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## Regulation by the International Council of Museums: An Example of the Role of Non-Governmental Organizations in the Transnational Legal Process

### Keywords

Organizations, Regulation, Cultural Property, International Law: History, Jurisprudence

REGULATION BY THE INTERNATIONAL  
COUNCIL OF MUSEUMS: AN EXAMPLE OF THE  
ROLE OF NON-GOVERNMENTAL  
ORGANIZATIONS IN THE TRANSNATIONAL  
LEGAL PROCESS

JAMES A. R. NAFZIGER\*

The massive looting, scarring, destruction, and international smuggling of the artistic and archaeological heritage of national patrimonies has received, as it has deserved, widespread public concern and commentary.<sup>1</sup> The plunder of national art treasures has been called quite aptly the "murder of man's history."<sup>2</sup> Individuals, professional groups, governments, intergovernmental organizations, and non-governmental organizations (NGO's)<sup>3</sup> have all recently come to the rescue. Their efforts have led to the emergence of a transnational regulatory regime which, as will be seen, is both directed toward and supported by a gradual substitution among relevant global actors of the value of enlightenment for that of wealth.

The emerging regime of control is highly pluralistic; it includes multilateral conventions, bilateral treaties, domestic antiquity and export-import laws, private bilateral agreements, enforcement by the International Criminal Police Organization (Interpol), voluntary self-regulation by museums, domestic and

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\* Administrative Director, American Society of International Law; and Lecturer, Catholic University of America School of Law. The author gratefully acknowledges the cooperation and assistance of Hugues de Varine-Bohan, Director, and Bonnie Burnham, Project Coordinator, International Council of Museums and especially Ann Zelle, Executive Secretary of the U.S. National Committee of ICOM.

<sup>1</sup> Coggins, *Illicit Traffic in Pre-Columbian Antiques*, 29 ART JOURNAL 94 (1969); Coggins, *The Maya Scandal: How Thieves Strip Sites of Past Cultures*, 1 SMITHSONIAN 8 (1970); Evans, *Archaeology and Diplomacy in Latin America*, FOREIGN SERVICE J 35 (1968); Gaskill, *They Smuggle History*, illus. London News, June 14, 1969, at 26; Hamblin, *The Billion-Dollar Illegal Art Traffic — How It Works and How to Stop It*, 3 SMITHSONIAN 16 (1972); Williams, *Destruction in the Name of Art*, HARV. TODAY 3 (1972); Zelle, *Acquisitions: Saving Whose Heritage?* 49 MUSEUM NEWS 19 (1971); Christian Science Monitor (six part series), July 12, 1971, at 9, col. 1; July 13, 1971, at 9, col. 1; July 14, 1971, at 9, col. 1; July 15, 1971, at 9, col. 1; July 16, 1971, at 9, col. 1; July 17, 1971, at 9, col. 1; N.Y. Times, April 4, 1970, at 5, col. 3; June 4, 1972, at 3, col. 5; Wall Street Journal, June 2, 1970, at 1, col. 1; Washington Post, March 10, 1970, at A12, col. 7; April 4, 1970, at B1, col. 1.

<sup>2</sup> Wall Street Journal, June 2, 1970, at 1, col. 1.

<sup>3</sup> That is, "[a]ny international organization which is not established by inter-governmental agreement . . ." U.N. ECOSOC Res. 288(X), (1970).

international NGO programs and controls, and, to a perhaps diminishing extent, the market itself. Although there has been useful commentary on some aspects of this regime, little of it pertains to the role of such NGO's as the International Council of Museums (ICOM).

As a potential leader in the process of regulating both local acquisitions and transfers of art and artifacts, ICOM is interesting first in respect of its specific functions of control. Moreover, and more generally, as an organization showing signs of transformation from a static, conference orientation to a dynamic instrumentality of social action, ICOM is interesting in respect of the emerging role of non-governmental organizations in the transnational legal process. This study will explore both of these dimensions of ICOM's institutional role. It represents one effort in what has been described as the "tremendous job" of investigating the practices of international organizations<sup>4</sup> in applying their basic norms and law. Such investigation can serve as a foundation for the sort of comparative analysis and general theory which improves the capacity of international organizations to engage in responsive and effective decision-making.

Most countries have their own legal controls over international traffic in art treasures.<sup>5</sup> It is clear, nevertheless, that by themselves, domestic governmental controls, based upon criminal and antiquity laws, civil suits, policing of sites, border controls, taxation, duties, tariffs, and the like are insufficient.<sup>6</sup> It has been noted, for example, that domestically the "problem cannot be dealt with through the existing channels of criminal law since the very concept of a cultural heritage transcends

<sup>4</sup> Sohn, *The Growth of the Science of International Organization*, in *THE RELEVANCE OF INTERNATIONAL LAW* 267 K. Deutsch and S. Hoffman ed. 1968.

<sup>5</sup> Two unpublished summaries of municipal controls are, *Protection of Art Treasures and Antiquities in Various European Countries* (Library of Congress, Law Library, European Law Division, July (1969)), and J. NAFZIGER, REPORT TO THE AMERICAN SOCIETY OF INTERNATIONAL LAW ON MUNICIPAL LEGAL RESPONSES TO THE INTERNATIONAL MOVEMENT OF NATIONAL ART TREASURES.

<sup>6</sup> Among the vicissitudes of the numerous municipal controls are lax domestic law enforcement; an overemphasis on reactive export, rather than import, controls; the weakness of the corresponding market mechanism; reliance upon control systems of guards and inspectors that are often prohibitively expensive for the art-rich developing countries; the ancillary susceptibility of poorly paid guards and inspectors to bribes; the susceptibility of other agents of law enforcement, including judges, to bribes (known as "mordida" in the Spanish-speaking countries); the lure of hard currency from foreign purchasers in preference to indigenous currency sometimes available from the government or local purchasers; topographic and logistic obstacles, particularly in the remote, often treasure-laden, areas of developing

traditional notions of ownership and title."<sup>7</sup> It seems imperative that non-governmental controls be developed.

Several professional and learned associations have led in the expression of domestic non-governmental concern within the United States — most notably the American Society of International Law, the College Art Association of America, the Archaeological Institute of America, and the Society of American Archaeology.<sup>8</sup> But the efforts of these organizations have been han-

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countries; an iron law of inflation that sets prices on the international antiquities market beyond government control; draconian, sometimes completely proscriptive, export controls and embargoes that counterproductively drive up the market and invite disobedience; the difficulty of controlling the movement of items intended for re-export in such entrepôts as Switzerland and Lebanon; and the impossibility of sealing off borders and intercepting diplomatic pouches, which may contain contraband in cultural property (see, e.g. Evans, *supra* note 1). In view of such deficiencies in the municipal regime of control, it is not surprising that the laws are found to be honored more in their breach than in their observance. See, with respect to municipal controls in Latin America, Evans, *id.* On the efficacy of holding out the "carrot" of more liberal loan policies, and financial aid, as an alternative to the "stick" of rigid controls, see Hamblin, *supra* note 1, at 25.

