Should ICOM Adjudicate Cultural Property Disputes?

A Review Essay from the Triennial in Seoul

By

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What role should ICOM play in cultural property disputes? Does the current ICOM approach underwritten by the *Code of Ethics* suffice? If not, should ICOM consider the introduction of dispute settlement such as arbitration or mediation? And would such a mechanism add to the moral authority of ICOM or erode the current prestige of the organization?

These crucial and timely questions were on the agenda at a joint session (INTERCOM, ICME and the Executive Councils *Legal Affairs and Properties Committee*) at the ICOM Triennial General Conference in Seoul, October 2004. In spite of the last minute room change this session attracted an overwhelming attendance and was the only one your reviewer visited during the conference, where a bigger venue would have been appropriate. The keynote address of the panel was given by Professor Marilyn E. Phelan[1], entitled *Legal and Ethical Considerations in the Repatriation of Illegally Exported and Stolen Cultural Property: Is there a Means to Settle the Disputes?* The organizers had asked Harrie Leyten, Senior Lecturer of Museology at the Reinwardt Academy in Amsterdam and W. Richard West, Jr. the founding Director of the newly opened *National Museum of the American Indian* in Washington DC to respond to Phelans keynote. The session was introduced and moderated by a past-President of ICOM and the Chair of its Ethics Committee, Geoffrey Lewis.

ICOM's current position

Lewis opened the session up in a double sense. In his detailed and elaborate introduction he extended the terrain of the issue beyond that of demonstrably stolen and/or illegally exported cultural property. He framed the wider question as the ability of a nation or a cultural community to be able to display inalienable elements of its heritage for its own people. Since the international legal regimes applicable to cultural property were not retroactive, this wider issue turned on ethics rather than legalities. To render ICOM's current position reflected by its *Code of Ethics* Lewis chose to quote and summarize the relevant provisions of the newly reformatted *Code* (2004), which he later in the week presented for adoption to the General Assembly (GA).

One of the lead problems addressed by the keynote was the incompatibility between civil and common-law systems arising in cultural property disputes. As an indirect response to this state of affairs, Lewis emphasized that the *Code* does not operate in a legal vacuum. It has elevated most of the principles entailed in all major international conventions on cultural property to its professional standard. Moreover, in the face of the legal pluralism the *Code* does not only require a familiarity with the provisions set out in the pertinent legal instruments for museum operation, but extends to expect knowledge of the national differences in the deployment of international conventions (§ 8.1).[2]

Regarding the leitmotif of Phelan's keynote, namely stolen and illegally trafficking in cultural property, the approach of the *Code* is one of due diligence and good provenance. Lewis stressed that the *Code* expects institutions to establish the entire biography of an object from its material inception or discovery to the point where the object is offered to the museum (§ 2.3). Raising the bar even higher on acquisition policy, the *Code* advocates abstention from the collection of objects from countries under occupation (§ 6.4). In the case of claims for demonstrably stolen or illicitly exported cultural property the *Code* expects the concerned institution to take prompt steps to co-operate in the restitution thereof (§6.3).

On the larger issue of the ability of a nation or a cultural community to be able to display crucial elements of its heritage for its own people, Lewis mentioned the provisions set forth under §6. These encourage co-operative partnerships with museums in countries, which have lost a significant part of their heritage. With regard to requests for voluntary return of cultural property the *Code* expects museums to initiate a dialogue with the claimant based on “scientific,

professional and humanitarian principles" (§ 6.2).

So far there is nothing which is entirely new in the restructured 2004 *Code* compared to the revised 2001 Barcelona version. However, the reformatted *Code* introduces two interesting new concepts applicable to objects without provenance. If an unprovenanced object carries "primary evidence", which is of exceptional value to the public domain, then the acquisition of such an object by a museum should be the matter of a decision taken by specialists (§ 3.4). Lewis commented that this provision did open up for a form of mediation by specialists in the relevant discipline, rather than museum professionals. However, the new concept of "Repositories of Last Resort" seems to move the authority in the say over unprovenanced material back to the museum: "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" (§2.11).

