

(iii) The recipient’s cooperation could include assistance in establishing institutional or display facilities and training programs or assistance in discovering the whereabouts of material similar to that whose transfer was requested. Such cooperation would be particularly appropriate in the case of requests by indigenous groups or cultural minorities inside a country with a museum or other institutional 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 transfer of cultural material, including alternatives to transfer.

4. Cultural Material of Indigenous Peoples and Cultural Minorities

Consistent with the rights of indigenous peoples under the United Nations Draft Declaration on the Rights of Indigenous Peoples and Cultural Minorities, recipients recognize an obligation to respond in good faith to a request for the transfer of cultural material originating with indigenous peoples and cultural minorities. This obligation applies even when such a request is not supported by the government of the state in whose territory the museum or institution is principally domiciled or organized.

Notes

The transfer of cultural material may involve a claim by an indigenous group to a recipient in its own country or other countries.

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35 Agreement Between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaelogical Material Representing the Pre-Classical, Classical, and Imperial Roman Periods of Italy (2001), 40 ILM 1031 (2001). In January 2006, the agreement was extended for another five years.
These claims often involve cultural material removed during colonial times or before the rights of such groups received any sort of recognition under national or international law.

Claims to indigenous cultural material made against national institutions have been addressed through either legislation (such as the Native American Graves Protection and Repatriation Act (NAGPRA) in the United States), negotiation (such as the Task Force Report on Museums and First Peoples in Canada) or litigation.\textsuperscript{36} Claims across national boundaries are problematic since the governing law will usually be that of the country where the cultural material is presently located. 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 principle is informed by this past practice and obliges a recipient to respond in good faith and to recognize claims by indigenous groups or cultural minorities whose demands are not supported by their national governments.

5. Human Remains

Museums and other institutions possessing human remains affirm their recognition of the sanctity of such material and agree to transfer such material upon request to any requesting party who provides evidence of a close demonstrable affiliation with the remains or, among multiple requesting parties, the closest demonstrable affiliation with the remains.

Notes

Most legislative and non-binding codes dealing with the repatriation of human remains provide for their transfer in all cases from museums and other institutions 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 transfer of remains so long as affiliation with the requesting group is clear. The problem of ancient remains unaffiliated with a particular group or tribe has led to court rulings such as that in the highly publicized “Kennewick Man” case in

\textsuperscript{36} See, for example, Mohawk Bands v Glenbow Alberta Institute, [1988] 3 C Native L R 70 (Canada).
the United States. The court there determined that 9,000-year-old remains did not fall within the requisite statutory definition of “Native American,” were not culturally affiliated with any legitimate claimant, and could therefore be scientifically examined prior to their final disposition.\textsuperscript{37} Sometimes an arrangement short of the outright transfer of human remains is agreed to, but this is usually only where the museum or other institution is the preferred place of rest for the remains and access is heavily restricted.\textsuperscript{38}

6. Registers of Cultural Material

(i) All state museums and other institutions that hold or control holdings or collections of cultural material shall take steps to establish inventories and a register of such material. The register may take the form of a database of information that is available to interested parties.

(ii) Museums and other institutions should submit annual reports of the information recorded in these registers for general publication to any national services that are established to manage and protect cultural material.

(iii) A national service responsible for the maintenance of a state register, in a separate section of such register, shall record all inquiries by identifying the name of the party making the inquiry, the cultural material involved, and the response of the museum or institution concerned. Every three years each such national service shall submit up-to-date copies of registered items to the United Nations Educational, Scientific, and Cultural Organization (UNESCO) in order to facilitate accessibility.

(iv) Each register shall be made available to any requesting party that is interested in the transfer of cultural material, so as to help identify the location and provenance of such material and to facilitate claims.

\textsuperscript{37} Bonnichsen v United States, 367 F3d 864 (9th Cir 2004).

Notes

The preparation of inventories of cultural material is an emerging characteristic of attempts to resolve issues surrounding requests for the return of such material. Indeed, the existence of reliable inventories may be seen as a minimum precondition for the successful resolution of requests for the return of cultural material. Sometimes such inventories are based on national laws (such as NAGPRA in the United States) or codes of good practice (such as the 1998 Washington Conference Principles on Nazi-Confiscated Art). In accordance with modern practice, inventories and summaries and reports of inventories should be accessible by electronic means whenever possible.

The preparation of inventories raises issues about accessibility and awareness of such inventories and the information they contain. To facilitate access, museums and other institutions should annually forward inventoried data to any existing national services. Such national services could serve as a place where inquiries about inventoried material and responses to such inquiries could be recorded. State Parties to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, under Article 5, are obligated to set up such national services.

7. Notification of Newly Found Cultural Material

Persons, groups of persons, museums, and other institutions possessing significant, newly-found cultural material should promptly notify appropriate government authorities, communities, and international institutions of their finds, together with as complete as possible a description of the material, including its provenance.

Notes

Newly found cultural material often gives rise to issues concerning appropriate conservation, protection and custody. Persons, groups of persons, museums and other institutions possessing significant examples of such material should be subject to a responsibility to notify governments and international bodies of their finds. Such notification is an important aspect of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and many countries already require notification of discoveries of human remains and antiquities under their finders’ laws.
8. Considerations for Negotiations Concerning Requests

Good-faith negotiations concerning requests for transfer of cultural material should consider, inter alia, the significance of the requested material for the requesting party, the reunification of dispersed cultural material, accessibility to the cultural material in the requesting state, and protection of the cultural material.

Notes

These considerations are merely exemplary of recent practice concerning requests respecting cultural material. Ancestral remains have been returned from colonial-era museum collections based on the importance of such material to source communities. Cultural material has been returned or lent to enable the coordination of objects or pieces of cultural material separated in the past. None of these considerations may be legally enforceable, but their observance reflects changing public policy and the recognition of the special significance of much cultural material to humanity in general.

9. Dispute Settlement

If a requesting party and a recipient are unable to reach a mutually satisfactory settlement of a dispute related to a request within a period of four years from the time of the request, upon a request of either party, both parties shall submit the dispute to good offices, consultation, mediation, conciliation, ad hoc arbitration, or institutional arbitration.

Notes

If an attempt to negotiate a solution to a request for transfer of cultural material is unsuccessful, the requesting party and the recipient should attempt to resolve their dispute by alternative dispute resolution (ADR) rather than litigation whenever possible. Parties might stipulate to pursue a third-party ADR procedure should their 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. NAGPRA (in the United States) establishes an expert committee with statutory powers to determine such issues as the categorization of cultural material and the identification of culturally affiliated groups. 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 transfer. Many museums and
other institutions have established repatriation committees to deal with and recommend solutions to transfer 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 situations. The parties might also agree to bar another request from the same requesting party to the same recipient for a limited period of up to five years after an unsuccessful initial request.

10. Other Rights and Obligations

Nothing in these Principles should be interpreted to affect rights enjoyed by the parties or obligations otherwise binding on them.