Proposals for more efficacious domestic regimes of control have included, *inter alia*, the encouragement of higher insurance rates for the storage of art objects, so as to prompt their release on loan or exchange; the elimination of long-term capital gains tax treatment of cultural property; a restriction on tax exemptions for charitable contributions of objets d'art to those of unimpeachable provenance; provisions (such as those in effect in Japan and Great Britain) for a public or governmental option, at the declared valuation for a sale, to purchase treasured objects intended for export; a tariff on the export of certain classes of cultural property; a sales tax on all foreign sales; a general sales tax with forgiveness or rebate in the case of a domestic sale; a revocation of the tax-exempt status of museums that accept illegally exported or otherwise obtained items; and museum subsidies.

A special panel of the American Society of International Law prepared two resolutions that, if implemented, promise some hope of more effective U.S. controls over the flow of illegally exported objects into this country. One of these resolutions recommended emergency congressional authorization to the President, to prohibit the import into the U.S. of designated cultural property that formed part of another country's heritage; and another called for prompt measures to protect pre-Columbian monumental and architectural sculpture and murals exported contrary to the laws of the countries of origin. The resolutions were transmitted to the Secretary of State, and were subsequently supported by the American Institute of Archaeology. The Secretary of State proposed measures which became H.R. 9463 in order to accomplish the purpose of the latter resolution. H.R. 9463 was reported out from the Committee on Ways and Means, Feb. 7, 1972, Report No. 92-824.

<sup>7</sup> Gordon, *The UNESCO Convention on the Illicit Movement of Art Treasures*, 12 HARV. INT'L L. J. 537, 541 (1971).

<sup>8</sup> The responses of the first two of these organizations are summarized in Zelle, *supra* note 1, at 22. The College Art Association adopted a resolution at its 1972 meeting that expressed concern about the failure of the U.S. government to ratify the 1954 Hague Convention for the Protection of Cultural Property. Letter from Edward N. Wilson, Secretary, College Art Association of America, to the author, July 10, 1972. The Association of the Bar of the City of New York held a program on the subject, March 9, 1970. The Society of American Archaeology held a symposium on "Looting the Past: An International Scandal" on December 29, 1971, during the annual meeting in Philadelphia of the American Association for the Advancement of Science. Aside from these domestic responses, several international NGO's have helped kindle public awareness of the underlying problem. These NGO's include the International

dicapped by their relative isolation from the critical constituency of large volume collectors. By far the leading U.S. non-governmental organization with such a critical constituency is the American Association of Museums (AAM). Its response, however, has been very limited, although its Special Policy Committee has issued a mild statement of concern.<sup>9</sup> On the credit side it should be noted that the Association of Art Museum Directors is in the process of preparing a proposed acquisition policy.<sup>10</sup>

Because the AAM appears disinclined to establish an effective code of self-control measures,<sup>11</sup> the International Council of Museums has been increasingly expected to be a prime mover in establishing effective non-governmental controls.

Before turning to ICOM, it will be useful to establish a theoretical framework of inquiry and to identify the nature of the available framework of control, in order more clearly

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Congress of Americanists and The Union of Prehistoric and Proto-historic Sciences, the latter of which adopted a resolution at its 1971 annual meeting that called for stricter international control of trade in artistic and archaeological material, N.Y. Times, Sept. 18, 1971, at C5 col. 1.

The role of the American Association of Museums regarding transnational movement of international art treasures has been and will continue to be one of cooperation and encouragement of effective, *national* procedures whereby the integrity of the object and its educational value are respected and utilized together with full respect of the laws and regulations of the country of origin.

As a non-governmental organization, the AMM is not in a position to regulate its members or any national government on these matters; it is in a position to stimulate and encourage positive steps of professional and educational cooperation and protection of the object and respect for the nation of origin [emphasis added]. Letter from Kyran M. McGrath, AAM Director, to the author, May 26, 1972.

The AAM's Special Policy Committee urged the organization's members "to abstain from purchasing and accepting donations of antiquities exported from their countries of origin in contravention to the terms of the UNESCO draft convention." A major loophole is that "this abstention is to apply only to antiquities from a country which has adopted the farsighted policy of making duplicate material available through legal channels, or has installed a procedure for granting export licenses to material which has been approved by a board of review." In an accompanying Report, the AAM Special Policy Committee surprisingly emphasizes, not the vulnerability of the "have" countries, but of the U.S., which the Report suggests, is experiencing a "cultural drain." Generally, the AAM gives the UNESCO Convention only "conditional support" subject to the submission of "modifications." *Report of the AAM Special Policy Committee*, 49 Museum News, May, 1971, at 22.

<sup>10</sup> Letters from C. C. Cunningham, Director of the Art Institute of Chicago to the author, May 30, 1972 and from Mitchell A. Wilder, Director of the Amos Carter Museum of Western Art and President of the Association, to the author, July 3, 1972, and Aug. 8, 1972.

<sup>11</sup> As, for example, recommended by P. Bator, Memorandum Submitted by the Reporter to the Panel of the American Society of International Law [on] the International Movement of National Art Treasures 67 (October 10, 1969, unpublished), summarized in HARVARD LAW RECORD, Feb. 5, 1970, at 7, col. 1.

to orient and appraise the ongoing activities of ICOM as a non-governmental paradigm of transnational regulation.

THE THEORETICAL FRAMEWORK: ORGANIZATIONAL NESTING

The design of effective transnational regulation is enhanced by a clear identification not only of the target problems and available decision-making agencies, but also of the relevant values. When these are clarified, a functional response may be formulated that takes account of the strengths and weaknesses of the available organizational machinery. The emerging institutional network may well include a variety of related governmental, intergovernmental and non-governmental mechanisms whose relationships with each other are important.

Whether the emerging pattern of interorganizational relations is formally prescribed or operationally descriptive, and however strong its internal linkages,<sup>12</sup> it will have an organizational ecology whose complexity demands both systematic and systemic inquiry. Both empirically and normatively, the central question is: how do (or would) the several regulatory structures interact most optimally? The complexity and dynamism of the organizational system will correspond to the varying styles of the component organizations.<sup>13</sup> These styles may be conveniently categorized as traditional, charismatic, classical bureaucratic, human relations, system and network.<sup>14</sup> The preferred, dynamic style for a global system of interacting organizations is that of an autocoordinated, organic network that at different points and times may be centralized or decentralized.

Without elevating form over function, it may be productive to idealize the network as a "nesting" of organizations. Thus seen, the typical problems of "linkage" and interaction among the component organizations become less ones of conflict among them than ones concerning the multi-dimensional "fit" at a given point in time between different, organically related organizations oriented toward similar or identical goals. Presumably, there will be a correlation between the closeness of fit among the structures and the system's functional effectiveness. Component organizational structures may, and presumably should, be flexible over time. Yet even if the nesting is seen to be adjustable, this conceptualization will help in perceiving functional interstices, in attributing to the total institutional struc-

<sup>12</sup> Aldrich, *Relations Between Organizations: A Critical Review of the Literature*, 24 *INTERNATIONAL ASSOCIATIONS* 26 (1972).

<sup>13</sup> See Judge, *The World Network of Organizations: A Symbol for the 1970's*, 24 *INTERNATIONAL ASSOCIATIONS* 18 (1972).

