

THE CASE FOR RETURN OF THE PARTHENON SCULPTURES

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INTRODUCTION¹

In 1986 UNESCO listed the Acropolis and its monuments as a World Heritage Site, because these masterpieces of the fifth century BC “are universal symbols of the classical spirit and civilization and form the greatest architectural and artistic complex bequeathed by Greek antiquity to the world”. This unique crucible of intellectual and artistic thought, the world’s first democracy, some 2,500 years ago, produced the Parthenon and its sculptures. When UNESCO considered the cultural value of the site, it found that it was the supreme expression of the adaption of architecture to a natural site, creating a monumental landscape of unique beauty. It found that the Parthenon’s monuments bear testimony to the religions and civilisations of ancient Greece, and are associated with events and ideas which have never faded over the course of history. So much so that they became the logo for UNESCO itself.

The Doric columns of the Parthenon still stand on the Acropolis, as an enduring symbol of the glory that was Ancient Greece in the time of the great statesman Pericles and the inspired sculptor Phidias. Just below it is the glass roof of the New Acropolis museum, where about one third of the amazing Parthenon “Frieze” which ran for five hundred feet across the top of the building, and most of the sculptures that have survived in Greece are displayed. But most of the surviving “Marbles” – half of the frieze together with fifteen of the stand-alone sculptures on its sides (the metopes) and seventeen Gods from its East and West pediments, are missing. So are sculptures taken from other buildings forming part of the Acropolis ensemble, notably a caryatid and column from the Erechtheion and sculptures

¹ This is a summary by Geoffrey Robertson QC, of detailed legal opinions provided to the Greek government by himself, Professor Norman Palmer QC and Amal Clooney. Chapters 1 and 2 are based on Mr Robertson’s work; Chapter 3 is based on work by Mr Robertson and Professor Palmer; Chapters 4 and 7 are based on Mrs Clooney’s opinion and Chapters 5 and 6 are based on the opinion provided by Professor Palmer.

from the Temple of Athena Nike. In this publication the word 'marbles' will denote all the sculptures taken from the Acropolis – not just from the Parthenon, but from the Erechtheion and the Temple of Athena Nike – which are now in the British Museum.

These were ripped from the standing fabric in 1801–3 by workmen employed by Lord Elgin and then shipped to London, where they are now displayed in a gallery that honours Lord Duveen, a notorious art fraudster. The case for bringing them back home, for reuniting them with the Acropolis and its artwork of which they were once such an integral part, so that the world can appreciate the full power and beauty and historical context of this "greatest architectural and artistic complex", has moved not only Greeks, but (so opinion polls tell us) the majority of the British people. The UK government, rather than engage positively with the Greek requests, has washed its hands of the issue and left it to the Museum Trustees, who have adamantly refused even to negotiate, at least in any meaningful way.

In recent decades, this position has become untenable. There is an increasing jurisprudential recognition of the critical value of cultural treasures to national sovereignty, identity and dignity and a consequent developing recognition of a right in nations to possess and enjoy the keys to their ancient history – by way of recovering from foreign museums or private collections their national cultural symbols. Case law is reflecting an emerging sensitivity to the "value" (in non-commercial terms) of cultural objects and their importance to nations, in a way which might trump claims of private property asserted by organisations or individuals, especially where such objects had been acquired by theft or imperial domination. We consider that international law has evolved to a position which recognises, as part of the sovereignty of a state, its right to reclaim unique cultural property of great

historic significance which has been wrongfully taken in the past – a rule that would entitle Greece to recover and reunite the Parthenon sculptures.

This publication will identify actions that might be taken by Greece under international law, and the *fora* in which they might be heard, because – unless there is a major shift in UK policy – only a judgment by an international court will be likely to result in the reunion of the Marbles in Athens, UNESCO mediation having now been refused.

There remains in Greece a real sense of gratitude to Britain for its historic role in helping to bring about the country's independence and in beating back the Nazi occupation. There has been a spirit of amicable and productive co-operation between British and Greek museums across the field of art history and archaeology at large. In some quarters this goodwill manifests itself in a wish not to alienate opinion in Britain which it is thought would be offended by bringing a legal case against the UK or its renowned institutions. But an international legal action should not antagonise Britain. One of the qualities that makes Britain great, certainly compared with many other countries, is its willingness to abide by international legal judgements, and rational British people should not object to their government being sued for return of stolen property in a court whose jurisdiction the UK has chosen to recognise by treaty. On the contrary, many may welcome the opportunity for judicial resolution of a cause that most of UK citizens think is rightful.

Greece has now exhausted all political and diplomatic steps open to it to recover the Parthenon Marbles. For over two centuries, it has consistently sought the return of the Marbles, through public and private, written and oral exhortations. It has delivered bilateral requests and initiated attempts to negotiate. It has invited the UK to engage with UN procedures, including mediation, without success. Still the UK and the Trustees of the

British Museum are determined to keep the Marbles permanently on display in the Duveen Gallery (or else send them on loan to third countries such as Russia, but not Greece).

Legislation (the 1816 and 1963 British Museum Acts) bars any reasonable prospect of legal action succeeding in British courts, which are bound by these domestic statutes. However, were Greece to engage the United Kingdom in an inter-state action under the European Convention of Human Rights, for breaches of Articles 8 and Article 1 of its First Protocol which protects property, it would stand a reasonable prospect of success. So too would a case under customary international law brought by way of a request from UNESCO (or from the UN's General Assembly) for an advisory opinion from the International Court of Justice. Indeed, without such litigation – unless the UK now U-turns on its unreasonable refusal to consider a diplomatic solution – the Parthenon Marbles will assuredly remain in the Duveen gallery forever.

It is ironic that the British Museum is currently promoting its role as temporary repository of antiquities looted from conflict zones in Syria and Afghanistan, and publicly promising that they will be returned as soon a peace is established. “We are holding an object we know was illegally removed from Syria” announced its current director, Neil MacGregor, “and one day it will go back”.² He did not explain why the museum was holding objects illegally removed from Athens which the Trustees and government were determined would never go back, despite the importance of their reunification with the Parthenon – an importance not only to Greece, but to the world.

² K. Burgess, ‘British Museum guarding antiquity looted in Syria’, *The Times*, 5 June 2015.

CHAPTER 1. THE GLORY THAT WAS GREECE.

Atop a hill in Athens today stand the pillars of the Parthenon, the great temple of Athena, constructed two and a half thousand years ago by architects of the first democratic state. Beneath its high roof once ran a coloured frieze that gloriously depicted its citizens in a procession that celebrated the creative life they had obtained by 440BC, through their laws and religion, their sport and their government.

