

INTERCOM

LEGAL AND ETHICAL CONSIDERATIONS IN THE REPATRIATION OF STOLEN AND ILLEGALLY EXPORTED CULTURAL PROPERTY: IS THERE A MEANS TO SETTLE DISPUTES?

Introduction

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I appreciate the opportunity to moderate this afternoon's session. The repatriation of cultural property is an important matter and one that exercises the collective mind of ICOM's Ethics Committee regularly. If added evidence of its significance was necessary it is your attendance here in such numbers.

The title of this session refers to the repatriation of stolen and illegally exported cultural property. But the issue extends beyond items that are demonstrably stolen and illegally exported. In a sense that is a matter that can be resolved by law. The law is not, however, retroactive and there is a much wider issue here. It is the ability of a nation, a people, a culture, to present the key aspects of their material and immaterial heritage to their own people. The manifestations of this notion are not necessarily confined within national boundaries. It does, however, take us beyond the legal arena into the realm of ethics and I see this session as concerning the repatriation of cultural property generally.

By way of introduction and background, therefore, I will outline ICOM's position as seen primarily through its *Code of Ethics*. To do so I shall quote from the newly restructured *Code* (ICOM 2004) which will be presented for approval to the General Assembly at the end of the week.

Legislation

We start with what might seem to be very obvious. But the obvious needs to be stated. It is that our institutions and our personnel operate legally, abide by the law and that all transactions are undertaken in a legal manner.

7.1 National and Local Legislation.

Museums should conform to all national and local laws and respect the legislation of other states as they affect their operation.

Much can be resolved legally within a sovereign State. But there may be a regional legislature or a federal structure also to take into account. When it becomes a legal matter between States the issues are even more complex because neither State has jurisdiction over the other.. In the context of cultural property this is not just that there are different legislatures but because the implementation of national and international legislation is highly varied between States and is often out-of-date. The Ethics Committee has drawn the attention of both the Executive Council and Advisory Committee to this problem and I hope there will be a resolution before the General Assembly asking national committees to review cultural property law in their countries. Because of the nature of our work, therefore, it is not an unreasonable requirement for museum personnel to be aware of both the laws of other States that affect their operation and the relevant international legislation as well.

8.1 Familiarity with Relevant Legislation

Every member of the museum profession should be conversant with relevant international, national and local legislation and the conditions of their employment. They should avoid situations that could be construed as improper conduct.

Collections

A key resource of the museum is its collection. It is important here to emphasize that the nation's heritage embodied in that collection is not ordinary property. There is a permanence associated with collecting cultural property and in addition many collections are of more than national significance. These notions may or may not be set out in national laws but they figure strongly in the international legislation. They also feature prominently in ICOM's Code of Ethics, as the statement of principle in section 2 shows:

Museums have the duty to acquire, preserve and promote their collections as a contribution to safeguarding the natural, cultural and scientific heritage. Their collections are a significant public inheritance, have a special position in law and are protected by international legislation. Inherent in this public trust is the notion of stewardship that includes rightful ownership, permanence, documentation, accessibility and responsible disposal.

Collecting

When it comes to making collections it is reasonable to suppose that any item offered to a museum is owned by the person offering it and that ownership will be transferred to the museum on completion of the transaction. It is the responsibility of the museum to ensure that this is so.

2.2 Valid Title

No object or specimen should be acquired by purchase, gift, loan, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held. Evidence of lawful ownership in a country is not necessarily valid title.

The last sentence in this clause of the *Code* perhaps needs further elaboration. In countries with a civil (Roman) law system it is possible to gain legal title to stolen material after a set period of time if the acquisition is considered to have been made in good faith. In a slightly different way it is also possible to achieve good title through the law of most US states if the rightful owner's challenge is not substantiated within a given period of time. The ICOM Ethics Committee has had to deal with more than one case recently where stolen material has been sold and then reappeared openly on the market as a legally owned item after the limitation period.