<sup>14</sup> *Id.*, at 20.

ture some degree of predictability and stability, and in suggesting ways in which the component structures may shape each other. For these reasons and as a technique of appraisal, the "closeness of fit" between ICOM and other functionally related structures of transnational control is indicative. Generally, with qualifications to be noted, each of the following control structures may be seen as nesting within those of the previous, more comprehensive structures.

THE AVAILABLE FRAMEWORK: AN INVENTORY OF CONTROL STRUCTURES

1. *Multilateral Agreements.* Multilateral agreements to protect cultural property have their origins in several attempts to isolate such property from the ravages of war and to prevent the sort of devastating pillage premised on the traditional recognition that to the victor belongs the spoils. The first multilateral convention that offered peacetime international protection to cultural property was the European Convention on the Protection of the Archaeological Heritage, signed in 1969 by member states of the Council of Europe.<sup>15</sup> Its emphasis is on joint conservation, education and information programs, the preparation of public and private inventories, regional cooperation and vigilance, the creation of archaeological zones for excavation by qualified scientists alone, and limited rules governing acquisitions by institutions under sovereign control. No sanctions are provided by the convention.

The most comprehensive multilateral agreement on the movement of cultural property is the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, which went into force in April, 1972.<sup>16</sup> As its *travaux préparatoires*

<sup>15</sup> European Convention on the Protection of the Archaeological Heritage, May 6, 1969, Europ. T.S. No. 66, 8 INT'L LEGAL MATERIALS 736 (1969). It should be noted that there were earlier International Conventions, such as the Hague Convention of 1907, several League of Nations treaties, and the UNESCO-sponsored Convention on the Protection of Cultural Property in the Event of Armed Conflict, that have offered some degree of protection to cultural property in time of war.

<sup>16</sup> Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the United Nations Educational, Scientific and Cultural Organization General Conference at its 16th Session, Paris, Nov. 14, 1970, 10 INT'L LEGAL MATERIALS 289 (1971). The Convention, which was adopted by a vote of 77 to 1, with 8 abstentions, entered into force three months after ratification by three signatories. As of August 1972, five countries — Bulgaria, Cameroon, Central African Republic, Ecuador, and Nigeria — had ratified the Convention. On August 3, 1972, the U.S. Senate advised and consented to ratification of the convention.

Two related draft conventions have been prepared by UNESCO. A Draft Convention Concerning the Protection of Monuments, Groups of Buildings and Sites of Universal Value was adopted by UNESCO at its sixteenth session. SHC/MD/18, Paris, Feb. 21, 1972 (translated from



make clear, it is not the first global agreement affecting the international movement of cultural property.<sup>17</sup> It is, however, the first global convention whose entire purpose is to protect cultural property from non-military threats. Briefly, the convention, which is entirely prospective, binds its parties to cooperate in establishing national registers of important cultural property, in facilitating the scientific and technical work of collection agencies, in supervising archaeological field work, in publicizing stolen or missing property, and in certifying legally exportable items. Parties to the convention are obligated to bar the import, and upon request, take steps to recover and return cultural property stolen from museums and the like; and to bar the importation of uncertified items by domestic museums and institutions, "consistent with national legislation." Bonafide purchasers of illegally imported items with valid title to them are protected by a requirement that the country of origin must pay compensation in order to regain possession of them. The UNESCO Convention is of particular interest to this study because of explicit references in it to its relationship with other functionally related control structures, including municipal laws (*passim*), bilateral agreements (Articles 9 and 15) ethical codes (Article 5) and non-governmental programs (Articles 5 and 17).<sup>18</sup>

the French). A Draft Convention for the Protection of the World Cultural and Natural Heritage and Draft Recommendation Concerning the Protection at National Level, of the Cultural and Natural Heritage, were prepared by a Special Committee of Government Experts at a meeting on April 22, 1972, and were submitted to the UNESCO General Conference for approval and adoption at its meeting in October, 1972. 17 C/18, Paris, June 15, 1972.

<sup>17</sup> Agreements cited note 15 *supra*; also, several provisions in the Treaties of Vienna of 1815 and 1966 and the post-Versailles treaties are of particular pertinence. See Means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property, Preliminary Report prepared in compliance with Article 10.1 of the Rules of Procedure concerning Recommendations to Member States and International Conventions covered by the terms of Article IV, paragraph 4, of the UNESCO Constitution, SHC/MD/3, Paris, August 8, 1969 (translated from the French), at 2, 3, 9, 11 [hereinafter cited as Preliminary Report]. See generally B. HOLLANDER, THE INTERNATIONAL LAW OF ART 56 (1959), *passim*.

<sup>18</sup> The fundamental regulatory role of the UNESCO Convention was emphasized by Bonnie Burnham, Project Coordinator of ICOM, in a letter to the author, July 17, 1972. She wrote:

It is my feeling that a working accord, beginning with the ratification of the UNESCO Convention must be the basis for future limiting of illicit import and export of cultural property. A central office dealing with this technical implementation of the resolution of the UNESCO Convention would not necessarily be a function of ICOM, but would be linked to it, perhaps as an "international specialized body" and linked, as well, to UNESCO, Interplc, the Rome Centre for Conservation, and other international bodies concerned. . . . In summary, a harmonisation and coordination of the activities of the participating 'nested' organizations, an encouragement of their potential development.

2. *Bilateral Agreements.* One weakness of the UNESCO Convention is its incapacity directly to control the importation by private institutions and individual collectors of items purchased in good faith which were not stolen, but rather were exported contrary to the laws of the country of origin.<sup>19</sup> This is a particularly pronounced weakness in respect of importation through "transit" countries such as Switzerland. The Convention does not require one party to it to enforce the laws of another, except in the instance of stolen property and, consistent with national legislation, whenever a museum receives property that has been certified by a country other than that of the museum as belonging to its national patrimony. Another weakness of the Convention resides in the generality, even vagueness, of the term "cultural property."<sup>20</sup>

These two vicissitudes of the UNESCO Convention can be overcome on a specific, ad hoc basis by means of supplementary, bilateral agreements, which are explicitly encouraged by Article 9 of the UNESCO Convention<sup>21</sup> and which find their precedent in several nineteenth and early twentieth century international agreements that governed archaeological expeditions conducted by foreign nationals. There is a close relationship between the UNESCO Convention and supplementary, bilateral agreements. Indeed, the cutting teeth in the draft UNESCO Convention were pulled largely as a result of U.S. diplomatic efforts to substitute the concept of bilateral agreements for a blanket requirement in the draft Convention that

<sup>19</sup> Article 7(a) provides simply that "The States Parties to this Convention undertake: To take the necessary measures, *consistent with national legislation*, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States" [emphasis added].

<sup>20</sup> "For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: [eleven categories follow]." The *travaux préparatoires* of the Convention indicate that the phraseology of this definition caused continuing controversy.