The legal case for removing the partial Parthenon Frieze and its associated sculptures from the British Museum and reuniting them with their fellow Marbles in the New Acropolis Museum must begin with an assessment of the importance of this enterprise to our understanding and appreciation of the development of human civilization. The sections of the frieze that were ripped down from the Parthenon columns by Lord Elgin's workmen are now anachronistically displayed under harsh light in the Duveen gallery in North London, but even here they give the impression of an ancient newsreel, a three dimensional record of people walking and talking and playing, in the first society that can confidently be described as 'civilised'. Reuniting them with other sections of the frieze which survive in the New Acropolis Museum, custom-built to receive the Marbles and to display them under a glass roof that lets in the blue of the Attic sky above the Parthenon, would be akin to putting together the torn pieces of an ancient photograph, allowing us to see, through the art of the sculptor Phidias, a moving image of the consciousness of a people whose philosophy, culture and politics have influenced the intellectual development of the world.

The importance of the Parthenon, its frieze and its adorning sculptures, has been the subject of hundreds of books in dozens of languages, and lauded in a legion of learned papers and at academic conferences. The Trustees of the British Museum themselves concede that "the

Marbles rank among the highest achievements of mankind... not only for their aesthetic qualities... but also for their central place in the cultural history of ancient nations".³

The unique wonder of the Marbles requires acknowledgement at the outset. It serves to refute the "slippery slope" argument made by some museums, that any legal decision to return them to Greece would be a precedent for emptying Western museums of cultural treasures which have been looted or stolen or purchased from other countries at other times. Whether this might be a *good* precedent (as many would argue) is a matter of indifference: the Parthenon is unprecedented in human history, and putting it back together in Athens is an exercise which can have no close comparison. It is not the equivalent of restoring a cultural icon to a nation robbed of it when under imperial domination, but rather of allowing a wonder of the world to be appreciated in the most authentic way that is now possible. The Parthenon Frieze is a *nonpareil*: the experience of seeing part of it in the Duveen Gallery is as nothing compared to the prospect of seeing all that is left of it while looking up at the Parthenon.

That building's unique historical, artistic and religious importance circa 440 BC also refutes the claim made by the current Director of the British Museum that exhibition of the sculptures in his "world museum", rubbing marbled shoulders, as it were, with sculptures from other periods and civilisations, somehow aids their appreciation. On the contrary, their appearance in a museum which so jumbles its artefacts that tourists can walk from the Duveen Gallery to the Mummies of Tutankhamen's tomb, via the Sutton Hoo burial ship, Goddess Tara from Sri Lanka, Captain Cook's seizures in Tahiti and Islamic pottery, (not to

³ B.F. Cook, *The Elgin Marbles* (British Museum, 1984 & 1997) p.5. Cook was keeper of the Greek collection, and his short book has been re-printed by the Trustees for 30 years and has pride of place in the museum bookshop.

mention the Chessmen from the Isle of Lewis) simply reduces the Marbles to one tit-bit in a cultural smorgasbord.

This chapter begins with an objective assessment of the significance of the Marbles to Greece and to the world.

SOME HISTORY

The Homeric epics composed about 725 BC were oral poems about the Iliad and Odyssey, and we know they were recited on ceremonial occasions in Athens by 550 BC, by which time the laws laid down by Solon had turned the city into a self-governed community. Democracy came about in 508 B.C., when the Ten Tribes from Athens and environs elected representatives to an assembly of five hundred that took political decisions, whilst military strategy was entrusted to elected generals, preparing for battles against the threatening Persians led by Darius and later by his son Xerxes. Their invading army was defeated at the great battle of Marathon (490 BC) in which 192 Athenian heroes lost their lives compared with 6,300 Persian soldiers – a victory reflected in some of the Parthenon Sculptures. Xerxes invaded in 480, forcing the Athenians to flee whilst the city and its shrine on the Acropolis were sacked, but they re-grouped and vanquished the enemy in the naval battle off Salamis.

From this point, Athens developed over the next decades as a city-state with sea power that dominated the Peninsula, leading an alliance with other Greek cities and islands – the Delian League, so-called because its treasury was initially kept on the island of Delos. By 450 BC Athens had what could loosely be termed an Empire without an Emperor. Its political decisions were democratically made by the Assembly, which came to be dominated by Pericles – a great general turned elder statesman. The city enjoyed a government in

which all male citizens participated, with laws that were enforced through a system of paid jurors, and a wealth that was increasing through forced contributions from members of the Delian League, its treasury now moved to Athens. It was at this point that Pericles persuaded the Assembly to spend this war chest on the celebration of peace – through a building programme that would most spectacularly provide a new Temple on the Acropolis for Athena, the Goddess – protector of Athens.

Athens in this period tends to be idealised today for its intellectual achievements – Euripides, Sophocles, and other great playwrights were competing for theatrical laurels, historians like Thucydides and Herodotus were recording its past and philosophers were earning money from thinking aloud in the market place (the Agora, just below the Acropolis). But cultural life was still influenced by religious beliefs and rituals, and myths were still accorded some credibility. Whether or not the rationalists in the Agora believed that Athena had sprung fully clad from the cleaved head of her father Zeus, or that she then competed with Poseidon for the honour of representing the city, they nonetheless joined in the Temple-rituals and sacrifices that were part of community worship and believed in a God-driven providence discernible from signs and oracles. This was not, interestingly, in order to attain a heavenly life after death – no paradise awaited dead Greeks, or even their slain heroes, but merely an after-life as a shadow in a cave, occasionally visited by a mortal as daring as Odysseus.

But the Gods themselves were real in the sense that their ambitions and quarrels helped to explain the world, and given their excitable temperament, they required a lot of assuaging and placating. Hence their place in the Parthenon Marbles, as observers of the greatest ritual that men had devised in their honour. This was the *Panathenaia*, a festival procession on the birthday of the city's Goddess. It assembled at the Agora for athletic games and

musical competitions, and later moved up to Athena's Temple on the Acropolis, to wrap her icon, fashioned from sacred olivewood, in a newly made robe (the *peplos*). Then there would be hymns and prayers and sacrifices of the bones and offal of the herded cattle (the best meat was reserved for mortal feasting, thanks to a deal the cunning Prometheus had once made with Zeus). Oxford Professor of Classical Archaeology and Art John Boardman points out that

*This was no military parade: elders and citizens walked the Panathenaic Way, as well as troops of soldiers, cavalry and clattering chariots, and citizens viewed its progress and ceremonies. There was no real distinction between participants and viewers in the city's celebration of itself and of its divine patron.*⁴

BUILDING THE PARTHENON.

