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The "Caring and Sharing" Alternative: Recent Progress in the International Law Association to Develop Draft Cultural Material Principles

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Abstract: Increasingly those concerned with cultural property favor an approach that focuses on protection and shared access over unequivocal demands for return to places of origin or insistence on retention by museums and other institutions. This article starts by describing the International Law Association and discussing its role, along with that of other nongovernmental organizations, in connection with the development of cultural heritage principles and instruments. It then outlines the intent behind "Draft Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material" presently being developed by the Committee on Cultural Heritage Law of the International Law Association. The Committee favors a nonadversarial and collaborative approach to issues surrounding the return of cultural material to its place or people of origin. This article describes and discusses the draft principles being developed by the Committee. Its hope is that a set of principles could be developed that would form the basis for expediting the resolution of a variety of cultural property disputes. These principles are at an early stage in their development and the Committee welcomes suggestions for changes and additions to the draft principles as they now stand.

> "The issue where material culture is concerned is not about ownership; it's about the ultimate responsibility for caring for the objects, which is something that needs to be shared and towards which we need to be moving". (John Mack, Keeper, Department of Ethnography, The British Museum)[1]

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A plethora of intergovernmental and nongovernmental organizations now play significant roles in relation to the development of the law surrounding cultural heritage. Many, however, maintain a low profile and pursue their work largely unexamined. Amongst these is the Cultural Heritage Law Committee of the International Law Association. Since 1988, the Committee has pursued a series of projects concerned with legal issues affecting cultural heritage in various contexts. The best known of these is perhaps its work leading to the *UNESCO Convention on the Protection of the Underwater Cultural Heritage*.[2] Since then the Committee has broadened its work and explored issues affecting the protection of cultural heritage in general.[3] This article outlines the most recent work of the Committee concerning the development of a set of principles that could form the basis for developing cooperative solutions to disputes concerning possession of cultural material. This will be explained in the context of earlier efforts by the Committee to assess the role of intergovernmental and nongovernmental bodies in relation to the cultural heritage. It is hoped that this will provide the reader with a better understanding of the current nature and role of the Committee itself.

I. THE INTERNATIONAL LAW ASSOCIATION AND ITS CULTURAL HERITAGE LAW COMMITTEE

The International Law Association (originally called the Association for the Reform and Codification of the Law of Nations) was founded in Brussels in 1873.[4] It resulted from the efforts of some American lawyers who, inspired by Elihu Burritt (a member of the American Peace Society), worked with a number of European international lawyers who had been considering the establishment of a foundation to support the codification of international law. In September 1873, David Dudley Field, the draftsman of the Civil Code of New York state, visited Belgium and met with Professor Rolin-Jaequemyns. This meeting led to the formation of the Institut de Droit International. This institute became the Association for the Reform and Codification of the Law of Nations which, in 1895, changed its name to the International Law Association (ILA).

The membership of the ILA is organized on a regional basis. There are some fifty branches around the world. Most are coextensive with states, but some represent regions (such as the Pacific Islands branch). The branches are autonomous, but work under the auspices of the Executive Council of the ILA, whose members the branches elect. The current chair of the Executive Council is the Right Honourable the Lord Slynn of Hadley. The offices of the ILA are located in London, England.

The study and advancement of specific areas of international (both public and private) and comparative law is pursued primarily by the work of international committees of the ILA. The biennial conferences of the ILA (the most recent was August, 2004, in Berlin, Germany, and will be followed by a meeting in Toronto in 2006) furnish a forum for the discussion and endorsement of these committees' various projects.

The Committee on Cultural Heritage Law of the ILA (the Committee) was formed in 1988 and is currently ably chaired by Professor James A.R. Nafziger, who is also the President of the American branch of the ILA. I am the Rapporteur of the Committee. The Committee's membership includes representatives from such countries as Denmark, South Africa, New Zealand, Israel, Germany, the Netherlands, Japan, the United Kingdom, Australia, Nigeria, and India.