<sup>21</sup> "Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State."

would have obligated its parties to enforce the export laws of other parties.<sup>22</sup> Thus, a U.S.-Mexican treaty,<sup>23</sup> in force since March, 1971, not only pledges both parties to bar illegal imports, but also obligates them to take judicial action under municipal stolen property laws to effect the recovery and return of pre-Columbian objects, Spanish colonial artifacts and religious art, and pre-1920 documents taken from official archives. Although the treaty is intended primarily to protect the Mexican patrimony, it *quid pro quo* establishes that serious professional field work by U.S. archaeologists in Mexico will be welcome. The bi-national feeling of trust that the treaty engenders serves not only to encourage a mutually beneficial exchange of cultural items, but to assure that the scientific community will have continuing access to the field.<sup>24</sup> Moreover, the U.S.-Mexico agreement will serve as the nucleus of a contemplated western hemispheric convention sponsored by the OAS, and eventually perhaps, of an expanded global regime.

3. *Non-governmental Controls.* In order of comprehensiveness and long-term nesting within the overall control structure the three NGO regulatory structures are: international NGO's; domestic NGO's; and private characteristically bilateral, arrangements between museums. The order of presenting these three regulatory structures has been reversed in this study in order to accommodate a clear presentation of the role of ICOM in response to the deficiencies of other control structures. The order of presentation adopted by this article should not, however, blur the perception of ICOM as at least potentially the most comprehensive NGO structure.

a. *Private Agreements.* It is widely accepted that spiraling market for artifacts and objets d'art can be markedly wound down by encouraging short- and long-term loans and exchanges, and by the sharing of cultural information among collecting

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<sup>22</sup> See, e.g., the comments of the State Department's chief representative to the UNESCO Conference, quoted in the Washington Post, April 4, 1970, at B7, col. 8.

<sup>23</sup> Treaty of Co-operation with the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, [1970].

<sup>24</sup> The risk that illegal activity may lead threatened countries to bar foreign archaeological expeditions provides a strong incentive for collector interests to favor transnational controls. The recent refusal of a U.S. museum either to explore the pedigree of a valuable collection of ancient gold, or to cooperate in its return to the probable country of origin, Turkey, has led to retaliation by that country against all archaeological expeditions, even the most impeccably legitimate of them. Washington Post, March 10, 1970, at A12, col. 7. Archaeologists are, of course, often restricted in their field work on the basis of other national policies, such as that of military security.

interests and institutions. Although the UNESCO Convention and the U.S.-Mexican Treaty explicitly second such programs, they are handicapped by the sheer complexity and expense of being effective. Of considerable efficacy in supplementing inter-governmental agreements are private agreements, such as that signed in 1968 between the Metropolitan Museum of Art in New York and the National Institute of Anthropology and History in Mexico City. This agreement has, for example, stimulated a flow of previously stockpiled pre-Columbian objects northward, and ancient Mediterranean objects southward.<sup>25</sup> To be sure, the development of such private agreements is demonstrably incremental, and may be handicapped by a lack of cooperation within a country between a disinterested, "have" institution and an import-seeking, "have-not" institution. Nevertheless, private agreements may serve a useful role in easing the market and in creating mutual trust both among leading collectors of importing countries, and between them and officials and institutions within the exporting countries.

b. *Domestic Non-governmental Regulation.* Private inter-museum agreements are commonly regarded as a luxury of affluent museums. Those less well-endowed institutions with less to offer foreign lenders may feel left out. One alternative to bilateral private agreements are multilateral ones within a single country that enable small museums with limited resources of time and money to receive the benefits of bilateral agreements. In return, all museums, large and small, that are parties to the agreement may be required to adopt restrictive acquisition policies and other self-controls.

In the context of the current crisis, the case for organized, joint self-control of what has been described as the "voracious" acquisition policies of U.S. museums has been well stated:

In order to avoid governmental regulations, museums must act to police themselves. Museums must adopt policies which will provide complete, honest, and potentially public pedigrees for all their acquisitions. . . . [M]useums would clearly find it easier to resist the temptation of buying beautiful objects which they know to have been stolen, if they were to adopt a code of ethics which would regulate their relationships with art dealers.<sup>26</sup>

So far, neither effective voluntary agreements nor an effec-

<sup>25</sup> Zelle, *supra* note 1, at 25. The importance of a comprehensive, global regime of control, of self-regulation by private interests was noted in the official statement of the U.S. Department of State presented to the Senate in its hearing on the UNESCO Convention. *Hearings on S. Exec. Rep. No. 29, 92d Cong., 2d Sess. 11 (1972).*

<sup>26</sup> Coggins, *The Maya Scandal*, *supra* note 1, at 16.

tive ethical code among them, have been forthcoming.<sup>27</sup> Several inhibitions may be responsible. Among them are mutual suspicion among domestic museums; the bugbear or perhaps excuse that an agreement among museums would violate anti-trust laws;<sup>28</sup> the notion that restrictions on museums may serve only to deflect the market to individual collections; the "Elgin syndrome" — that is, the attitude that the object would have been lost had it not been for a collector's or art dealer's purchase and protection of it (thereby sanitizing the intermediary dealer); the reluctance to alienate any source of gifts; and the uniquely U.S. attitude that all museums should be encyclopedic, eclectic, and therefore vast in scope. Inhibitions such as these continue to hamstring the domestic organizations whose leadership is necessary for an effective domestic NGO response to the underlying problems.

The most significant offsetting perception to these inhibitions, which have served to block the development of joint measures, is that a laissez-faire philosophy of acquisition may lead the art and archaeological "have" countries to bar all serious field activity conducted by museum interests, even cooperative ones, from the "have-not" countries, especially the United States.<sup>29</sup>

The strongest joint action taken by U.S. collecting interests so far was a resolution adopted in 1971 by the Society of American Archaeology.<sup>30</sup> In lieu of organized, domestic NGO controls,

<sup>27</sup> In a letter, dated September 19, 1969 to L. Arthur Minnich, Executive Secretary of the U.S. National Commission for UNESCO, Kyran M. McGrath, Director of the American Association of Museums, wrote that although the AAM was prepared "to assist in any means possible to develop a meaningful program to prevent the profitable traffic in objects, especially pre-Columbian, either stolen or smuggled," nevertheless it opposed the "overkill" posed by the suggested imposition of disciplinary sanctions by governments on institutions which acquired illegally imported cultural property. There is no mention of self-regulation as an alternative to the imposition of government sanctions.

<sup>28</sup> E.g., The American Institute of Architects was recently charged by the U.S. government for alleged violations of the Sherman Antitrust Act. The action charged that AIA's practice, under its ethical code, of banning competitive bidding among its members was a restraint against interstate trade. The suit asserted that as a result of the practice, price competition in the sale of architectural services has been eliminated and customers have been deprived of the benefits of free competition. The action would, of course, be legally distinguishable from a "trade" agreement to protect archaeological treasures insofar as the activity controlled in the latter instance would be contrary to both public policy and, in various instances, international agreement. N.Y. Times, May 18, 1972, at 15, col. 1; Wall Street Journal, May 18, 1972, at 5, col. 1; Washington Post, May 18, 1972, at A3, col. 5.

<sup>29</sup> *Supra* note 24, and N.Y. Times, Sept. 18, 1971, at 5, col. 1.