Now, what exactly are ICOM's options for sanctioning violations of the *Code*? Later in the week Lewis told the GA that in the past triennial some fifteen matters have been reported to the Ethics Committee involving potential breaches of the *Code*. Six of these involved illicit trafficking of property. Three of these concerned museums which were reported to be displaying recently acquired material listed in ICOM's *Red List*. These three museums had all been notified by the Committee. However, due to lack of evidence in two of the cases no further action had been taken. In the third case the evidence was sufficiently clear to justify a 'name and shame' approach. This action by the Ethics Committee prompted the museum to enter into bi-lateral negotiations, which resulted in a long-term loan agreement with the country in question. With regard to voluntary returns, Lewis reported that a human body, which had been on public display for many years, had been returned to its African descendants in accordance with the advice of the Committee.

To recap, the repertoire of sanctions, which the ICOM Ethics Committee dispose of, is limited to a 'name and shame' approach and the exercise of a discrete advisory role, which nevertheless seem effective. This operational repertoire seems fully consistent with the whole ethos of the *Code,* which is one of general principles and guidance, not narrowly defined prescriptions and stipulations. The key question is if ICOM's current position as one of institutional self-regulation guided by general principles applied on a case-by-case basis is enough in an era where the voices of the debate are becoming increasingly confrontational? Phelan's keynote address was an invitation to ICOM to visit this question.

A Call to Action

Phelan opened her paper with a critique of the position taken by the American Association of Museums (AAM) in two recent U.S. court rulings, which have come to be known as the *Steinhardt* and *Schultz* cases. The former concerned a so-called *phiale*, a shallow bowl with a raised central boss of the early third century B.C. molded from over two pounds of 24 carat gold.[3] Sometime in the 1970s this object was looted from an archaeological site not far from Palermo in Sicily by local workers doing electrical repair work. The object surfaced by a number of Sicilian antiquities dealers, before it was examined by a prominent New York antiquities dealer, who made the necessary arrangements for its sale to his client Michael Steinhardt. The dealer exported the gold bowl from Italy via a Swiss intermediary and by means of incorrectly completed custom declarations. The object reached New York and was for several years displayed in the private Steinhardt home. However, in 1997 the *phiale* was seized from the Steinhardt home following a request from Italy. Beside the clear cut case of misstatements on the customs declarations the district court in New York ruled that the *phiale* could be considered "stolen", because it had been exported without the permission of its true owner, namely the Italian government. It was the court's recognition of Italy's 1939 cultural patrimony legislation and consequently the proceedings set in motion for the restitution of the *phiale*, which sparked a notable controversy in the U.S.

Leaving aside the decision of the Court of Appeals, the denial of the Supreme Court to hear the case and the eventual restitution of the object to Italy in February 2000 orchestrated by fanfares in Rome and Palermo, Phelan concentrated on the *amicus curiae* ("friend of the court" statement) filed by the AAM. In these the AAM took the stand that the ruling of the district court was a "fundamental error" in "its automatic enforcement of Italy's patrimony law"[4]. The rationale behind this statement was a concern that in upholding retentive cultural patrimony legislation of foreign States the ability of museums to collect and exhibit works of foreign provenance in the U.S. would be impaired. Phelan critiqued the AAM position, because it implied a limitation on the restrictions on the looting of archaeological sites, hereby indirectly supporting the illicit trafficking in cultural property. She was right in so far that the AAM position surprisingly supported Steinhardt's activities and went against the restitution of the gold bowl to Italy. However, the larger implication of the controversy here was that the New York district court ruling ran against the general rule in international jurisprudence that a nation has no obligation to enforce another nation's restrictions on the export of cultural property.[5]

Beyond the legal technicalities the *Steinhardt* case is thus an illustrative example of two fundamental different ways of thinking about cultural property characterized in a canonical essay as "Byronism" versus "Cosmopolitanism"[6]. Enforcing retentive foreign cultural patrimony laws the NY District Court exerted a form of 'Byronism', i.e. a conception of cultural property defining the relation between the object and the original context as inalienable (*in personam* rights). The *amicus curiae* submitted by the AAM embodied the 'cosmopolitan' vision of cultural property as the heritage of humankind (*in rem* rights) to be preserved where it is best cared for.

Beside the *Steinhardt* and the *Schultz* cases, Phelan's paper revolved around two important cases of Holocaust looted art[7]. The central issue in these two cases seemed inverted from the *Steinhardt* case: Can foreign States be held accountable with recourse to U.S. jurisdiction, when the question is whether rights in property were violated according to international law? In *Republic of Austria v. Altmann* the U.S. Supreme Court ruled that a foreign state is not immune from the jurisdiction of U.S. courts. Comparing the four cases the *Steinhardt* and *Schultz* cases represented the enforcement of foreign cultural patrimony laws, whereas the *Republic of Austria v. Altmann* exemplified an overruling of foreign national sovereignty. Thus, these four cases accentuated the question of which legislatures to apply in trans-national cultural property disputes.