The current work of the Committee concerns the development of a set of *Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material*.[5] This project arose out of a sense of frustration with the essentially adversarial regime for addressing issues relating to the protection of the cultural heritage. The draft principles developed by the Committee (which were recently discussed in Berlin) are intended to serve as a basis for international communication and cooperation, with a view toward more specific implementation in the form of an international agreement or other instrument.

2. HERITAGE LAW CREATION: THE ROLE OF NONGOVERNMENTAL AND INTERGOVERNMENTAL ORGANICATIONS

Before detailing the current work of the Committee, it will be instructive to summarize an earlier Committee project that affords some context for assessing the work of the Committee generally.

The 1994 Conference of the ILA in Buenos Aires adopted the Committee's proposal to undertake a project on the organizational process for formulating cultural heritage law. This proposal was further refined in 1998 at the 68th Conference of the ILA in Taipei. The Committee was concerned about the polarization of the cultural heritage legal framework through a tension between demands for the outright return of cultural objects, on the one hand, and a retentionist view that such objects should not be returned except in very limited circumstances, on the other. In view of this concern, the 1998 ILA Conference adopted a resolution that the Committee develop a set of recommendations designed to advance "a broader regime based on sharing and enhanced circulation of cultural heritage, rather than on reconciling principles of retention and return."[6]

In looking first at cultural heritage nongovernmental organizations (NGOs) the Committee attempted an inventory of such organizations under the following categories:

1. Private Dealers, Auction Houses, and Collectors;
2. Museums and Art Galleries;
3. Anthropologists and Archaeologists;
4. Indigenous and Ethnic Groups;
5. Artists; and
6. Historic Preservationists, Archivists, and Art Historians

The Committee noted that NGOs have been active at every phase of the legal process affecting cultural material, from the formulation of general principles to the execution of prescribed rules and processes of international protection and cooperation. Thus, dealers and collectors have developed codes of ethics and practices associated with membership in their various international, regional, and national associations.[7] The leading NGO of museums—the International Council of Museums (ICOM)—has issued guidelines and codes on such matters as ethical acquisition practices and professional museum ethics in general.[8] Like the art collector and dealer associations mentioned, the ICOM standards lack legal compulsion but they operate as a kind of "soft law" whose persuasive qualities are enhanced by the status of ICOM itself.

Anthropologists and archaeologists usually oppose trade in excavated material. This approach is seen as maximizing the preservation of information about objects and sites.[9] Associations of archaeologists promote appropriate standards for archaeological fieldwork amongst their members and sometimes furnish information about such opportunities abroad.[10]

The concerns of many anthropologists in relation to indigenous cultures have recently been significantly reinforced by the initiatives of these cultures themselves. Most strikingly, in the four English-speaking developed countries with significant indigenous populations (Canada, the United States, Australia, and New Zealand) there has been an expansion in the role of indigenous peoples in gaining greater access to or return of cultural objects associated with their peoples, in sharing information, and in questioning standing professional assumptions as well as the activities of anthropologists, archaeologists, and museums.[11]

The Committee followed up its inventory of NGOs by setting out the alternative methods of international cooperation that have characterized their activities. While it noted that there have been some instances of refusal to consider requests for the return of sensitive cultural material to its place of origin, far more common have been instances of some sort of compromise solution.[12] The Committee referred to a New Zealand example where the national government, the Otago Museum (in Dunedin), and a Maori tribe (Ngati Awa) had negotiated the return of a carved Maori meeting house (Mataatua) from the museum in an exchange involving the government paying the museum a large sum to have a new house built and providing funding to the tribe for the movement and reinstallation of the house.[13] While this was an internal return from a museum to an indigenous group, such negotiations have also arisen across national boundaries, such as when the Haisla people of British Columbia secured agreement from the Stockholm Ethnographic Museum to return a totem pole to Canada in consideration of a new pole being made and sent to Sweden.[14]

In Canada a comprehensive set of criteria have been developed by the Canadian Museums Association and the Assembly of First Nations which now form the basis of requests for the return of First Nations objects from Canadian museum collections.[15] While this approach may not eliminate litigation of such requests in Can-

ada, it has fostered a cooperative climate for ongoing cooperation and partnership between Canadian museums and Canada's indigenous populations.