<sup>30</sup> Resolution of the Society of American Archeology, Zelle, ed., Newsletter of the United States National Committee/International Council of Museums [hereinafter cited as U.S.-ICOM Newsletter], Aug. 1971, at 2, col. 1.

several museums have unilaterally adopted strict acquisition policies that proscribe the acceptance by them of items of suspect provenance.<sup>31</sup> Explicit encouragement of such unilateral action may lead in time to a domestic climate more tolerant of proposals for jointly organized codes and controls.

c. *International Non-government Regulation.* In view of the failure of a domestic NGO regime to emerge in the world's greatest art-consuming country as a means of self-controlling what is unquestionably a transnational problem, recourse to the authority of international NGO's, such as ICOM, seems essential.<sup>32</sup> In moving from domestic to international NGO's, not only do the pressure groups expand geographically and quantitatively, but public-private linkages come into play, which, aside from those between the U.S. government and the Smithsonian Institution and the National Gallery of Art respectively, are generally alien to the laissez-faire tradition of museum acquisition in the United States. An advantage of international regulation by NGO's is that as NGO's assume regulatory authority the effective sources of pressure are no longer limited to competing private institutions; rather, national museums with governmental support may come to exert pressure through diplomatic channels, with considerable foreign policy implications.

<sup>31</sup> See the acquisition policies of the University of Pennsylvania Museum, adopted April 1, 1970, ICOM, *Ethics of Acquisition* 7 (undated); the Metropolitan Museum of Art, announced May 3, 1971, U.S.-ICOM Newsletter, *supra* note 30; Harvard University, adopted June 21, 1971, ICOM, *Ethics of Acquisition* 8 (undated). The University of Pennsylvania Museum rejects all items that are unaccompanied by a "pedigree," including legal export papers and a description of provenance. The Metropolitan Museum's system of control involves the dispatch of a description (accompanied by a photo) of all offered items to all countries in which the item could have its origin. Foreign officials are given 45 days to inform the museum that the work is or is not important enough to its patrimony to proscribe its export. Harvard's policy puts the burden on each museum officer responsible for acquisitions in his department to do his utmost to ensure that artifacts and works of art which are being acquired by Harvard either by outright purchase or by gift have left the country of origin with approval of its government and have entered the United States properly, so that Harvard can claim a valid title to the object. Otherwise, rejections of the items and steps to return it to the country of origin are required. This embargo on illicit materials also includes, "if appropriate," materials received on loan for exhibition. Williams, *supra* note 1. It should be noted finally, that other domestic museums have co-operated in returning legally exported items to their countries of origin. Coggins, *Maya Scandal*, *supra* note 1.

<sup>32</sup> The U.S. government has officially supported the work of ICOM. See Report of the U.S. Delegation to the Special Committee of Governmental Experts to Examine the Draft Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 41 (1970), submitted to the Secretary of State, July 27, 1970 (reproduced in the 1970 DEPT. OF STATE, BULL. 22). UNESCO has also supported the development of acquisition codes as a useful element of transnational control.

The role generally of international NGO's in the transnational legal process has been described as one of limited legal authority. NGO's are regarded, indeed usually designed to serve as pressure groups, shapers of public opinion, advocates of preferred policies, and as channels of transnational communication and exchange. In sum, "they can be effective in providing information and applying pressure in the pursuit of their goals. If nothing else, non-governmental organizations provide a mechanism through which private interests in various states can cooperate to bring pressure on their respective governments and on the relevant international institutions."<sup>33</sup> Moreover, NGO's may help relieve overloaded international governmental organizations of demands on them. From even a conventional, modest viewpoint, then, the role of NGO's may at least be called "para-legal."

It is rudimentary, therefore, that ICOM as an NGO offers technical assistance to both intergovernmental organizations and to domestic authorities, as, for example, through its special relationship with Interpol to facilitate the return of clandestinely exported property.<sup>34</sup> But more important than this limited role is the possibility that the policies and norms of ICOM, combined with supporting programs, can be marshalled into a body of effective legal constraints and facilities. The establishment of authoritative standards by NGO's, particularly scientific-technical ones, is an example of the legally operational role of such organizations. Similarly, ICOM's role may be transformed from a para-legal into a quasi-legal or legal one.

There are, to be sure, several other international NGO's operating within this sphere; as recognized by UNESCO these include the International Association of Art, the International Council of Monuments and Sites, the International Council for

<sup>33</sup> W. COPLIN, *THE FUNCTIONS OF INTERNATIONAL LAW* 105 (1966). For an excellent discussion of the decline of governments in the West and the concomitant rise of transnational relationships based on non-governmental organizations, see Hughes, *Whose Century?* 50 *FOREIGN AFFAIRS* 476 (1972). Note too, this comment: "that traditional legal theory denies these entities [NGO's] a specific and formal law creating or law applying role, cannot detract from the bustling reality." W. HOLDER & G. BRENNAN, *THE INTERNATIONAL LEGAL SYSTEM* 293 (1972). See also, S. BASTID, *2 DROIT INTERNATIONAL PUBLIC: LE DROIT DES ORGANISATIONS INTERNATIONALES* 317 (1970); J. LADOR-LEDERER, *INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS* 82-84 (1963); Skjelsbaek, *The Growth of International Nongovernmental Organization in the Twentieth Century*, 25 *INT'L ORG.* 420 (1971); Szalai, *The Future of International Organizations*, 5 *INT'L ASSN'S* 267 (1972); L. White, *INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS* 10 (1951).

<sup>34</sup> Article 17(3) of the UNESCO Convention specifically provides that UNESCO may call on the cooperation of competent NGO's in this respect.

Philosophy and Humanistic Studies, the International Committee on the History of Art, and the International Centre for the Study of the Preservation and Restoration of Cultural Property.<sup>35</sup> Of all the relevant international NGO's, however, ICOM seems to exhibit the greatest potential as an effective transnational mechanism of control.

#### THE INTERNATIONAL COUNCIL OF MUSEUMS

ICOM, established in 1946 with its headquarters in Paris, is composed of about 3,000 institutions and dues-paying representatives of recognized institutions in 100 countries, and of national committees in seventy-four.<sup>36</sup> Financed by members' dues, foundation grants, and UNESCO support, it is a consultative organization of both UNESCO<sup>37</sup> and ECOSOC.<sup>38</sup>

The component bodies of ICOM include a General Assembly, which consists of all members of ICOM and which meets every three years as ICOM's "Sovereign Body"; a 26-member Executive Council that is elected by the General Assembly to prepare and implement programs and budgets; a Board that acts between sessions of the Executive Council; a Secretariat in Paris; the National Committees; several "International Specialized Bodies"; an Advisory Committee that meets every year and is composed of the chairmen of the national committees and the international specialized bodies (the chairman of the Advisory Committee is an *ex officio* member of the Executive Council); and, finally, the UNESCO-ICOM Documentation Center.<sup>39</sup>

The expressed aims of ICOM are to stress the essential

<sup>35</sup> The first three of these organizations, together with ICOM, participated as observers in the UNESCO meetings. Report of the Special Committee of Governmental Experts to Examine the Draft Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property [hereinafter Report of the Special Committee], 9 INT'L. LEGAL MAT. 1038 (1970). The latter two, together with ICOM and the International Council of Monuments and Sites, were acknowledged as competent sources of technical assistance by UNESCO in the preliminary report on the Convention. Preliminary Report, *supra* note 17, at 13. A sixth NGO, the International Federation of Library Associations, had been recognized by UNESCO and had participated as an observer in the UNESCO meetings, but was recently suspended by UNESCO. 24 INT'L ASSN'S 216 (1972).