It was in 448 BC that Pericles persuaded the Athenian Assembly to spend its revenue surplus, from Delian League exactions, on a building programme that would restore the Temple of Athena which had been destroyed by the Persians in 480 BC. The Parthenon was constructed on the highest point of the Acropolis, to house a new, twelve foot high statue of Athena, wrought in gold and ivory by the sculptor Phidias. The oblong building comprised forty-six Doric columns, supporting a marble beam on which rested sculptured panels (metopes) beneath pediments which featured groups of carved figures. Around the top of the inside columns ran a frieze, 160 yards long, depicting the festival procession. The construction was overseen by Iktinos, an architect brought in from the Ionian Islands, where a more decorative style of Temple design was in vogue. Kallikrates, master-builder of the wall between Athens and Piraeus (behind which the Athenians had sheltered from the

⁴ John. Boardman and David. Finn, *The Parthenon and Its Sculptures* (University of Texas, 1985), p.12

Persian invaders) was involved in hiring the hundreds of craftsmen brought in from other cities to swell the local work-force, (which presumably included young Socrates, apprenticed to a stone-mason) and the building began in 447 BC. It took fifteen years – the records show that the last workmen were paid off in 432, although the Temple and most of its adornments were in place for an official opening in 438 BC.

The design process for the Parthenon is unrecorded, ironically, the only records that survive are accounts of expenditures. Pericles, Phidias, Iktinos and Kallikrates presumably agreed on the overall design and the choice of subject matter for the frieze and the statues, although Phidias would have been responsible for assigning individual sculptures to particular artists and supervising the quality of their work from clay model to the chiselling of the design from marble blocks. Many of the sculptures had metal appendages – spears, for example, and harnesses for the horses – which had to be cast and then affixed. Most important was the paint. As Professor Boardman explains:

dress, weapons and backgrounds had to be painted, and the waiting metopes had already received their colours. A dark red background helped to lift figures even more realistically off the stone. Reds, blues and yellows picked out the dress and trappings, and the hair, eyes, brows and lips of the figures were painted so that their features stood out boldly even at the great distance from which they would ultimately be viewed. And on the dress, intricate patterns were depicted, borders and figurines.⁵

Amazing as this may be to those schooled by the British Museum's distorted presentation of the "white" Marbles against the grey-walled Duveen Gallery, the fact is that the frieze was a

⁵ Ibid, p.34

riot of colour, standing out beneath the corrugated Doric columns under the blue sky. The painting, which brought the sculptures to life in a way that could never be wrought in cold white marble or in bronze, was important to the overall impact. As Boardman concludes,

*The mortal figures behaved with the calm assurance of Gods, and the Gods fought or observed with an almost human indifference to their supernatural powers or immortality. Never before had the divine and human been so closely assimilated, even confronted, and the heroic figures, of which there were many on the metopes, and whose status lay between Gods and men, seem to demonstrate that spiritually as well as physically there was more in common between them than divisive.*⁶

By the time the Parthenon was completed, it had used up 22,000 tons of marble, quarried and transported from nearby Mount Pentelios. It not only housed the great gold and ivory statue of Athena – now lost to posterity – but served additionally as the Treasury for the Delian League which had been partly emptied in order to build it. The modest cult statue of the Goddess that had always been worshipped, cut from the sacred olive wood, was moved to an adjacent building, the Erechtheion, famous for the life-size statues of six Caryatids standing on its porch (after Elgin there were only five – the sister he seized stands forlornly in an annexe to the Duveen Gallery). At each end of the Parthenon was a triangular pediment depicting the city's founding myths: the birth of Athena and the struggle between Athena and Poseidon for supremacy in Attica. Pediment statues taken by Elgin include the powerful figure of the River God, Ilissos, with Putinesque chest, controversially transported to Russia's Hermitage Museum in 2014. Also held hostage in the Duveen Gallery are two draped and embracing (but headless) females – probably Demeter and Persephone – and

⁶ Ibid. p.35

"perhaps the best-loved of all the Elgin Marbles"⁷ as the Keeper puts it – the head of an exhausted horse, sinking into the sea after it has carried the moon's chariot across the heavens. The torso of its charioteer, and indeed the chariot and the marble sea, are in the Acropolis Museum: the horse would be even more loved were it able to join them.

One matter of some legal significance to the return of the "Elgin Marbles", and for the refutation of the British Museum's argument for keeping the Marbles apart relates to the planning and execution of the Parthenon project. All the Marbles – the sculptures on the Frieze and pediments, and the ninety-two metopes – were designed as an integral part of the Temple. They were a crucial part of the concept, from the very outset, their subject matter and stories selected to glorify the history and the prestige of the city and its protector. They were fashioned from the same marble, from the same quarry, as the high Doric pillars of the temple, and their placing must have been incorporated in the original design. Throughout the fifteen years it took to build the Parthenon, the frieze and the metopes were created at the same time as the columns were being chiseled and erected, and then hauled into their carefully prepared high places as part of the structure of the temple. These were not added adornments, but an essential part of the composition and structure of the building, chiseled precisely to fit and hard-wired into it through a careful scientific process in which holes were drilled in the marble slabs and in the columns, by workmen on scaffolds forty feet from the ground. Buckets of molten lead were hoisted up and then poured around iron clamps and dowels of iron or wood, by which the wall-blocks and column-drums were fastened to one another.⁸ The British Museum's claim that the

⁷ Cook, *op. cit.*, p.66

⁸ Boardman and Finn, *op. cit.*, p.34

sculptures can be appreciated individually, or in part alongside treasures from other civilisations, simply fails to recognize that they were designed as a unity.

Perhaps the greatest tribute to the skill of the architect and his craftsmen, his masons and inspectors, is that the frieze remained on the Parthenon for over 2,000 years, until the depredations of Lord Elgin's workmen, using great force to pull large parts of it down from the building and damaging them in the process. The Marbles survived the civil wars with Sparta, the onset of Alexander the Great, and even the end of Athenian democracy in 322 BC. They were there, five hundred years later, to be remarked upon by Plutarch and to be described in a "travel guide" to Athens published for tourists from Rome. It was the arrival of Christianity that led to their first vandalism: several of the 'pagan' metopes were broken when the building was turned into a Christian church, *circa* 450 AD. It had lasted, by this stage, nine hundred years, and it survived its change of religion largely intact. When the Ottoman Turks conquered Athens in 1458 and built a mosque inside the Parthenon, they showed much greater respect for its adornments, which were still in place in 1674, when they were carefully sketched by Jacques Carrey, an artist who visited with the French Ambassador. It was a war between the Turks and the Venetians which occasioned the only significant damage before the arrival of Lord Elgin: in 1687 a shell from a munition cannon hit the building and caused an explosion of gunpowder the Turkish army had stored there. Several of the collonnades collapsed and part of the frieze was damaged. The Venetian general stormed the building and attempted to souvenir the sculptures on the west pediment, but they were too closely attached for his engineers to pull them down, although they caused some damage whilst trying.