By choosing to illustrate the constraint and inadequacies of the existing legal structures in resolving four rather clear cut and morally compelling cases of illicit exported and looted art, Phelan made a poignant case for the introduction of new means for dispute resolution. Her central argument was that there is currently no legal regime in place to address adequately the issues relating to the restitution of illegally exported and/or stolen cultural property. What we have is a dysfunctional legal pluralism, where cultural property claims run up against fundamental differences between civil and common-law systems. The problem inevitably arose how adjudication could possibly proceed when we have fundamental different standards regarding prohibitive limitation periods, evidentiary regimes and *bona fide* acquisition clauses.

Now, to solve this problem Phelan recommend ICOM to consider a special international arbitration panel equipped with unique substantive and procedural rules capable of handling such cases. Asserting that "international arbitration is probably the most effective way to secure an impartial resolution of ownership disputes"[8] she concluded that such a mechanism would instill an ethical obligation to return those objects in museum collections that were acquired unlawfully. Ultimately, she argued that such a dispute mechanism would foster mutual respect between museum professionals and provide more international opposition to the illicit trafficking in cultural property.

An International Court for Culture?

Arbitration is a resolution mode, which does not seek to compromise disputes, but to decide them. It is resorted to only if both parties agree to it. The arbitrator has to be neutral and is expected to rule in a judicial manner by weighing the evidence presented by the parties. The verdict is typically final and binding. Thus, arbitration is decisional by nature and has the formality of the court room.

Contextualizing Phelan's proposal it has to be said that it constitutes part of a growing interest within international jurisprudence in arbitration. This is illustrated by the seminar held last year on the subject by the International Bureau of the Permanent Court of Arbitration[9], as well as other important scholarly contributions.[10] Phelan's proposal to use arbitration to settle cultural property disputes is not a new idea. It first came up during discussions at the 3rd session of the UNESCO IGC held in Turkey in 1983. At this meeting the Chairman suggested that if no acceptable resolution in a dispute had been reached after one year of submitting it for review to the IGC, then the Committee could perhaps arbitrate. This statement created controversy among the Member States, of which several declared that bilateral negotiations should be respected absolutely and that the role of the Committee was one of mediation, not arbitration. The outcome of the UNESCO 1983 debate was that the mandate of the Committee should not extend beyond analyzing the reasons for the failure of an attempt to achieve a return through bilateral channels[11]. Although the idea did not gain foothold within UNESCO in 1983 an arbitration provision was nevertheless adopted in Article 8 §2 of the UNIDROIT Convention of 1995.

However, the fundamental question put in front of the two respondents was not an academic one, but the rather practical whether ICOM should consider supporting an international court of arbitration for cultural property. Phelan left the two respondents, the audience and ICOM at large with a number of closely focused questions to consider in such an arbitration endeavor:

1. What rules of dispute settlement procedures should be established?
2. What criteria should qualify in the selection of arbitrators?
3. What time restrictions should apply to the recognition of a valid claim?

The Dutch Experience

Responding to Phelan's paper Leyten drew on his many years of field experience from West Africa and his institutional experience as a curator in the *Tropenmuseum* (Amsterdam). As Chair of the informal *Leiden Network* established September 2001, which includes archaeologists, anthropologists, museum curators, educators, directors, law professors, antiquities dealers and civil servants with special expertise on cultural property issues[12], Leyten is exceptionally well positioned to comment on an inherently interdisciplinary issue.