Defining the relationships among collectors, museums, archaeologists, indigenous peoples, and other relevant groups is a very difficult aspect of the debate over whether cultural material should be retained or returned to its place or people of origin. Disputes are not always between representatives of these separate categories but sometimes between members of the same category (such as when two separate indigenous peoples claim identical material as their own). The Committee noted that while the character of some relationships is of longstanding (such as the traditionally distant relationship between private collectors of antiquities and anthropologists and archaeologists) the main challenge to the established order has come from indigenous groups and their demands have often struck a responsive chord with the public generally. The Committee deduced from its survey of the activities of the various NGOs that they already play a significant role in promoting alternatives to the retention or unqualified return of cultural material in their having developed alternative principles of sharing and collaboration. The main limit on this role, however, is that it operates outside the existing system of intergovernmental organizations. The Committee suggests that what is needed is a set of rules and procedures to facilitate this role of NGOs in "... a broader, more effective regime of international cultural heritage law."[16]

The Committee then surveyed the leading legal instruments created by the various intergovernmental organizations (IGOs), from the 1954 *Convention for the Protection of Cultural Property in the Event of Armed Conflict*[17] (administered by UNESCO) to the *Scheme for the Protection of Cultural Heritage Within the Commonwealth* (produced by the Commonwealth Secretariat).[18] It noted that the origin of these instruments was *ad hoc*. They often arise from a contemporary perception of risk to a particular aspect of the cultural heritage. Thus, the Commonwealth Scheme followed the English House of Lords' decision in *Attorney-General of New Zealand* v. *Ortiz*,[19] whereby the government of New Zealand failed in its attempt to claim possession of a valuable Maori wood carving that had allegedly been smuggled out of the country. When this sort of event is the basis for action, the resulting development tends to be focused on concerns surrounding the character of the triggering circumstances and does not necessarily take into account the equally urgent need for initiatives in other areas of cultural heritage law.

The preparation of new international instruments typically involves two types of input: expert and political. Experts are often entrusted with the role of formulating or revising planned cultural heritage instruments. The qualifications of these individuals will vary with the subject matter of the particular project. When UNIDROIT was involved in the preparation of the 1995 *Convention on Stolen or Illegally Exported Cultural Objects*,[20] for example, it began with two export reports that led it to convene a group of experts to draft a preliminary text. These included specialists in the law of theft and unlawful trade in cultural heritage, private international law, and national laws dealing with transactions in art objects. These experts convened three meetings and submitted a text to governments. While most experts will be cognizant

of political considerations, there is a difference between the situations of experts acting in a political context and those acting in an independent capacity. Most experts, however, are likely to be aware of different political perspectives concerning their topics, and their advice will usually have a significant impact on the text of whatever instrument emerges.

Given that most cultural heritage instruments emerging from intergovernmental organizations involve legal obligations on the part of member states, it is inevitable that representatives of the latter will be involved to some degree in their formulation. While, in theory, this could occur only once the instrument has been finalized by the particular inter-governmental organization, this is unlikely to be acceptable to most states. In the case of the UNIDROIT Convention, Italy summoned a diplomatic conference to consider the draft Convention. Conventions proposed by UNESCO are usually adopted at a General Conference held every two years.

The Committee first noted what it thought were some major problems with the political process for reviewing draft international instruments. All of these can contribute to the quality and effectiveness of a particular instrument.

First, government delegates may not consult adequately with the cultural divisions in their own administrations. Cultural specialists may thus be unable to influence governmental positions despite their awareness and expertise about particular issues.

Government delegates themselves often lack qualifications or are improperly prepared. The Committee cited the words of the late Professor Paul Bator:

> A final complexity was added by the fact that some delegations were totally unpredictable. In one or two cases this was because the particular delegate seemed baffled by the proceedings. Delegations differed not only in their approach to the problem; there also existed variations in their expertise and level of interest. Although billed as a conference of "experts," there were countries that did not send special delegations, and whose permanent UNESCO delegate attended as one among many chores to be taken care of. Some delegations were large and elaborately prepared; some were small and only casually prepared. Some delegations appeared well-informed and competent; others appeared to me to be uninterested, uninformed, and confused.[21]

Using local representatives may save on costs, but it may result in the participation of individuals who lack any real understanding of particular issues or who are trying to simultaneously perform too many different responsibilities on behalf of their government.