So the Marbles had stuck to the Parthenon, and other parts of the Acropolis, through thick and thin, for two thousand three hundred years. They were an essential part of its

composition, its form and its meaning, as a temple for Athenian worship at the dawn of democracy, as the defining symbol for the Ionian race of their contribution to human progress, and as a reminder to the modern world of the time when humankind first achieved a life we can confidently call 'civilised'.

THE IMPERATIVE OF RE-UNIFICATION.

There is no need, in legal proceedings over the Marbles, to contest their inestimable value. The British Museum accepts and boasts, in its many publications, of their incomparability. How then, can the museum justify its adamant insistence on keeping half the frieze in their crowded museum, and then refuse to allow it to be reunited with the surviving panels of the frieze in the custom-built museum beneath the Parthenon? They do so by lauding "the cosmopolitanism of the something for everyone museum predicated on a pluralist idea of history where the making and understanding of one culture informs and is informed by knowledge of others".⁹ This "something for everyone" approach they illustrate by juxtaposing that section of the frieze which shows boys bringing a lowing heifer to sacrifice, with a recent photograph labelled "Masai youths restraining a bolting (*sic*) cow". The frieze sculpture of horsemen preparing their steeds for the cavalcade is juxtaposed with a picture of an English fox-hunt meeting outside a Georgian mansion. Pictures of Assyrian torture appear, with the explanation "This kind of documentary cruelty was avoided in Greek temple sculpture".¹⁰ These are the given examples of the "something for everyone" museum, where "one culture is informed by knowledge of others". This is nonsense. Fox-hunting, Masai herding and Assyrian torture impart no "knowledge" of any kind about the Marbles. These comparisons are wholly inapposite.

⁹ Ian Jenkins, "The Parthenon Sculpture in the British Museum" (Trustees of the British Museum, 2007) p18

¹⁰ Ibid, pp11-12

They do, however, illustrate the illogical lengths to which the British Museum is now driven in its attempt to justify its refusal to allow Greece, and the world, to see in full the unique “representation of timeless humanity” in the only place where it belongs, a museum on the foothills of the Acropolis, where the gallery designed to exhibit all the surviving marbles has a ceiling of glass through which visitors look directly at the Parthenon. This enables the viewer to see them as they were meant to be seen, on the outside of the Temple and against the Attic sky. In London, the museum houses the frieze anachronistically, as if in a courtyard, and “cut up into sections interrupted by doorways and voids. This arbitrary segmentation has, over the past 200 years, profoundly affected the ways in which the frieze has been read and misread, obscuring its character as a continuous narrative”.¹¹ As Professor Connelly puts it:

The sculptures thus derive their original and essential meaning from their immediate context of one another, the sanctuary they share, and the city for which they were created. Apart from one another they are merely relics, however finely wrought... The wholeness of the Parthenon demands our respect and warrants our every effort to reunify it, such as we can. Let us, for a moment, consider the state of the central figures of the west pediment. Poseidon’s shoulders are held in London while his pectoral and abdominal muscles remain in Athens. Athena’s battered head, neck, and right arm are displayed the new Acropolis Museum while her right breast remains in the British Museum. This deliberate and sustained dismemberment of

¹¹ J.B. Connelly, *The Parthenon Enigma* (Knopf Doubleday Publishing Group, 2014), p.347. Joan Breton Connelly is an American classical archaeologist and Professor of Classics and Art History at New York University.

*what are some of the most sublime images ever carved by humankind brings shame
on those who work to uphold this state of affairs.*¹²

¹² Connelly, op. cit., p.345.

CHAPTER 2: ELGIN, ROBBER OR SAVIOUR?

For many Greeks, their governments and even their school textbooks, Thomas Bruce, seventh Earl of Elgin, is a perfidious British Ambassador who looted the Acropolis and stole its Marbles for personal profit. For stalwarts of the British Museum, it is a case of "No Elgin, no Marbles". Jenkins refers to "the sculptures salvaged by Lord Elgin from the wreck of the Parthenon".¹³ The museum makes so much of its claim that without Elgin's 'salvage' there would be no Marbles to speak of, it is worth remembering that as a matter of law, a robber cannot avoid conviction by arguing that he took better care of the stolen goods than the owner he had robbed. The real issues that arise in this chapter, however, are whether Elgin breached his trust and mis-used his authority as a British plenipotentiary in order to gain personally from 'collecting' and exporting the Marbles, and whether in law he had any permission to do so.

THE ACROPOLIS BEFORE ELGIN

Greece was occupied by the Ottomans in 1458 and that status continued until it won independence from them in 1832. International war-law in this period required occupying powers to respect temples and places of worship or of historical or cultural significance, and it must be said that until Elgin's depredations, the Turks did protect the Parthenon from despoliation. Its religious significance was maintained by the building of a small mosque within the Parthenon, although the Acropolis itself was a strategic position and was used for the stationing of troops. Athens by the time of Elgin had shrunk from a city state to a town of some 10,000, mainly orthodox Christians with their own Archbishop, ruled by a Turkish Governor (the Voivode), with a military Governor (the Disdar) who commanded the troops

¹³ I.D. Jenkins, *The Parthenon Sculptures* (Harvard University Press, 2007), p.9.

on the Acropolis. The Turkish minority were ruled by Muslim civil law, whilst the Archbishop had ecclesiastical law powers over local Greek Christians. Britain, France and a few other countries had appointed Consuls, whose main job was to assist visitors. The Acropolis, as a military site, fell under the authority of the Sultan and the Ottoman government, giving its two Governors power to grant or deny access to the three fifth century BC buildings that were still standing – the Parthenon, the Erechtheion and the Propylaea.

These buildings stood amongst the rubble that had been left after an attack and brief occupation by a Venetian army in 1687. Marble fragments were lying around after the gunpowder explosion and a subsequent attempt by the Venetians to pillage the statues from the west pediment. It failed – their cables broke and some of the massive statues were smashed and left lying on the ground (a head from one of the pedimental figures was taken to Venice and is now in Paris; two heads from a metope were also taken, and are now in Copenhagen). In the 18th century, tourists lured by stories of the still-standing Parthenon would scavenge around its rubble, and even break off and souvenir pieces of attached marble, so long as they paid a bribe to one or other of the Governors. Small pieces of the Marbles were turning up in European cities and a clandestine trade in Parthenon antiquities was underway by the time Elgin's team arrived, although the pieces were very small and the illegality of their export was emphasised by the bribe that was necessary to induce officials to turn a blind eye.

The most important, and directly relevant precedent came in 1780, just twenty years before Elgin, when his counterpart, the French Ambassador to the Sublime Porte – i.e. to the Ottoman Empire and its capital, Constantinople (now Istanbul) – sent an artist and an architect to Athens, initially to make drawings and casts of the Parthenon sculptures. French

influence in Constantinople was high and his enterprise was permitted, over the objection of the British Ambassador.¹⁴ However, most importantly, the Ottoman officials refused to give the French Ambassador a licence (called a *Firman*) to remove any of the Marbles from the walls of the building. Turkish administration was wayward and corrupt, but it would not countenance defenestration of the temple sculptures. As that is precisely what Elgin did, twenty years later, the question must be asked, how did he do it?