Leyten sided with Phelan in the critique of the *amicus curiae* letters submitted by the AAM, which indirectly supported illegal trafficking in cultural property. He further condemned the "arrogance" embodied in the *Declaration on the Value of Universal Museums* (2002), which constituted "a step back" and a continuation of a deeply entrenched European museum

attitude to the "have-nots". Overall, Leyten located the issue closer to Lewis's general introduction, than to Phelan's more narrowly focused paper, by arguing that the establishment of European ethnographic museums were deeply intertwined with the construction of national narratives fueled by imperialism and colonialism: "Shiploads of treasures from African shrines and burial grounds were taken to European museums of ethnography and to the homes of private collectors. Africans who want to learn about their past kingdoms, have to go to London, Paris, New York and other cities in Europe and the U.S., in order to see the relics of their history. Is it strange if these countries want some of their treasures back?"[13]

Responding directly to Phelan's central question whether ICOM should mandate that its members be subject to a panel of arbitrators that would decide issues relating to alleged illegally and/or stolen cultural property in their collections, Leyten came down strongly in favor of an informal mediation option as opposed to formal and binding arbitration. He referred to the UNESCO *Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation*, established in 1978, as an already existing mediating body of advisory nature. Since your reviewer was an observer at the last IGC meeting in Paris, March 2003, I might pause here for a moment to comment.

Currently there are two disputes before the Committee: Greece's claim for the Parthenon Marbles and Turkey's request for a Hittite artifact known as the Bogazköy Sphinx. Both these cases have been before the Committee since September 1984 and January 1986 respectively and at the last 2003 meeting no resolution was even remotely within sight. Perhaps in light of earlier experiences of the Committee it did not seem to exercise alternative dispute resolution in the form of negotiation or mediation between the involved parties. The exact mandate given to this body is the following: "The Committee shall be responsible for seeking ways and means of facilitating bilateral negotiations for the restitution or return of cultural property to its countries of origin when they are undertaken according to the conditions defined in Article 9" (Article 4 §1 of the Statues)[14]. Generally very few cases have been submitted to the Committee, which consists of 22 UNESCO member states.

Leyten was of course right that in exploring Phelan's proposal ICOM should examine the mandates as well as the virtues and vices of all existing fora established for cultural property disputes. In this context the *WIPO Arbitration and Mediation Center* in Geneva established 1994 seems to me an interesting model to study. The remarks made by the newly elected ICOM President Alissandra Cummins at the GA, about promoting working partnerships between ICOM and WIPO with regard to the safeguarding of intellectual property rights inherent in museum collections, also point toward the convergences between cultural and intellectual property rights.

In conclusion, Leyten opted for cautious steps. He preferred to stay with the existing ICOM approach of promoting awareness that collectors/museums should not purchase objects without proper provenance, through publications such as the *Red List*. He mentioned the merits of the "name and shame approach" ICOM took when unprovenanced Nok Terracotta Heads, acquired for the Quai Branly Musée, were exhibited in Paris. Finally, opening the door to some kind of arbitration mechanism Leyten touched on what he called the 'Dutch experience', which has taken more than ten years and is not completed yet. If I understood Leyten correctly, a museum in the Netherlands can opt to be registered in the Dutch Museum Association, upon meeting a list of requirements. In due time the governing statues for the registered museums will be modified to accommodate sanctions for the violation of the Code of Ethics of the Association. It is still not clear precisely what type of sanctions will be made available. However, if a dispute arises, arbitration is a possibility, because all the members of the Association have agreed to subject themselves to a binding regulatory framework. Thus, arbitration is an integrated part of the operation of the Association, the point being that institutional self-regulation at the national level can do the job. The question is of course if the merits of the Dutch model can be transposed to the international arena?

The American Experience

W. Richard West, Jr., the founding Director of the newly inaugurated *National Museum of the American Indian*, looked pleased and relieved having 'escaped' to Seoul for a week. In the mist of the range of obligations associated with the opening of a 200 million dollar project set in direct vicinity of Capitol Hill at the National Mall in Washington DC, I think everybody were deeply impressed that West had accepted the invitation to respond to Phelan's paper.

In his response, West explicitly spoke from his perspective as Director of a landmark museum, which radically redefines the very concept of a collecting holding institution. The NMAI stands as an icon for the cultural accomplishments of Native peoples of the Western Hemisphere, insisting that these cultural communities are vibrant and coeval in time, not relics of the past. Thus, the overarching story told at the National Mall is not one of victimization and cultural genocide, but one of cultural survival despite destructive colonialism. This story is told by Native peoples themselves in a monumental architectural innovation, which is a tribute to and a triumph for Native America. Your reviewer had the good fortune to be present at the grand opening ceremony and witnessed the biggest Native gathering ever in U.S. history. On this occasion, West gave the opening remarks delivered in front of almost 100.000 spectators, wearing his Western Cheyenne Chief dress and regalia. For me it was of course quite a transformation to see him in business attire in a conventional conference setting, having seen him speak less than two weeks before in DC in full regalia. But West masters many seemingly incompatible worlds, which equips him exceptionally well to think through this issue outside the box.