At the end of its 1998 report the Committee sought to link perceived deficiencies in the rule-making processes of both IGOs and NGOs and the nature of the substantive principles these various bodies could most realistically develop. It suggested that a regime that emphasized sharing and enhanced circulation of cultural heritage would not only inhibit illegal removal and trafficking in cultural heritage, but would also encourage greater cooperation and expedite agreement on new international rules.

The Committee's study of the role of IGOs and NGOs in connection with the formation of cultural heritage law resulted in conclusions that would presumably be common to other areas of international rule development. The realities of organizations in any field of international rule-making will always involve variations of effectiveness turning on levels of expertise, preparedness, interest, and competence relative to the task at hand. At its 2000 meeting in London, the Committee noted that the emerging international regime to regulate cultural heritage had been only marginally effective. Apart from the lack of funding available to developing countries to protect their heritage, there had sometimes been a lack of support for international rules amongst developed countries in Europe and elsewhere. An even more critical problem was that the international cultural heritage regime was too often defined in binary terms such as art-exporting/art-importing countries; common heritage/national patrimony; and so on.

The Committee reiterated its view that a broader regime for regulating cultural heritage might work to produce a nonadversarial and collaborative framework within which rules against illegal trafficking and facilitating the return of cultural material could operate. It noted that none of the existing multilateral instruments provided in any detail for a comprehensive collaborative process to facilitate the sharing and redistribution of cultural heritage. Such results were usually limited to private and bilateral government agreements. Many of the best models were national measures, such as the *Native American Graves Protection and Repatriation Act* in the United States.[22] The Committee thought that UNESCO, perhaps more actively working with NGOs, would be an obvious vehicle for developing a broader, more collaborative regime, based on a multivalue framework agreement. A set of principles for consultation and collaboration that national authorities could adopt might achieve greater uniformity among states.

The Committee met again at Oxford University on November 8, 2001 and again during the ILA Regional Conference in Barbados (March 26–29, 2003) in order to further develop this and other projects. At the Berlin meeting of the ILA in August 2004 the Committee presented its report entitled *Draft Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material*. These draft principles are intended as a basis for international communications and cooperation with a view towards specific implementation in the form of some sort of agreement. The Committee will now turn its efforts towards the preparation of such an instrument. The next section of this article will set out the background of the Committee's draft report.

3. DRAFT PRINCIPLES FOR COOPERATION IN THE MUTUAL PROTECTION AND TRANSFER OF CULTURAL MATERIAL (2004)

The Committee's draft report begins by outlining the already mentioned division amongst those concerned about cultural property issues. On one side are those who resist attempts by countries, entities, or individuals to compel restitution or return

of objects to their places of origin. This group claims that there are tangible benefits to the free flow of art objects in licit trade between countries.[23] Such movement is supported on the basis that it can enhance the protection and preservation of items from physical harm and deterioration as well as deflect the growth of a black market in stolen goods. Movement is seen as facilitating an educative effect that is broader in scope than if objects remain in their often remote or obscure places of origin. Unsurprisingly, this group often includes museums, art dealers, auction houses, and collectors. With the expansion of museum collections and increased affluence there has been an increase in the demand for high-quality cultural properties.

Another perspective on cultural property comes from those supporting the return of such property, often taken from its place of origin during colonial times or in periods of unrest or armed conflict.[24] Many states in Africa, the Americas, and the Pacific experienced colonial periods during which vast quantities of objects (often originating from indigenous populations) were removed to various (often European) countries. These artifacts now currently form the core of museum collections of art from these former colonies. Many argue that those objects should be returned to their places of origin on the grounds that colonial powers took advantage of their former subjects in acquiring them, as part of a general policy of domination or exploitation. Similarly, many countries have lost control of cultural property as a result of war or other crisis situations that have facilitated illegal trafficking. World War II and other conflicts such as the current situation in Iraq are examples.