<sup>36</sup> Interview with Hugues de Varine-Bohan, Director ICOM, in Washington, D.C., June 14, 1972. Other data in this summary, unless otherwise indicated to the contrary, are taken from 1970-71 Y.B. INT'L ORG'S (13th ed. 1971) [hereinafter cited as Yearbook].

<sup>37</sup> The Union of International Associations lists ICOM as an "A" category consultative organization of "proven competence in an important field of UNESCO's work." Yearbook, *supra* note 36, at 1020.

<sup>38</sup> ICOM is listed as a third-category consultative organization to ECOSOC, that is, one that "can make occasional and useful contributions to the work of the Council." *Id.*

<sup>39</sup> The International Council of Museums, I.C.O.M. STATUTES § V, Art. 13 (1969).



unity of purpose behind the museum concept; to further cooperation between museums and members of the museum community in different countries; to protect and promote museums' interests and to widen their influence, and to emphasize the importance of their role in community life and in the promotion of knowledge and understanding among peoples.<sup>40</sup> ICOM's current statement of aims diverges from an earlier statement which emphasized cooperation with "international, educational, scientific, and cultural organizations" toward not simply the "promotion" of "knowledge and understanding among peoples", as expressed in the current statement, but also the "preservation, advancement, and diffusion of museums."<sup>41</sup> If such statements are to be taken as serious articulations of shared norms, the policy framework today for ICOM action in regulating the flow of cultural property would seem to have been restricted. Nevertheless, ICOM has more ambitiously and significantly articulated its current place in the transnational system of control as follows:

It should be noted in the first place that the praiseworthy efforts of UNESCO towards the establishment of international legal regulations serve only to reduce the problems involved in the field of international exchanges. The law has never restrained any but those who choose to respect it or whom it can reach. It is therefore to be feared that each of the governments participating in this project might seek only to project its own interests and that the terms of the law could not put a stop to illegal manipulations, fraud and smuggling. The criticism is not meant in any way whatever to underestimate the extent of UNESCO's efforts but to stress the fact that unless the museums meet their own responsibilities such efforts cannot be fully effective.

In spite of all the cleverness of which fraudulent dealers might be capable, the problem remains simple. The fraudulent dealer is only a go-between who is himself either ignorant of the law, knows how to avoid it or profits from its absence, and he might therefore also elude the proposed regulations. However, the boycott solution remains. . . . It is vital for museums to cooperate and to coordinate their efforts. Their mission can only be fully accomplished within a framework of cooperation between the museums of the entire world — a cooperation which will be capable of surmounting personal, local and national interests.<sup>42</sup>

A decade of ICOM concern about the rampant traffic in art and archaeological treasures led to an April, 1970 meeting of ten experts to design a set of ethical rules for guiding museum acquisitions.<sup>43</sup> Their meeting took place just prior to the meet-

<sup>40</sup> *Id.*, § III, Art. 5.

<sup>41</sup> 1961-62 Y.B. INT'L ORG'S 1341 (9th ed. 1963).

<sup>42</sup> ICOM News, Sept. 1969, at 49.

<sup>43</sup> A short summary of their deliberations may be found in ICOM, *Ethics of Acquisition*, *supra* note 31, at 5.

ing of the Special Committee of Governmental Experts to examine the draft UNESCO Convention, to which meeting ICOM sent observers. After ICOM had drafted a set of twenty rules, it emphasized at the UNESCO meeting two points: that an effective regime of control must govern traffic through the so-called transit countries and entrepôts, and that "the legal measures to be taken [by UNESCO] could be effective only if they were backed up by a moral code for museum workers." ICOM reported on its newly drafted ethical rules, and commented upon the importance of the transnational market in cultural property and the utility of export certificates.<sup>44</sup> At its own 1970 meeting, the ICOM experts recommended, and its General Assembly later adopted, a resolution that museums develop explicit, scientific programs of acquisition; that they acquire and exchange items purposefully, selectively, and cooperatively; that they never acquire items without full documentation; and that they not acquire objects solely for their commercial value. The resolution also urged cooperation among museums in field work and expeditions, and the sharing of documentation between an expedition and the country in which the expedition was conducted. Finally, ICOM adopted a statement that "[a]s a matter of principle, a museum or other collecting institution or individual should act in good faith to make all reasonable efforts to avoid acquiring, directly or indirectly, any object which it has reason to believe, either from inadequate documentation or other available evidence, has been illegally removed from its country of origin."<sup>45</sup> The ICOM resolution was officially characterized as "a first step in establishing a professional ethical code regarding acquisition"; it was to comprise a set of "ethical rules", to which member museums might voluntarily adhere "in working out their own policies."<sup>46</sup> Although in general, ICOM rules are given authority as a "practical application of the . . . Statutes",<sup>47</sup> it is doubtful that the new ethical rules are considered to be "rules" in this technical sense.

The ICOM Secretariat prepared a form for completion by all museums wishing to formalize their adherence to the rules.<sup>48</sup>

<sup>44</sup> See Report of the Special Committee, *supra* note 35, at 1039.

<sup>45</sup> U.S.-ICOM Newsletter, *supra* note 30, May 1970 at 1.

<sup>46</sup> *Ethics of Acquisition*, *supra* note 31, at 5.

<sup>47</sup> I.C.O.M. STATUTES, § XVI, Art. 46 ("Rules").

<sup>48</sup> As a first step in establishing a professional ethical code regarding acquisition, the staff of the .....museum accepts the ICOM recommendations as a minimum standard for the collection of objects, thereby agreeing to assist other countries in safeguarding and

It also undertook the preparation of a summary of domestic antiquity laws, scheduled for completion in 1973, to which will be appended the addresses of local Interpol agencies and a "first list" of museums voluntarily adhering to the rules.<sup>49</sup>

Programmatic support for the resolution is being or will soon be provided by several ICOM services.<sup>50</sup> These are in increasingly close association with Interpol in the dissemination of information taken from a "stolen objects" list and in the developing of a system to verify the legality of exports; a periodic bulletin; the UNESCO-ICOM Museum Documentation Center,<sup>51</sup> which *inter alia* microfilms domestic antiquity laws for ready reference and analysis; an "inter-exchange" service to inform museums of the availability on loan of surplus items and to facilitate the exchange of these;<sup>52</sup> the organization of regional meetings to discuss mutual legal and law enforcement problems; and the dissemination, principally through ICOM News, of information about progressive or model museum acquisition policies.

It is clear that the ICOM "ethical rules", even as institutionally supported, represent only a beginning. Beyond the establishment of a more binding ethical code — the logical next step — what can be done? To answer this question, a clear identification of the values at stake will be productive. One study of the problem lists eleven such values: greater accessibility to art, and visibility of it; the preservation of the national

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enriching their cultural heritage, and to give preferential treatment in all professional activities to other museums adhering to the code.