Responding to Phelan's paper, West foregrounded his experiences as a lawyer with congressional legislation mandating

repatriation of Native cultural patrimony in the United States. Two legislatures govern this: The *Native American Graves Protection and Repatriation Act* (NAGPRA) of 1990 and the *National Museum of the American Indian Act* (NMAIA) of 1989. The first applies to all institutions, which receive federal support, the second only to the Smithsonian. Generally speaking, the statues are very similar, although they do differ with regard to the recognition of parties and evidentiary standards. In order to achieve repatriation a recognized claimant must establish cultural affiliation between the object in question and the requesting group based upon the preponderance of evidence. West did not mention that this is not always a straight forward process. Your reviewer has participated in the meetings of the NAGPRA Review Committee since 2001 and these testify to the numerous problems implied in establishing cultural affiliation over millennia, defining what a sacred item actually is, and who is a recognized party under the law.

However, West's central argument here was that what led to the imposition of a formal legislative framework were the frustrations Native Americans experienced with more informal negotiated or mediated efforts with the American museum community. In short, a negotiated, ultimately voluntary approach was not satisfactory from the Native point of view. This brought about legislatures. Ironically, it was only when a formal repatriation law was in place and operational that informal negotiated agreements were reached, so to speak in the shadow of NAGPRA.

The repatriation experiences of other settler nations with indigenous peoples have been different. With respect to First Nations and Aboriginals both Canada and Australia have frameworks, which mandate repatriation based on ethics and consultation, not legalities. This led West to conclude that success in this area was not dependent on choosing between a formal legalistic or an informal consultative and ethically driven approach. What preceded these accomplishments in the U.S., Canada and Australia was a "museological sea change" in the way the American Congress and the Canadian/Australian governments viewed fundamental relationships between Indigenous peoples and museum collections.

The Enlightenment view that museums hold collections in trust for the general public with the authority to interpret and exhibit them was challenged, questioned and ultimately dissembled, as far as indigenous peoples were concerned. The emerging vision that Native cultural material, which relate to contemporary ceremonial life of living communities, is held for the benefit of them and not for the general public has now taken foothold in settler societies. West argued that this dramatic reformulation of museology preceded the instruments of repatriation, be they legislative or ethical.

Transposing this conclusion to the Seoul ICOM context, the crux of the matter for West was not about the limits of legalities regarding illegally/stolen cultural property, nor whether arbitration or mediation was the right remedy to address it. For him, the problem was the deeply entrenched historical view of the nature of museums and controls over their collections, such as that embodied in the *Declaration of the Value of Universal Museums* (2002).

Regarding Phelan's paper West came down in principal support of her international arbitration proposal, but he was less hopeful with its prospects of realization. From his experience as a practicing lawyer and litigator, he knew that the American legal culture was opposed to internationalist multi-lateral approaches (the current administration's attitude toward the International Criminal Court in the Hague being one case in point).

Concluding by way of summarizing the lessons learnt from his directorship of the NMAI, West opted for greater sensibility of museums toward the multiple interests vested in their collections. He held a change in the conventional precept of the relations between a museum collection and its beneficiaries to precede Phelan's proposal on arbitration or for that matter any instrumental remedy addressing the rightful location of cultural property.

The Audience Debate

Before Lewis gave the floor to the audience, he mentioned that the organizers had extended an invitation to the Directors from the eighteen self-declared Universal Museums to participate in the panel, which none of them obviously had accepted. He then gave the word to Manus Brinkman, the past Secretary-General of ICOM (1998 to 2004), who stated that he saw no problem with arbitration in relation to contemporary looting of archaeological sites and Holocaust looted art, but the crucial question was "how far back are we going?"

On this question of limitation period, West responded that neither the NMAI Act (1989) nor NAGPRA (1990) set any cut off dates for claims. He argued that repatriation decisions could not be based on quantitative time charts. Phelan seconded his statement and argued that there should be no time limitation on claims. Given this response Manus Brinkman warned about taking ICOM into an arbitration endeavor, because cultural property disputes often are irresolvable and politically loaded. Entering into this arena would jeopardize the prestige of the organization. Responding to this Leyten said that abstaining from an arbitration/mediation instrument would leave ICOM as a tiger without teeth. He questioned the rationale of leaving museological problems in the hands of diplomats. ICOM should have the courage, teeth and integrity to deal with and resolve these problems without referring them to any subsidiary body. Leyten then called for the voice of the dispossessed in the debate, which only evoked a brief comment by the host country about Korean cultural patrimony in Japan.