LORD ELGIN'S MISSION

Elgin was, by most accounts, an under-bright but over-ambitious Tory, a Scottish peer who never succeeded in his life's ambition to be made an English peer with a permanent seat in the House of Lords. He drove himself deep into debt by building a lavish country house, "Broomhall" in Scotland, and his money problems were only temporarily solved when he married an heiress. He had uneventful diplomatic postings to Berlin and to Prussia, and was chosen to go as Ambassador to Constantinople. He may not have heard of the Parthenon until Thomas Harrison, the architect who had built Broomhall "in the Greek style", fired his imagination with the prospect of adorning the mansion with plaster casts of the Parthenon sculptures and paintings. It was an idea that Elgin took up with the Foreign Minister, and even with William Pitt, the Prime Minister, in the hope that the government would pay for his artists and workmen to travel to Athens and bring back objects "beneficial to the progress of the fine arts in Britain". But they declined, pointing out that there were already plenty of sketches of the ruined Parthenon. Elgin, undeterred, decided to hire a small team of experts and to send them to Athens at his own expense.

¹⁴ See W. St Clair, *Lord Elgin and the Marbles* (Oxford University Press, 1998), p.63.

It is clear that Elgin's motives were not, at the outset, mercenary and that he had no intention of extracting or taking away any of the sculptures. He envisaged that his team would draw them, take plaster casts and that he would bring those back to Broomhall. He would benefit personally, of course, because Hamilton had assured him that Broomhall would then be a beacon for classic art and would encourage more use of Hellenic style in British architecture. But he set out to do no more than the French Ambassador had been permitted to do in 1780, namely to draw and to mould, and would almost certainly have known that it was impermissible to take away any original sculptures: the French ambassador had been refused this permission.

In 1800 Elgin's artists arrived in Athens, led by the Italian painter Giovanni Lusieri, and began their work from a distance. It took six months before they were allowed to enter the Acropolis, and that was achieved only when they bribed the Disdar, the military Governor, paying him £5 per day. But he refused to allow them to erect scaffolding or take moulds – this exercise, he explained, would require the special permission of the Sublime Porte. At this time – May 1801 – relations with Britain could not have been better: the Ottomans had rejoiced in Nelson's victory in the battle of the Nile, and the British had then driven the French out of Egypt, which had reverted to occupation by the Ottoman Empire. It was a good time to ask for favours. So after Elgin (who had at this stage not even bothered to visit Athens) was told by Lusieri that his workmen would need a Firman to be able to access the site, he instructed a young clergyman in his employ, Reverend Phillip Hunt, to draw up a request.

THE FIRMAN.

The lawfulness of Elgin's behavior must be judged by the rules that applied in Athens in 1801. That governing law was the "holy law of Islam" – i.e. sharia – which the Sultan (i.e. the legislator) could amend by a formal decree, known as a Firman.

Hunt drew up a request for permission for:

*artists... in the service of the British Ambassador... to enter freely within the walls of the Citadel and to draw and model with plaster the ancient temples there to erect scaffolding and to dig where they may wish to discover ancient foundations and liberty to take away any sculptures or inscriptions which do not interfere with the works or walls of the Citadel.*¹⁵

This request was conveyed to the Sublime Porte by the dragoman (the official Turkish interpreter at the British embassy) and the permission – the Firman – was allegedly given in July 1801. The original Turkish document has never been found, although Phillip Hunt told the UK Select Committee in 1816, fifteen years later, that he had kept a copy of the Italian translation. If this copy of the Italian, as translated into English, really does reflect an original Turkish Firman, then it is clear Elgin disobeyed it. It recites a request for five painters to enter and draw, and to take mouldings, and "to dig the foundations to find inscribed blocks that may be preserved in the rubbish", and adds that no obstruction should be given if they "wished to take away some pieces of stone with old inscriptions". The five painters should be allowed "to make moulds from their ladders around the ancient temple" and permitted to copy, model, and to "dig according to need the foundations to find

¹⁵ Ibid, p.87.

inscribed blocks among the rubbish" and no opposition should be made "to the taking away of some pieces of stone and inscriptions and figures".¹⁶

It is abundantly clear from this Italian document that neither the seeker nor the granter of permission envisaged that Elgin's men would rip down and carry off large sections of the frieze, or any of the metopes and pediment statues. The permission was carefully limited to drawings, mouldings, and items found as a result of digging in the rubbish. "Inscribed bricks" and "pieces of stone with inscriptions" might include fragments of the Athenian treasury lists on which the payments to workmen were recorded, if they were dug up from the rubble. But nothing was to be taken from the building, and there was no right to remove or damage its frieze or sculptures. Letters from Elgin and his wife to Hunt and the artist, Lusieri, written just after the issue of the Firman, give no indication or instruction about doing more than digging for pieces of marble and "medals". Seizing and exporting metopes, or parts of the frieze, they could never have contemplated – other than as unlawful actions, requiring a further Firman which would have been unlikely to be granted.

What seems to have happened is that the Sublime Porte entrusted delivery of its reply to the Reverend Hunt, who used it to browbeat the Civil Governor (the Voivode) who (as it happened) needed a favour from the Porte and thought that Lord Elgin could help to arrange it if he co-operated with Hunt. The military Governor had recently died, and his son at this point similarly craved the help of English diplomats to support his claim to succeed to his father's office. The British Vice Consul in Athens, although thinking that the two Governors would not dare to "extend the Firman to such a point" as to permit the extraction of a sculpture, nonetheless patriotically supported Hunt's first demand, which

¹⁶ Ibid, pp.339-341.

was to detach the 7th metope, and the Civil Governor gave in. Hunt boasted that "I did not even mention my having presents for him till the metopes were in motion" – although the Governor doubtless expected them. The seventh metope was cut off the Parthenon wall and lowered by 20 workmen with chains and windlasses, and then carted down to Piraeus and put on board a British ship. When it was put to Hunt by the Select Committee, years later, that both he and the Governor must have known that the Firman did not permit such expropriation, Hunt replied "that was the interpretation which the Voivode was induced to allow it to bear". The inducements were of course bribes ('presents' whose cost, Hunt told the Committee, he could not remember) but in this case also the hope – carefully nurtured by the devious cleric – that Elgin would put in a good word for the Voivode at the Porte.