As already indicated there is considerable variation in the adoption of international legislation governing cultural property. Some countries have ratified international conventions and incorporated them into national law – either fully or in part. Others have not done so. Here the ICOM *Code of Ethics* seeks to provide a common-denominator in that it adopts the principles on which certain international legislation is based as a professional standard:

7.2 International Legislation

Museum policy should acknowledge the following international legislation which is taken as a standard in interpreting the *ICOM Code of Ethics*:

Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention, First Protocol, 1954 and Second Protocol, 1999);
Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970);
Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973);
UN Convention on Biological Diversity (1992);

Unidroit Convention on Stolen and Illegally Exported Cultural Objects (1995);
Unesco Convention on the protection of the Underwater Cultural Heritage (2001);
Unesco Convention for the Safeguarding of the Intangible Cultural Heritage (2003).

Associated Information

My next point concerns the significance of the information associated with cultural property. In many ways the importance of an item may result more from the data it carries rather than the object itself. For example, the associations of an archaeological object, the habitat of a natural science specimen or the provenance of an art object are highly significant. (For details of a recent conference on the loss of archaeological information see Heilmeyer & Eule, 2003)

Stolen and illicitly exported material is more likely to come without such information or may come with a false pedigree. We need to be vigilant in this. The *Code* is clear about it and expects curators to have shown due diligence in any acquisition and to establish the full history of an item from discovery or production.

2.3 Provenance and Due Diligence

Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in or exported from, its country of origin or any intermediate country in which it might have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item from discovery or production.

The rampant illegal trafficking of cultural property needs our constant attention. We need to ensure there is public awareness not just about the illegality of it but also of the enormous loss of knowledge that results from such activity.

Equally we need to ensure that we are not condoning this trade through acquiring material from unauthorized or unscientific fieldwork or through displaying unprovenanced items.

2.4 Objects and Specimens from Unauthorised or Unscientific Fieldwork

Museums should not acquire objects where there is reasonable cause to believe their recovery involved the unauthorised, unscientific, or intentional destruction or damage of monuments, archaeological or geological sites, or species and natural habitats. In the same way, acquisition should not occur if there has been a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities.

4.5 Display of Unprovenanced Material

Museums should avoid displaying or otherwise using material of questionable origin or lacking provenance. They should be aware that such displays or usage can be seen to condone and contribute to the illicit trade in cultural property.

Community Partnership

We must now come to the hub of most museum activity. We collect from communities – living or dead – for the benefit of communities. Museums exist because society wishes to preserve its memory. This means that, as the practitioners society entrusts with this, we need to be in partnership with those communities connected with our work. The *Code of Ethics* is very positive about this.

It expects co-operation:

6.1 Co-operation

Museums should promote the sharing of knowledge, documentation and collections with museums and cultural organisations in the countries and communities of origin. The possibility of developing partnerships with museums in countries or areas that have lost a significant part of their heritage should be explored.

It expects dialogues to be established concerning the return of cultural property.

6.2 Return of Cultural Property

Museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. This should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles as well as applicable local, national and international legislation, in preference to action at a governmental or political level.

It expects prompt and responsible steps in the restitution of illicitly acquired material:

6.3 Restitution of Cultural Property

When a country or people of origin seek the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international and national conventions, and shown to be part of that country's or people's cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to co-operate in its return.

It advocates abstention from acquiring objects from occupied countries.

6.4 Cultural Objects From an Occupied Country

Museums should abstain from purchasing or acquiring cultural objects from an occupied territory and respect fully all laws and conventions that regulate the import, export and transfer of cultural or natural materials.

The *Code of Ethics* is therefore very clear about the collection of unprovenanced material but it is necessary to recognize two additional scenarios. What if an outstanding unprovenanced item appears which it is clearly in the public interest to preserve? Here a form of mediation is suggested whereby the decision to preserve in the public sector is made by subject specialists rather than a museum.