.....  
Date

Signature of responsible officer

Signing of the agreement is valid upon receipt of this form along with a description of the museum's programme and acquisition policy, and a description of acquisitions and services requested by the museum to ICOM Secretariat, UNESCO House, 1 rue Miollis, Paris 15e.

<sup>49</sup> *Ethics of Acquisition*, *supra* note 31, at 5.

<sup>50</sup> See generally, Zelle, *ICOM Ethics of Acquisition: A Report to the Profession*, 50 *Museum News*, April, 1972, at 31.

<sup>51</sup> The UNESCO-ICOM Documentation Center is the outgrowth of a library established in 1947, by the Museum and Monument Division of UNESCO for its own research and documentation. In 1948, it became a part of ICOM. It is administered by a small staff and is now the largest library of its kind. Its activities are governed by Article 39 of the I.C.O.M. STATUTES.

[i]ts functions shall be (a) to conserve and classify printed and manuscript documents and illustrations of museological interest received from UNESCO, ICOM or other sources, and to make such documents available to members of UNESCO and ICOM and, whenever practicable, to all other qualified experts; (b) to assist the Secretariat of ICOM with any part of its work of a documentary or bibliographical nature.

<sup>52</sup> See U.S.-ICOM Newsletter, *supra* note 30, May 1970, at 3, col. 2, for a description of an exemplary exchange of cultural property.

patrimony; the exporting country's interest in export; the use of art as a good ambassador; the importing country's interest in imports; the enrichment of the national patrimony; the general interest in the breakdown of parochialism; the preservation of differences and the division of labor; the preservation of individual works of art; the preservation of archaeological evidence; the preservation of sets and collections; the preservation of values derived from particular locations; and values served by cooperation in enforcing the existing law.<sup>53</sup>

Of these values, all of which are germane to ICOM's activities, the last four would seem to be particularly so in establishing a global, specifically non-governmental structure of self-control based upon the enlightened self-interests of museums and the nesting within more comprehensive structures of control. Indeed, these four values, with their emphasis on the context of an item, were specifically identified and merged by the ICOM Board to form the two salient principles guiding the design of its ethical rules:

From the scientific point of view, a museum object has no real cultural value unless its origin, history and context are known and documented with maximum accuracy.

From the moral point of view, an object of doubtful origin would be dangerous for the good reputation of the acquiring museum and would consequently present difficulties for future cooperation between that museum and other similar institutions.<sup>54</sup>

It is true, as one useful study of relevant attitudes and controls noted, that individual museums have adopted a laissez-faire viewpoint largely because of a self-fulfilling fear of competitive disadvantage.<sup>55</sup> But museums are questioning more and more whether the "market" is free. The evidence suggests that it is not; foreign governments may, and do, retaliate against illegal exports of their national patrimony by simply shutting off the market to all excavators, collectors, and dealers. Moreover, museums have come to realize that their interests do not necessarily coincide with those of the individual collector or antiquarian.

As the science of museology has developed, scholarship has come to challenge connoisseurship. Museums, and increasingly their client communities, appreciate that wholeness and historic context are preferable to quantity and isolated fragments.

<sup>53</sup> Bator, *supra* note 11, at 7-21. Cf. UNESCO Convention, *supra* note 16, (preamble).

<sup>54</sup> ICOM News, September 1969, at 49.

<sup>55</sup> Zelle, *supra* note 1, at 20.

Broadly speaking, this shifting emphasis reflects a substitution of enlightenment for wealth.

The museum community's increasingly mature emphasis on contextual, cross-cultural, and holistic education cannot tolerate the pillage, "thinning", dismemberment, and separation from geographical and historical context performed by the obliging huaquero, or grave-robber. Thus, the owl of Minerva begins to fly only at the sunset of expectations, when the most precious educational values of cultural objects are forever lost and when national retaliation, such as that taken by Turkey, restricts or even cuts off the source of supply. Having perceived the need for self-controls and having appreciated the coincidence of their emerging values with those articulated by ICOM,<sup>56</sup> museums may find it constructive to support ICOM controls, which nest within the larger framework of a more comprehensive, principally intergovernmental régime of control. One scenario follows of how the ICOM regulatory mechanism might develop.

ICOM's ethical rules have become identified with the more education-oriented, less parochial values which are becoming more widely accepted by museums. As these rules are adopted by the museums, they will serve to mobilize shame<sup>57</sup> not only through diplomatic channels by nation-states that have been pressured by domestic museums, but also by museums which have high standards of acquisition against those with lower standards. Publicity is a strong disinfectant.

A second step for ICOM in transforming its transnational role from a para-legal to a legal one, would be to establish its ethical rules as a code of binding rules, perhaps by incorporating them by reference into the ICOM Statutes. A third step would be to support the rules with sanctions. According to the ICOM Statutes, "among the methods" by which it may carry out its "aims" are:

- (a) to establish itself in the largest possible number of countries and to recruit the greatest number of qualified members,
- (b) to set up study groups and working parties, either permanent or temporary,
- (c) to organise and encourage,
  - i) large international conferences of museum experts,
  - ii) smaller international meetings of specialists on museums and kindred subjects,

<sup>56</sup> ICOM has urged museums not only to reject items of doubtful ownership, but to define and publicize "the criteria which give value to an object." ICOM News, Sept. 1969, at 49.

<sup>57</sup> On the mobilization of shame as an inducement to compliance with the decisions of international organizations, see generally S. SCHWEBEL, ed. *THE EFFECTIVENESS OF INTERNATIONAL DECISIONS* 434-35, 442, 447-56, 482, 496, 511-12, 516 (1971).

- (d) to encourage the international exchange of experts and students, missions of experts, traveling scholarships in museology, and international seminars on the improvement of museum techniques,
- (e) to study the problems involved in the international exchange of museum objects,
- (f) to organize international exhibitions, to keep a watching brief on the quality, technical methods and the coordination of international exhibitions in which museums take part,
- (g) to carry out international surveys,
- (h) to encourage the exchange of information and publications,
- (i) to issue periodical or occasional publications,
- (j) to collect documents dealing with museum subjects, and to make them accessible,
- (k) to promote, in addition to missions of museum experts, the free flow of documents, objects and technical material relating to museums.<sup>58</sup>

It will be noticed that none of these "methods" approaches the legitimacy of a sanction. To be sure, article 12 of the Statutes provides one authoritative sanction: expulsion from membership (and presumably its benefits) of "any persons for not paying their subscriptions or for any other legitimate reason" [emphasis added]. The latter basis for expulsion, though cryptic, might offer a legitimate basis for the imposition of sanctions to support ICOM ethical rules, were it not for its limitation to "persons". Because of this limitation, institutions, the prime target, seemingly would escape the available sanction of expulsion from membership. Perhaps the most feasible, strong sanction would be a voluntary refusal by museums to cooperate in loans, exchanges and research sharing, with museums that do not follow minimal ethics of acquisition.