Elgin was undoubtedly 'in' on the conspiracy, "success beyond our most ardent hopes" he wrote after Hunt told him what had happened.¹⁷ The seizure of the seventh metope was successfully accomplished, and Hunt and the team quickly proceeded to strip the Parthenon. They ripped off its walls six continuous slabs from the frieze, and two more metopes. Another metope was broken in the haste of removing it, and one slab of the frieze was broken on the way to Piraeus. The bribes to the Voivode, the Disdar and the other local officials continued, mainly of money, but sometimes of horses and telescopes and expensive items of clothing, and the Voivode received a splendid set of duelling pistols.

There is some evidence that the local Turks felt guilty. An English traveller, observing the ropes and pulleys that were carrying off a metope, noticed the Disdar dropping a tear and crying "never again" as the object brought down adjoining masonry and marble. But this wretched official accepted the bribes, accepted Hunt's deliberately distorted interpretation

¹⁷ Ibid, p.94.

of the "Firman", and asked the British to do him favours at the Sublime Porte. One favour Elgin was said to have done, was to obtain letters from the Porte approving the actions of both corrupt officials, delivered to them by Lusieri in October 1802, to provide some protection against being sent to the galleys should English influence wane. These letters have never been produced, and no copies have been found to exist in Turkish archives – both circumstances suggesting that they did not exist, or if they did, they were not of much legal consequence. British Museum publications allege that they retrospectively validate Elgin's breach of the Firman, but in that case he would surely have kept a copy.¹⁸

Elgin said the Firman was issued on 1 July 1801, but it is nowhere to be found among the archives which hold all the Firmans issued by the Sultan at the time. Hunt certainly had in his possession a document which he said was a Firman, which he showed to the civil Governor, but – astonishingly – did not keep. The only document he ever produced was a copy of what he claimed to be an Italian translation. As neither Hunt nor Elgin spoke Italian, and nor did the Governors, this could not have been much use, although Hunt sent it to the Select Committee after he had given evidence. The Committee had it translated into English and attached to its Report, giving the document itself no scrutiny – perhaps because Hunt and Elgin in evidence had conceded that their removal of the Marbles had in any event exceeded its terms.¹⁹

¹⁸ Cook, for example, states that "Elgin obtained documents from the Turkish government approving all that the Voivode and Disdar had done" (Cook, op. cit., p.75). Then he admits these documents have not survived, but "had they done so they would no doubt support Elgin's claim that everything he did had been approved by the Turkish authorities". There is every doubt that they would have done so. Cook is writing propaganda, not history.

¹⁹ Select Committee, *Report on the Earl of Elgin's Collection of Sculpted Marbles*, 25 March 1816, at 23 (Elgin) and 57 (Hunt).

Recent scholarly analysis of this Italian-language document has cast doubt on whether it was in fact the translation of a Firman, because it contains none of the tell-tale insignia and protocol that attended such a solemn decree. For a start, it was not even signed by the Sultan, but by his army chief, the Deputy to the Grand Vizier. It was not headed by the Sultan's emblem and did not carry his distinctive monogram (his name, his father's name and the prayer for perpetual victory, which was always written in Arabic). Nor does it include the routine compliments in Arabic, to all who are mentioned, and most tellingly, the formal preambles always present in a decree are entirely missing, as is the ritual formula which introduces the Sultan's command. It is not dated in Arabic, like all other Firmans, and does not have the routine reference to its place of issue. There must now be the strongest suspicion that whatever the original document was, and however accurately it was translated into Italian, it was not a Firman.²⁰

But if not a Firman, what was it? The suspicion must be that it was simply a letter, setting out the recommendations of the writer, Kaimmakam Seyid Abdullah Pasha, a high-ranking officer in the Ottoman army and Deputy to the Grand Vizier. Given the gratitude of the Ottoman military to Britain at the time for restoring their rule in Egypt after expelling Napoleon's army, the Deputy Grand Vizier would doubtless have been happy to write the letter, but it could not have taken effect as a legal document, let alone as a Firman of the Sultan. It would of course have carried great weight with the military Governor, and the civil Governor also, who would take it as reason and authority to permit the sketching and moulding and rubble-grubbing around the Acropolis to which it refers, but could not (without the lavish bribes) have been induced to believe that it gave permission to strip the

²⁰ See Professor Vassilis Demetriades, "Was the Removal of the Parthenon Marbles by Elgin Legal?" (paras 15-20) Annex A, "Memorandum of the British Committee for Restoration of the Parthenon Marbles" in Seventh Report Session 1999-2000, Department of Culture, Media & Sport, VOL III Appendix 2 (printed 18 July 2000)

Parthenon. For many reasons, then, this inauthentic document provides no support for the British Museum's claim that Elgin acted lawfully. As between Elgin and the Sublime Porte there was no meeting of minds and therefore no contract.

ELGIN'S TRUE MOTIVATION.

It is clear from the available evidence that the stripping of the Parthenon walls by Elgin's team was blatantly in excess of the power he had been granted by the Firman, if indeed it was a Firman. Hunt's actions, bullying and bribing Turkish officials, were actions that Elgin knew about and that Elgin, quite ecstatically, approved ("beyond our most ardent hopes"). Not even the British Museum propagandists can excuse Elgin on this score. Cook (formerly keeper of the Greek collections at the museum) admits that "it may be questioned whether the Firman actually authorized even the partial dismantling of buildings in order to remove the sculptures."²¹ Plainly it did not, and Hunt admitted as much to the Select Committee in 1816 when he said that the Governor had been "induced" to "extend the precise permissions of the Firman".²²

The final toll was to dispossess the Parthenon of fifty slabs and two half-slabs of the frieze, and fifteen metopes, as well as various sculptures from other buildings on the Acropolis – all, as Hunt later said, that was worth taking. Under his orders, serious damage was done to the building by sawing through the frieze slabs, removing the cornice so as to detach the metopes and breaking the entablature on which they rested.²³ The words "vandalism", and "looting" are appropriate descriptions of Elgin's actions: he destroyed the temple, by taking

²¹ Cook, op. cit., p.73.

²² Ibid.

²³ See R. Browing, 'The Parthenon in History', in C. Hitchens, *The Parthenon Marbles. The Case for Reunification* (3rd edn, Verso, 2008) p.12.

all of its treasures that his agents thought were worth taking. Although he had not come to the East with pillage in mind, the circumstances allowed him the opportunity to pillage and he took that opportunity. He knew he was doing wrong, but he knew also that he would get away with that wrongdoing, because as British Ambassador he had immunity from any legal consequence. He could not resist the temptation to take what was not his to take.