Jews and others who were the victims of theft, persecution, or genocide during and before World War II have made claims for the return of cultural objects now located in museum or private collections.[25] When those currently in possession of such material have sought to rely on statutes of limitation or prescriptive rights, original owners or their heirs have claimed that it was impossible for them to locate their lost property earlier because of the circumstances surrounding its loss and the paucity of means to properly document claims. These victims of outright misappropriation argue that past wrongdoing cannot be excused because of factors outside the control of its victims.

Those who stand opposed to claims for the return of cultural material in situations like those described often benefit from various national laws. Many states refuse to recognize or enforce the cultural property export controls of other states. So when a valuable gold phiale, which was probably taken in an illegal excavation in Sicily, turned up in the hands of a New York collector of antiquities, Italy was unable to rely on New York law acceding to an Italian request for the return of the object.[26] This refusal is based on long-standing concepts of state sovereignty, territoriality, and public policy. American courts have also sometimes applied statutes of limitation or repose to resist claims by prior owners.[27] These statutes bar civil claims after the expiration of a given period of time. They are based on considerations of certainty through closure, equity, and the problems of collecting reliable evidence after the passage of time.

Common law systems have no tradition of recognizing cultural property as a distinct category of movable or personal property. In some civil law systems (such as that of Quebec) a separate category of *res sacrae* or *hors de commerce* is recognized.[28] While the civil law sometimes upholds possession of stolen property in the hands of innocent purchasers, it also offers special protection to owners based on the religious or sacred character of the property itself.[29]

Many states have also become party to the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property*.[30] These states often recognize an obligation under that treaty to enforce the cultural material export controls of all other parties on a reciprocal basis (Canada and Australia, for example).

In the case of claims by owners of stolen art, some courts in the United States, the United Kingdom, and the Netherlands have interpreted statutes of limitation more favorably towards owners of stolen objects.[31] If a victim of art theft has performed diligently in trying to uncover the whereabouts of his or her property, the limitation period may not start to run until the location of the object and the identity of its current possessor have actually been discovered.[32]

The ILA Committee concluded that there was an impasse between the two approaches to wrongfully acquired cultural property. It thought that there was room for a middle-ground approach between insistence on outright return and the unqualified assertion of a right to possess cultural property. This approach appealed to the Committee because it moved the focus away from the presence of rival claims to the protection and interests of the object itself. Most disputes over cultural property (as television viewers of any version of the *Antiques Roadshow* know) reveal concerns about art objects that go beyond those of a monetary nature.

In its 1996 *Interim Report on Heritage Law Creation* the Committee had emphasized the inadequacy of the current framework of international cultural heritage law, where claims of retention and return of cultural patrimony are dominant.[33] The Committee's *Second Report on Heritage Law Creation* (1998) examined the role of nongovernmental organizations and the processes of intergovernmental organizations in formulating heritage law. That report advocated a more collaborative and eclectic approach to developing international heritage law through the creation of an "improved regime based more substantially on collaboration and sharing of heritage."[34] Among its four recommendations to UNESCO, the Committee recommended guidelines to support expanded loan programs and exchanges of objects on either a short-term or long-term basis.

The Committee feels that it is now time to move beyond generalities and develop some specific principles that could form a workable basis for dealing with repatriation requests outside the courts. These principles could be especially valuable in breaking the deadlock that often arises when unequivocal demands are made for the return of iconic cultural objects such as the Rosetta Stone or the bust of Queen Nefertiti. Such requests are usually met with blunt refusals, and the result is a kind of tense stalemate. In agreeing to abide by a set of preexisting principles to resolve their

conflict, parties might be able to cooperate on reaching a viable solution to their particular repatriation dilemma.

The Committee was able to support its approach by looking at how cultural property repatriations had already been resolved in several contexts. In many cases involving art misappropriated in the World War II period, extrajudicial solutions have been secured by negotiating the retention of objects by museums, together with the payment of compensation to heirs.[35] These resolutions suggest many repatriation disputes may be best resolved in exploring new outcomes that ensure the proper conservation and protection of cultural property while not ignoring past misdeeds and the sense of material and spiritual loss arising from them.