The eleven methods quoted above at least provide some basis for the exercise of administrative discretion as a minimal sanction, and also provide a framework for the explicit formulation of sanctions, by means of their explicit incorporation into the Statutes.<sup>59</sup> Perhaps more akin to a genuine sanction is the mandate "to promote, in addition to missions of museum experts, the free flow of documents, objects and technical material relating to museums."<sup>60</sup> This mandate might serve to facilitate the exercise of administrative discretion in a manner tantamount to the imposition of sanctions. In any event, the eleven methods serve at the very least to generate positive and informed incentives for transnational cooperation and to

<sup>58</sup> I.C.O.M. STATUTES, § III, Art. 6.

<sup>59</sup> *Id.*, § XVII, Art. 47, provides the procedures for the amendment of the Statutes.

<sup>60</sup> *Id.*, § III, Art. 6, (k).

mobilize shame in response to violations of the rules. The only apparent inhibition to a broader regime of control based on the methods may be found in the first one listed, though it is not necessarily the *primus inter pares* ("to establish itself in the largest possible number of countries and to recruit the greatest number of qualified members"). The foregoing considerations are presented not only to identify available legal or quasi-legal tools, but also to assist in the drafting, already begun, of a new set of ICOM Statutes.<sup>61</sup>

Although the establishment of sanctions under either the current or revised Statutes may be premature and ICOM's effectiveness and efficiency might be endangered by a hasty formulation or attempted exercise of them,<sup>62</sup> nevertheless, their seed may be found in the ICOM Statutes, and in Rule 20 of the ICOM ethical rules:

The museums of any country which bind themselves to follow the ethical rules and the practical proposals formulated in paragraphs 1 to 19 of this document, will agree to offer each other preferential treatment in all professional activities, compatible with the existing laws.<sup>63</sup>

A set of sanctions might become operational on one of four bases: the "methods" listed in the ICOM Statutes; an application of Rule 20 of the ethical rules either voluntarily by the museums or by ICOM enforcement; an amendment of the current ICOM Statutes; or provision for them in the revised Statutes.

We may discern, then, a multi-stage process by which law, acting dynamically as both a constraint and a facilitation, may articulate authoritative procedures and powers, and, combined with various established methods and programs, provide a blueprint for helping govern and further the mutual interests within an entire arena of social action and interaction.

New programmatic inducements to cooperation might well expedite the development of a code of ethics and, later, a quasi-legal or legal regime of control. New ICOM programs might include the establishment of an international committee to review and harmonize domestic definitions and regulations related to the term "cultural property"; the establishment of

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<sup>61</sup> Interview with Hugues de Varine-Bohan, Director ICOM, in Washington, D.C., June 14, 1972.

<sup>62</sup> For an expression of ICOM's disinclination to do either at this time ("If we did, we wouldn't have any members left!"), see Hamblin, *supra* note 1, at 23.

<sup>63</sup> *Ethics of Acquisition*, *supra* note 31, at 3.

a conciliation and mediation panel; the formulation of a legal committee to draft uniform laws for the registration of sites and for excavation; the education of museum personnel, particularly in the preparation of object inventories; an expanded program of technical assistance to UNESCO, pursuant to Article 17(3) of the UNESCO Convention; the encouragement of inter-museum loans and exchanges of indefinite duration; the identification of various art forms as "endangered species", figuratively within the meaning of that term in U.S. conservation legislation; the adoption of corresponding transnational controls; the promotion of visual substitutes, such as rubbings, copies, and projected materials; and the "establishment of international committees of experts qualified to give useful advice to States having difficulty in identifying, collecting and preserving their cultural property."<sup>64</sup>

The endowment of ICOM's conservation programs with external financing would be of enormous assistance. Such assistance might be put toward the photographing and cataloguing of art treasures, and the establishment of a readily accessible means of information retrieval for use by dealers, collectors, and police authorities alike.<sup>65</sup>

Conservation programs, if properly funded, may spin off from feasibility studies, such as the Mayan Reserve Project launched jointly by the Center for Inter-American Relations and the American Society of International Law, which has undertaken to examine the efficacy within a particular area of alternative measures for protection, such as increased guards, international intelligence work, electronic devices, museums, and fencing.<sup>66</sup> Finally, and perhaps most important, financial assistance to ICOM might enable it to provide incentives for museums to develop unilaterally imposed self-controls. Such incentives might include the tying of loans, exchanges and other positive programs to the demonstrated cooperation, enlightened acquisitions policies, and acceptable conduct of the beneficiary institutions. Perhaps it is not too hopeful to expect that such measures would move ICOM well along toward the status of a non-governmental organization, such as the International Committee of the Red Cross, with more than para-legal or rudimentary legal authority.

<sup>64</sup> UNESCO suggested this role for ICOM. Preliminary Report, *supra* note 17, at 13.

<sup>65</sup> The two UNESCO Draft Conventions, *supra* note 16, provide respectively for an International Fund (Articles 11-13) and a World Heritage Fund (Articles 15-17).

<sup>66</sup> Coggins, *The Maya Scandal*, *supra* note 1, at 15.



## CONCLUSION

"Elginism"—the dismemberment of an historical monument, piece by piece, for permanent export—together with all other uncontrolled handling of national art treasures is nothing new. But fed by a mounting interest in objets d'art as speculative investment and by a skyrocketing market in them,<sup>67</sup> the problem has become worse. Keeping in mind the implicated values, it is difficult to dispute the ironic fact "that the warring interests of nations, museums, collectors and dealers, and their failure to achieve agreement on ethics and civilized tactics, have combined to drive price and demand steadily upward and to make thieving too enticing to resist."<sup>68</sup>

In response, a multidimensional regime of transnational controls has begun to emerge which, if the component organizations strive to fit themselves together into a single, functional system with shared goals, may at least gradually come to fulfill the prescription that "[e]verything must be organized the way it is for drugs, with everyone cooperating—police, professionals, museums, governments—to communicate the names of known culprits, to keep up-to-date international files."<sup>69</sup> It is encouraging that this statement, which explicitly recognizes a multiple governmental and non-governmental response to the problem, was made by ICOM, a non-governmental organization that shows an unfulfilled promise of helping shape the entire regime of control. ICOM controls cannot, of course, directly stem the flow of objects of doubtful provenance into the hands of individual collectors, but at least indirectly they can help dry up a market that presently is bathed in inflationary speculation. In working within an emerging framework of intergovernmental structure, ICOM can maintain a closeness of fit with related institutions that permits it to help shape them, as well as to conform to them with a clear awareness of their mutual nesting. Thus, ICOM may well emerge as a creative, as well as responsive, non-governmental organization with more than minimal legal authority in the process of transnational regulation.

<sup>67</sup> It is estimated that the average market value of archaeological artifacts has tripled during the last decade. Gaskill, *supra* note 1, at 26, col. 1.

<sup>68</sup> Hamblin, *supra* note 1, at 24.

<sup>69</sup> Statement of Hugues de Varine-Bohan, Director of ICOM, quoted in Hamblin, *id.* at 26. Cf. a statement accompanying the University of Pennsylvania Museum's acquisitions policy that "[p]robably the only effective way to stop this wholesale destruction of archaeological sites is to regulate the trade in cultural objects . . . just as most countries in the world today regulate domestic trade in foodstuffs, drugs, securities, and other commodities." *Ethics of Acquisition*, *supra* note 31, at 7.