By the time he was examined about his motives by a Parliamentary Select Committee, fifteen years later in 1816, he insisted that they were pure: he had intended merely to have the sculptures drawn and moulded (which was true), until he came to Athens and realised that they were in peril of "imminent and unavoidable destruction... had they been left many years longer the prey of mischievous Turks, who mutilated them for wanton amusement or for the purpose of selling them piecemeal to occasional travellers". This was a lie, crafted to play to racist views about "terrible Turks", although it was, in fact, they who had prevented the French Ambassador, at the height of his own influence, from behaving like Elgin. The proof of Elgin's deceit is the fact that he never visited Athens at all until June 1802: the fatal first removal of the metope had been in the previous year, and the removal of much of the frieze had been accomplished before he arrived. His claim to have acted to save the sculptures only after seeing them in "imminent and unavoidable peril" was, therefore, demonstrably false. It has, however, been advanced by the British Museum in all of its publications, on the basis that the end justifies the means – although Elgin may have "exceeded" his licence, he did so to save the statues from destruction. Had he not acted, they would have been lost to the world forever. "No Elgin, no Marbles".²⁴

²⁴ Jenkins, *op.cit.*, p.16.

On analysis, the proposition that Elgin acted as a selfless saviour is clearly untrue and the claim that without him, the Marbles would have been lost to posterity is highly dubious. There can be no justification of Elgin's conduct, and no credible assertion that he obtained an independent property in the removed Sculptures, on the basis of agency of necessity or some kindred doctrine operative under English law. In any event the applicable law on this point (and on any other question affecting title) would have been the law of the Ottoman Empire, as the *lex situs* of the Marbles at the relevant time. The British Museum has never shown that Elgin's removal of the abstracted Marbles was justified as an act of rescue under Ottoman law, or that such removal gave him title in the capacity of an agent of necessity. Given that the alleged rescue would have resulted in the permanent dispossession of the party from whose benefit the rescue was purportedly performed, such an argument would be impossible to sustain under any applicable system of law.

Elgin's statement to the Select Committee in 1816, in which he claimed to have "proceeded to remove as much of the sculptures as I conveniently could" when Turks told him that they would pound the marble to make mortar, was obviously false, because he delightedly authorised most of the removals before he ever set foot in Athens and before he spoke (if he ever did) to Turkish soldiers stationed there. His intention was to exploit the opportunity that Hunt had opened up by his bribery of the Governor and his wilful misinterpretation of the "Firman", to seize virtually free of charge (other than the bribes to keep the officials sweet) as many priceless antiquities as he conveniently could.

It follows that the museum's narrative of Elgin as a man motivated by concern to save the Marbles for posterity is a distortion of the truth. The claim is that

*Elgin's initial intention was to improve the arts of his country by having drawings and moulds made. He revised his plans when confronted by the continued destruction of the sculptures.*²⁵

But Elgin was not 'confronted' by anything, his first visit was in 1802, by which time his agents had taken most of them. He only revised his plans when Hunt reported that he could take advantage of a corrupt and weak Governor and could unlawfully remove the remaining sculptures and transport them to Britain without sanction. There was no "continued destruction" by the Ottomans and he did not so much "revise" as completely change his plans when he realised he could get away with a major act of despoliation. He thought nothing of the Greeks, and there is no evidence of the concerns he later claimed to have about the safety of the sculptures – there is no record, for example, of him even raising this so-called concern with the authorities with whom he was in regular contact at the Sublime Porte, or with MPs or Foreign Office officials. When he arrived in Athens for the first time in 1802, Hunt arranged for him and his wife to have their names carved on a column of the Parthenon, an act of vandalism that betrays the egotism and arrogance of the man and the mission. His letters show no understanding of the fact that he was despoiling a temple, and depriving the Greek people of their national treasure. The Marbles, suddenly, were his for the taking and he took them, knowing that he had no legal authority but that possession would be, in his case, nine-tenths of the law.

THE AMBASSADOR'S CONFLICT OF INTEREST.

There was another unattractive aspect of Elgin's behavior, which stemmed from his fiduciary duties which he owed his country as British Ambassador to the Sublime Porte. He

²⁵ M. Caygill, *Treasures of the British Museum* (British Museum, 2009), p.21.

had, on his appointment, canvassed the Foreign Secretary and even the Prime Minister about his Parthenon project, they had declined his invitation to involve the government. Yet he used his influence as British Ambassador to obtain the alleged Firman and then allowed it to be mis-used so as to facilitate the theft of cultural property which, as occupiers, the Turkish officials had a duty to protect. What must have factored into his thinking, in deciding to steal the Marbles, was his own diplomatic immunity, as Ambassador he was safe from arrest or reprisals throughout his mission. These considerations came back to haunt him during the 1816 debates. There, Lord Ossulston raised the question

*Whether an Ambassador, residing in the territories of a foreign power, should have the right of appropriating to himself, and deriving benefits from objects belonging to that power. It was not the respect paid to Lord Elgin, but to the power and greatness of the country which he represented, that had given him the means of procuring these chefs-d'oeuvres of ancient sculpture.*²⁶

Elgin's abuse of his diplomatic office affected many MPs who spoke in the debate. "If Ambassadors were encouraged to make these speculations, many might return as merchants"²⁷ commented one, while another thought it "a matter of public duty not to hold out a precedent to Ambassadors to avail themselves of their situation to obtain such property, and then to convert it to their own purposes".²⁸

One leading lawyer – the MP Sergeant Best – said that the preservation of national honour was more important than improvement of national taste. Elgin had "obtained the Firman out

²⁶ HC Deb 23 February 1816 vol.32 cc824-5 (per Lord Ossulston); Hitchens, op. cit., p.129; D. Rudenstine, 'Lord Elgin and the Ottomans. The Question of Permission', 23 (2001-2002) CARDOZO LAW REVIEW 23,

²⁷ Hitchens, op.cit., p.131.

²⁸ Ibid, p.129.

of favour and had used it contrary to the intention with which it was granted". Best derided Elgin's legal argument, pointing out that the Firman gave no power to pull down and remove, and that neither Hunt nor Elgin had claimed that it did. "The Firman could do nothing without bribery", Best exclaimed, and listed some of the bribes that had been used "to corrupt the fidelity of a subject of another state – the servant of a government in alliance with our own, and under obligations to us... these Marbles had been brought to this country in breach of good faith".²⁹

These sentiments were widely shared in the British establishment of the time, and most MPs who spoke in the debate were critical of Elgin's behaviour but thought that since the Marbles were now in London, their theft was a *fait accompli* and they should make the best of it by obtaining the Marbles from Elgin at a bargain price. The vote was by 82–30 in favour. Most MPs were actually critical of Elgin's behavior, on moral and on legal grounds, although a sufficient number were prepared to support the transfer because of the pricelessness of the Marbles and the sense that the actual price was so low that Elgin could not be said to have benefited financially, given that it was exceeded by his expenses.

NO ELGIN, NO MARBLES?