In the light of the general conference theme of ICOM Seoul 2004, Canada commented on the convergences between repatriation of tangible and intangible material. Responding to this, West made the point that if anybody thought repatriation of three-dimensional objects was complicated, then just wait until the story of repatriation of intangible heritage begins to

unfold. He then reminded the audience that there is no bifurcation on the side of Native Peoples, between tangible and intangible material.

Generally, the audience discussion raised a whole range of testimonies of different experiences with cultural property disputes. Australia spoke of "repatriation as a two way street", Austria commented further on the Klimt pictures, Norway shared their experience with the repatriation of a Sámi sacrificial stone, the U.K. mentioned a case involving Gibraltar, etc. This richness of institutional experience with repatriation among ICOM members prompted Helen Wechsler from the AAM to pose the constructive question of how we can promote all the good work which is not surfacing? She stressed the need to put forward the resolved disputes in order to promote "best practice" in this field. In fact the urge to share experience in this field was so overwhelming that the session organizer John Mcavity from INTERCOM concluded the audience debate by announcing another session solely dedicated to further discussion of the exceptional range of case material, which had surfaced during the debate. Your reviewer would like here to draw attention to his proposal to build a database systematizing constructive precedents accomplished so far to a knowledge platform accessible for ICOM members[15].

Three Different Paradigms

The panel as a whole was a successful demonstration of cooperation between two of ICOM's International Committees, in this case INTERCOM, ICME, and the Executive Council's *Legal Affairs and Properties Committee*. Cultural property issues demand interdisciplinary steps and this reviewer hopes that we will continue to see a tight corporation between the International Committees in this field. However, having three distinct scholarly perspectives represented and expertise drawn from very different contexts your reviewer was under the impression that the panelists at times addressed very different dimensions of a common theme.

Addressing solely illicitly exported artifacts and misappropriated Holocaust art, Phelan built her case around retribution or reparation for injury in a judicial sense, i.e. *restitution*. The drift of Leyten's response was geared toward the legacies of colonialism embedded in European museum collections, i.e. *return*. West's contribution revolved around indigenous peoples within settler nations (North America & Oceania), addressing recognition of cultural affiliation between museum collections and Native communities, i.e. *repatriation*. These three approaches represent very different takes on the predicament of cultural property, which Lewis also made clear at the outset of the session.

In my view these disparities between the panelists revealed more fundamental differences in their conception of museum collections as cultural property. Phelan seemed to conceive museum collections as conventional property implicating that if demonstrably stolen they should be given back, which she compellingly demonstrated with regard to illicit exported and/or Holocaust looted art. Contrary to this notion of ownership Leyten did not conceive museum collections as ordinary property, but as inalienable heritage embodying the ethos of a nation or cultural community. This opens up a range of different perspectives, which at heart turn on ethics, rather than legalities. West conceived museum collections as vested with other interests than these of the general public. This is in fact a dramatic re-conceptualization of the Enlightenment vision of what constituencies a museum and its collection should serve.

I think these three different property conceptions of museum collections to some extent explained why the three panelists differed on the appropriate remedy to apply. To recap the lead question of the session: Is there a need for ICOM to take on the charge of formulating binding or non-binding decisions – in the form of arbitration or mediation - to its own members in cultural property disputes? If the problem can be reduced to a conventional ownership issue, then it is consistent to argue as Phelan did in favor of an International Arbitration Panel. If the problem is about a postcolonial Nation's ability to display its heritage or a local community's control of its ceremonial objects, then the issue hinges on more than conventional ownership notions and mediation or other negotiated proceedings would seem the most appropriate remedy to apply, as the two respondents both argued.

Overall, the panel revealed a need to re-examine fundamental conceptions of ownership of museum collections with respect to the relevant stakeholders. Such groundwork seem a necessary precursor for any serious exploration of arbitration or mediation as an expansion of ICOM's instrumental repertoire to reach the objectives set out in its newly restructured *Code of Ethics*. I hope ICME will continue to be involved in and contribute to this important work.