The ILA Committee feels that it is appropriate to put some of these described practices into a statement of principles that can serve as an international minimum standard. While it is unlikely that solutions can be found that will satisfy all parties to cultural property claims, a set of principles might form a useful starting point from which the parties involved could fashion an appropriate resolution of their dispute. Agreed-upon principles would also ameliorate the extremities of the two approaches set out at the beginning of this article.

Before reviewing the Committee's proposed principles, some general points should be made concerning their scope. Where cultural property that has been recently stolen appears on the art market, the laws of most countries will allow for its recovery at the suit of its owner.[36] Even in civil law countries where bona fide purchasers of stolen property can acquire good title, there is usually a period of three to six years before such entitlement on the part of a purchaser arises.[37] In the case of cultural property that has not been stolen but has been exported from a source country contrary to its export controls, those controls may sometimes be recognized on the basis of bilateral agreements (United States) or implementation of the 1970 UNESCO Convention. Finally, customs laws (such as those providing for forfeiture of improperly declared objects) often provide a mechanism for the return of smuggled cultural property to its place of origin.[38]

The ILA Committee Report consists at present of eight principles described as "Draft Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material." It should be emphasized that these draft principles have been developed in their present form for discussion purposes only. The final version of the Committee's principles may vary significantly in number and content from the version summarized below.

(i) Making and Responding to Requests for the Return of Cultural Material

The first of these principles deals with the responsibilities of those making and responding to requests for the return of cultural property. It attempts to set minimum standards for those requesting such returns in the form of obligations to

describe in writing the object in detail and what is known about its origin, as well as outline the reasons for the making of the request. Conversely, the recipient of such requests must respond within a reasonable time either setting out reasons for any disagreement concerning such requests or proposing a time frame for negotiations. Most of these responsibilities should be those of the requesting party but there may be situations where this should be varied such as when the requesting person or institution lacks sufficient resources, such as a small indigenous group or a developing country.

(ii) Principle of Repose

The second principle is more likely to engender controversy than the first. Described as the principle of repose, it arbitrarily states that "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 introduction of a principle of repose for cultural objects that have been removed from the territory of their country of origin for at least 250 years is designed to introduce a threshold of certainty for repatriation requests. It also discreetly avoids resolution of the Parthenon marbles dispute, since the removal of the frieze by Lord Elgin's agents was apparently completed in 1812.[39] The Committee hopes that by clarifying the situation for recipients of repatriation requests, such museums and institutions will be encouraged to adopt more liberal and flexible attitudes towards requests. Thus, the United States has recently agreed to recognize Italian cultural property export controls on the basis that Italy will make cultural objects available for temporary exhibition and study in the U.S. as part of ongoing scholarly and scientific cooperation between the two countries.[40]

(iii) Alternatives to the Return of Cultural Material

A third principle seeks to encourage the development of alternatives to the outright return of cultural material. Museums and other institutions should be obliged to develop their own guidelines for responding to requests for the return of cultural material. These should set out possible alternatives to outright return, such as loans, the making of copies, and the shared management and control of collections. Museums should be obliged to prepare and publish detailed inventories of their collections, with the assistance of UNESCO and ICOM where they lack sufficient resources themselves. As part of this principle, where a substantial portion of an institution's collection is not on public display or is otherwise inaccessible, the institution would be obliged to agree to lend or otherwise make available portions of that material to a requesting state of the place of origin of the collection, unless there were compelling reasons not to do so.

(iv) Fundamental Change of Circumstances

The fourth principle set out in the Committee's report deals with fundamental changes of circumstance. This principle applies 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 material. Whether or not agreement is reached on the return of cultural material, the parties to an agreement for the return of cultural material should take account of the possibility of a fundamental change of circumstances, such as the closure of a facility or the risk of loss or deterioration of the objects in question.

(v) Cultural Heritage of Indigenous People

The fifth principle concerns the cultural heritage of indigenous peoples and provides that, consistent with the rights of such 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 requests for the return of cultural material originating with such peoples, even when such requests are not supported by national governments. While some countries, such as the United States, have comprehensive laws governing such requests, the return of objects is often problematic when they are located in countries other than where the indigenous group is located. Most of these so-called "international repatriations" have been based on voluntary negotiations, without recourse to national courts.