3.4 Exceptional Collecting of Primary Evidence

In very exceptional cases an item without provenance may have such an inherently outstanding contribution to knowledge that it would be in the public interest to preserve. The acceptance of such an item into a museum collection should be the subject of a decision by specialists in the discipline concerned and without national or international prejudice.

Then there is the question of the legitimate housing of unprovenanced, illicitly collected or recovered specimens. This is really a matter for the country concerned but it is important that the museum concerned has the authority to do so.

2.11 Repositories of Last Resort

Nothing in this *Code of Ethics* should prevent a museum from acting as an authorised repository for unprovenanced, illicitly collected or recovered specimens and objects from the territory over which it has lawful responsibility.

This summarizes the ICOM *Code of Ethics* in the context of the subject of this seminar. I could elaborate on other ICOM initiatives, its *Red Lists*, the *One Hundred Missing Objects* series or the reporting of stolen objects over many years in *ICOM News*. All have contributed both to creating awareness of the issues and the recovery of stolen material. The essence of ICOM's approach has been that of self-regulation, informing the parties involved and encouraging mediation preferably at a professional level. It recognizes that every case has to be treated individually and that there is no uniform mechanism that can be invoked to meet this problem. Is this enough? Should we be looking at other approaches? ICOM does not have the monopoly on this issue. The debate is a matter for UNESCO and is actively under consideration by the International Law Association, for example.

I question whether too much attention has been paid to the concept of "ownership". This is easily stated and is not an argument to reduce in any way the present mechanisms to reduce illicit

trafficking and the flow of stolen property. But claims which seek the return of cultural property transferred many years ago on ownership grounds either with doubtful or no legal justification is now resulting in hardened and entrenched attitudes. The recent statement by eighteen directors of large museums seeking “universal status” and exemption from such requests is a case in point. On the other hand the invoking of a order seeking to prevent the return of Dja Dja Wurrung bark etchings which had been lent by the British Museum and the Royal Botanic Gardens at Kew for exhibition in the Museum Victoria in Melbourne is unlikely to encourage cooperation and partnership among the wider international museum community. This is something that needs to be worked on.

Do we need to reexamine our objectives here? Are the key results we seek more likely to be achieved through co-operation and partnership to establish goodwill and appreciation of those objectives? What has been achieved so far? In response to this last question and by way of a reply to an article by Harrie Leyton (2003), Martin Skrydstrup (2004) has suggested the creation of a database of all known transfers of cultural property. He argues, with some justification, that it is difficult for an informed debate to proceed without knowledge of this and a systematic assessment of what has been accomplished so far.

Another approach, drawn from the legal repertoire, is to formalise a process of arbitration. Indeed this approach was discussed in one of the earlier sessions of the UNESCO Intergovernmental Committee on the Restitution and Return of Cultural Property. The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995) also provides that parties may submit a dispute ... to arbitration (8(2)). Arguing from an African perspective, Professor Folarin Shyllon (2000) sees the adoption of the UNIDROIT Convention with its facility for arbitration an important step forward for a continent suffering so much from the illicit trafficking of cultural property.

Last year an International Law Seminar was organised on this subject and the papers have just been published (International Bureau of the Permanent Court of Arbitration, 2004). Professor Marilyn Phelan, Professor of law and museum science at the Texas Technical University, was at the Seminar and it is appropriate that she should now present her keynote paper on this subject to us.

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Key points made at debriefing breakfast:

1. There is a need to examine the notion of museum collections in trust and the nature of the ownership of such collections, particularly in respect to first peoples;
2. There should be far greater promotion of what has already been achieved;
3. Partnership between museums and the communities from which their collections are derived should be encouraged;
4. Except in cases of stolen or illicitly exported cultural property, there should be a move away from a legalistic approach;
5. The possibility of mediation, rather than full arbitration, should be explored as a means of dispute settlement;
6. The full implications of any involvement of ICOM in the mediation process should be carefully considered before reaching a decision on this.