Acknowledgements

I would like to thank the President of ICME Daniel Papuga for inviting me to write this review and not least for sniffing out interferences from other languages in my English prose. I am also very grateful to Geoffrey Lewis and the panelists for their comments on a draft of this paper.

Notes

1 Marilyn E. Phelan holds a J.D. from the University of Texas and a Ph.D. from Texas Tech University. Presently she is the Robert H. Bean Professor of Law and Museum Science at Texas Tech University. She has published widely on museums

and cultural property issues, e.g. *Museum Law: A Guide for Officers, Directors, and Counsel* (Kalos Kapp Press, 2001), co-authored *Art and Museum Law: Cases and Materials* (Carolina Academic Press, 2002) and co-edited *The Law of Cultural Property and Natural Heritage: Protection, Transfer, and Access* (Kalos Kapp Press, 1998). Phelan has served as co-chair of the International Cultural Property Committee of the American Bar Association Section of International Law and Practice. She was recently appointed to the Legal Affairs and Properties Committee of ICOM.

2 In the discussion of this panel which erupted on the ICOM-L list server Marta de la Torre encouraged an inventory of the differences in implementation of the UNESCO 1970 Convention:" there are many countries that have signed the UNESCO convention on illicit traffic and each one seems to implement it in different ways. Just gathering the information about the national implementation mechanisms would be a huge contribution to the field." (Message from Marta de la Torre posted at the ICOM-L list server 28 Oct 2004)

3 I draw the facts in the *Steinhardt* case from Claire L. Lyons "Objects and Identities: Claiming and Reclaiming the Past" in *Claiming the Stones – Naming the Bones,* ed. Barkan & Bush, (Getty Publications, 2002).

4 I quote from Phelan's paper *Legal and Ethical Considerations in the Repatriation of Illegally Exported and Stolen Cultural Property: Is there a Means to Settle the Disputes?* (2004) distributed at the session.

5 In the other case (*Schultz*) which Phelan chose to elaborate on, the court had similarly enforced the Egyptian patrimony law known as "Law 117" and convicted the acquirer (Schultz) of conspiring to receive stolen property.

6 Merryman, J. H. (1986). "Two ways of thinking about cultural property." American Journal of International Law **80**: 831-853.

7 In the *U.S. versus Portrait of Wally* an Egon Schiele portrait had been taken from a Viennese Jew in 1938, when Germany annexed Austria, and was later brought into the U.S. by a private collector. In the *Republic of Austria v. Altmann* Maria Altman filed suit against Austria for the recovery of six Gustav Klimt paintings taken by the Nazis from her Jewish uncle, Ferdinand Bloch.

8 Phelan, Marilyn (2004), 7-8.

9 International Bureau of the Permanent Court of Arbitration (ed.) *Resolution of Cultural Property Disputes,* The Permanent Court of Arbitration/Peace Palace Papers, Volume 7, (Kluwer Law International, 2004)

10 See for example the substantive bibliography in Isabelle Fellrath Gazzini *Cultural property disputes: the role of arbitration in resolving non-contractual disputes*, (Transnational Publishers, 2004).

11 Shyllon, Folarin (2000) 'The Recovery of Cultural Objects by African States through the UNESCO and UNIDROIT Conventions and the Role of Arbitration' available at: www.unidroit.org/english/ publications/review/articles/2000-2a.htm

12 See Harrie Leyten (2003), 'Return – Restitution – Repatriation', *ICME News 34* (February 2003) and available at http://icme.icom.museum or http://museumsnett.no/icme/icmenews34.html#illicit

13 Harrie Leyten (2004) *Can Selfregulation Do The Job? A Response to Professor Marilyn Phelan*

14 Article 9 states:"

> §1. Offers and requests formulated in accordance with these statues, concerning the restitution or return of cultural property, shall be communicated by Member States or Associate Members of UNESCO to the Director-General, who shall transmit them to the Committee, accompanied, in so far as is possible, by appropriate supporting documents.
> §2. The Committee shall examine such offers and such requests and the relevant documentation in accordance with Article 4, paragraph 1, of these statues."

15 Please see Martin Skrydstrup (2004) 'Repatriation between Rhetoric and Reality', *ICME News* 38 (September 2004) available at http://icme.icom.museum or http://museumsnett.no/icme/icmenews38.html#repatriation

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