(vi) Notification of Newly Discovered Cultural Material

The notification or publication of newly discovered cultural material is sometimes required under finders' laws, but the sixth principle elevates this to an obligation on the part of museums and other institutions in possession of significant newly discovered cultural material to notify appropriate government authorities and international institutions of their discovery, together with the provision of as complete as possible a description of the material, including its provenance.

(vii) Human Remains

The seventh principle deals with human remains and obliges museums and other institutions in possession of such material to affirm their recognition of its sanctity and to return it upon request to any persons who provide evidence of the closest demonstrable affiliation with the remains. This is already widespread practice in many countries, especially in the case of the remains of indigenous peoples which were often retained in museum or university collections for ostensibly "scientific" purposes that are now regarded with skepticism. The only appropriate exception

would seem to be where a museum or other facility is seen as the preferred place of rest for remains by the affiliated people and access is heavily restricted.

(viii) Dispute Resolution

The eighth and final principle developed by the Committee concerns dispute resolution. This principle states that where the parties are unable to reach agreement within a period of two years from the time of a request for return having being made, they must attempt to resolve their differences in good faith by some such process as arbitration, consultation, mediation, or conciliation. The Committee feels that litigation is not an appropriate method to resolve most disputes involving cultural property. Most legal systems have not developed rules of law that adequately address the unique nature of cultural objects. Furthermore, an adversarial context is not seen as appropriate to resolve issues that often go beyond questions or issues of ownership or outright possession. UNESCO could perhaps play a role by facilitating the formation of arbitral or mediation panels whenever the parties are unable themselves to do so. It should be noted that this principle would not force a resolution of the parties' differences within a certain time frame. It would merely eliminate the litigation option after two years, while leaving less adversarial alternatives available.

The principles developed by the ILA Committee on Cultural Heritage Law concerning *Draft Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material* are based on the Committee's perception of existing practice. Most disputing parties already avoid the courts and resort to negotiation. These, though sometimes prolonged, often meet with considerable success and sometimes form the basis for new personal and institutional partnerships. The delicate moral and cultural issues that often surround cultural property disputes and the value of a cooperative approach that minimizes confrontation both add to the appropriateness of collaborative solutions. The Committee's report builds on this practice in the form of principles designed to facilitate appropriate outcomes.

4. CONCLUSIONS

The ILA Committee comprises a group of international lawyers with specialized expertise in various aspects of cultural heritage law. What draws these individuals from a broad range of countries together is a genuine interest in the current legal problems affecting the cultural heritage. What characterizes these individuals is their lack of a narrow focus and a single perspective on what the optimal rules affecting the cultural heritage should be. Though not unaware of the various political dimensions of this issue, Committee members lack the narrow focus of many other cultural heritage NGOs with more sectoral membership. While the Committee lacks any governmental support to enhance the likelihood that its recommendations be nationally or internationally adopted, the expertise and independence of the Committee enhances the credibility of its efforts.

ENDNOTES

1. Cited in "The Year in Review: 2004," *The Art Newspaper*, 45.
2. See www.unesco.org/culture/laws/underwater/html-convention.shtml and *International Journal of Cultural Property* 11 (2002): 107–28.
3. Nafziger and Paterson, "A Blueprint for the Development of Cultural Heritage Law," 1. This special issue of *Art Antiquity and Law* contains several articles by Committee members forming part of its recent blueprint project.
4. This summary of the history of the International Law Association appears in the *Report of the Seventieth Conference*, International Law Association, 76–77. New Delhi: 2002.
5. The current draft version of these principles can be accessed at www.ila-hq.org
6. International Law Association, *Report of the Sixty-Eighth Conference*, 218. Taipei: 1998.
7. For example, the International Association of Dealers in Ancient Art has developed a Code of Ethics and Practice; see www.iadaa.org/iadaa frameset_1/ethics/ethics_main.html.
8. International Council of Museums Code of Ethics (1995) at http://incom.museum/ethics_rev_engl.html
9. Coggins, "United States Cultural Property Legislation," 52–68.
10. The Code of Ethics of the Archeological Institute of America is at http://www.archaeological.org/pdfs/AIA_Code_of_Professional_StandardsA5S.pdf. Principles of Archaeological Ethics drafted by the Society for American Archaeology are at http://www.saa.org/aboutSAA/ethics.html. The World Archaeological Congress has a code of ethics as well (http://ehlt.flinders.edu.au/wac/site/about_ethi.php)
11. See, e.g., Simpson, "Making Representations"; Barringer and Flynn, "Colonialism and the Object."
12. See Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material, www.ila-hq.org, 227
13. Paterson, "Protecting *Taonga*," 123–24; Tapsell, "Partnership in Museums," 284, discussing the return of an important Maori carving (Pukaki) to its place and people of origin.
14. See Haisla Totem Pole Repatriation Project website, at http://www.haislatotem.org.
15. *Task Force Report on Museums and First Peoples, Turning the Page: Forging New Partnerships Between Museums and First Peoples*. Ottawa: 1992.
16. Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material, www.ila-hq.org, 228.
17. The Hague, U.N.T.S. 249 (14 May 1954): 240.
18. Scheme for the Protection of Cultural Heritage within the Commonwealth, *International Journal of Cultural Property* 11 (2002): 137–160.
19. [1983] 3 W.L.R. 809 (H.L.) and Paterson, "The Legal Dynamics of Cultural Property Export Controls," 241.
20. Rome, 1995. Available at www.unidroit.org and see Prott, "Commentary on the UNIDROIT Convention."
21. Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material, www.ila-hq.org, 232, citing Bator, "An Essay on the International Trade in Art," 375.
22. 25 U.S.C. 3001 et seq. (2000). See also Nafziger and Dobkins, "The Native American Graves Protection and Repatriation Act in its First Decade," 77–107, and Carter, "Native American Graves Protection and Repatriation Act," 285–306, and McKeown and Hutt, "In the Smaller Scope of Conscience," 153–212.
23. See, e.g., Merryman, "Two Ways of Thinking about Cultural Property," 831–53. The recently formed American Council for Cultural Property has also sought to advocate a less "retentionist" approach in cultural property issues.
24. See, e.g., O'Keefe, "Trade in Antiquities"; and Corbey, "Tribal Art Traffic."
25. See, e.g., Nicholas, "The Rape of Europa"; and Feliciano, "The Lost Museum."
26. See *U.S. v. An Antique Platter of Gold* 184 F. 3d 131 (2nd Cir. 1999), cert. denied, 528 U.S. 1136 (2000).
27. See, e.g., *DeWeerth v. Baldinger*, 836 F. 2d 103 (USCA 2nd Cir. 1987).

28. For a discussion of this approach in a Quebec decision, see Pelletier, "The Case of the Treasures of L'Ange Gardien," 371–82.
29. See also Siehr, "International Art Trade and the Law," 64–67, discussing the concept of *res extra commercium* under the civil law.
30. 823 U.N.T.S. 231, 10 I.L.M. 289.
31. See, e.g., *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.* 917 F. 2d 278 (7th Circ. 1990); *Gotha (City) v. Sotheby's* [1998] T.N.L.R. 650 (Q.B.D.); and Blom, "Laying Claim to Long-Lost Art," 138–50.
32. *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.* (id).
33. Siehr, "International Law Association Committee on Cultural Heritage, Helsinki, 12–17 August 1996," 142.
34. International Law Association, *Report of the Sixty-Eighth Conference*. Taipei: 1998. Heritage Law Creation–Second Report, 217, at p. 228.
35. Palmer, "Museums and the Holocaust," 233.
36. See, e.g., *Bumper Development Corporation v. Commissioner of Police for the Metropolis* [1991] 1 W.L.R. 1362 (C.A.).
37. Siehr, "International Art Trade," 58.
38. See note 25 above.
39. Merryman, "Thinking About the Elgin Marbles," 1881–1924.
40. See http://exchanges.state.gov/culprop/itfact.html

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