Is the catch-cry "No Elgin, no Marbles" true? It is the British Museum's contention that had the Marbles been left on the Parthenon, where they had stood for 2,300 years, they would have been destroyed over the next thirty years. This could not have happened as a result of Turkish susceptibility to bribes, which (except for Elgin's bribes to the two Governors) were accepted only for small pieces dug up or lying in the rubble, not for stripping the temple. But as the Greek war of independence got under way after 1820, there would certainly

²⁹ Ibid, pp.145–7.

have been some danger to the Marbles from the fact that they were located in a military zone of strategic importance. There was in fact some minor damage to the Parthenon walls during the Greek army's siege of the Acropolis in 1821–22 and again when the Turks in turn besieged it in 1827, but in neither case would the Marbles, had they still been in place, have been affected. The sculptures which Elgin had left survived – in some measure because by this time the Greek commanders were well aware of the importance of protecting the Parthenon and orders were given to the artillery in 1822 to avoid aiming at its columns. Indeed, it was towards the end of this siege that the Greek army learnt that Turk soldiers were melting down lead clamps from the Parthenon to make bullets. One of the Greek generals offered to send a quantity of bullets to the Turks, if they agreed to stop interfering with the Parthenon.³⁰

There seems little doubt that the Marbles, if left in place, would have survived the vicissitudes of the war and the petty corruption of the Turks, long enough to fall into the safe custody of the Greek Archaeological Service in whose hands the Parthenon was placed in 1835. The museum's claim that Elgin 'saved' or 'salvaged' the sculptures, (i.e. "No Elgin, no Marbles"), is simply propaganda. The overwhelming likelihood is that, without Elgin, the Marbles would still have been on the Parthenon when Greece won its independence.

³⁰ Hitchens, *op.cit.*, p.12 and p.59.

CHAPTER 3. IN THE KEEPING OF THE BRITISH MUSEUM.

Reverend Hunt's seizure of the first metope, followed by the pulling of half the frieze off the wall and the levering and winching off the temple of seventeen pediment figures and fourteen more metopes did considerable damage to the Parthenon. It took 300 workmen over a year to dismantle the frieze. Some of the sculptures were cut off to make them thin enough for transport to Piraeus and in the course of the removals the cornice above the south metopes and part of the east pediment were destroyed.³¹ There are reports of losses in transit, and some of the sculptures spent a year or so at the bottom of the sea before they could be salvaged from the wreck of '*The Mentor*', a ship that Elgin had chartered to convey them to London. Those that travelled free-of-charge in British warships arrived in better condition, although Elgin was not at home to greet them. from 1803 to 1806, he was held under a form of 'house arrest' in France, Napoleon's revenge for his humiliations by the British in Egypt. He secured his release by entering into a surety to return to France if required, and this dogged his steps until Napoleon's defeat at Waterloo.

ELGIN'S OFFER.

Elgin returned to England a much diminished figure – in fortune, health and status. He lost his Scottish peerage, his wife (whom he had to divorce, expensively and publicly), the lower part of his nose (perhaps from syphilis) and his dreams of surrounding himself with the sculptures of Phidias at Broomhall. he could not afford its upkeep, and discharged most of his servants. Worst of all, however, was the opprobrium, in high society and low, from his despoliation of the Parthenon. The Hellenic movement was by now campaigning for

³¹ J. Greenfield, *The Return of Cultural Treasures* (Cambridge University Press, 3rd edn, 2007), p.61.

humanitarian intervention to free the Greeks, and Lord Byron led the demands for poetic justice on Elgin, the Scottish 'plunderer' of the de-marbled temple.

Childe Harold, on his pilgrimage, reflects.

*But most the modern Pict's ignoble boast
To rive what Goth, and Turk, and Time hath spar'd.
Cold as the crags upon his native coast,
His mind as barren and his heart as hard
Is he whose head conceiv'd, whose hand prepared,
Aught to displace Athena's poor remains.³²*

Elgin had to devise a counter narrative as the prelude to selling the Marbles to save himself from bankruptcy, and this would require him to demonstrate that he had both good title and good faith. In 1810 he published anonymously *Memorandum on the Subject of the Earl of Elgin's Pursuits in Greece*, which presented him as a philanthropist who had acted in order to save the Marbles from the corrupt Turks and the greedy French. The following year he wrote to the Prime Minister and to the Paymaster General offering "his" sculptures for sale, at a price of about £70,000, to which should be added (he hinted heavily) his long-desired English peerage. It came as a shock to be told that the government would offer only £30,000, without the peerage.

³² Byron, *Harold's Pilgrimage*, Canto II stanzas 12 & 13.

THE SELECT COMMITTEE.

In 1816, close to financial ruin, Elgin petitioned Parliament, which agreed to set up a Select Committee to advise on whether the Marbles could be acquired by the government, and if so, on the appropriate terms. The Committee heard briefly from Elgin and Hunt, and from a number of witnesses as to artistic worth, and reported (to Elgin's great disappointment) that the Marbles should be obtained for £35,000. The Report was debated by Parliament on 7th June 1816 and its recommendation was adopted by 82 votes to 30. These proceedings have been relied upon by the Museum to legitimize its possession of the Marbles, which once acquired by the government in consequence of the vote were then vested by an 1816 Act of Parliament in the Trustees and their successors in perpetuity. However, the Committee Report and Commons vote have no legal effect, in international law, in legitimising Elgin's looted acquisitions.

The Committee's proceedings were casual and mainly directed to valuation – there was no real inquiry into Elgin's claims to title or to philanthropy. The proceedings were not adversarial: there was no opposing party, no cross-examination of Elgin and Hunt, no evidence from the Governors of Athens or the officials of the Sublime Porte, no opinion from the law officers as to the legality of Elgin's behaviour. Incredibly, the Select Committee did not look at a single document. Hunt said that originals had disappeared but he had a copy of the Firman, in Italian, at his home – he was not asked to retrieve it for examination. The failure to make any enquiry of the Turks makes the proceedings a travesty. Elgin lied about his motive to save the Marbles ("the prey of mischievous Turks") from "imminent and immediate destruction" and the penny did not drop that he had not visited Athens to make such an assessment until most of the Marbles had been removed. Hunt, like Elgin, conceded

that the Governor had been 'induced' to exceed the terms of the Firman.³³ When asked whether there "was any opposition shown by any class of the natives" he confidently replied "none", despite admissions in letters from his colleague Lusieri that "there were murmurs" from the Greeks and the Turks as Hunt demanded various sculptures.³⁴

The shoulder-shrugging insouciance of the Committee's Report is clear from their lack of concern about the actual wording of two Firmans Elgin claimed to have received³⁵ and their preparedness to adopt anything that he or Hunt said about them.

*Your Committee had no opportunity of learning from Lord Elgin himself their (the Firmans') exact tenor or of ascertaining in what terms they noticed, or allowed the displacing, or the carrying away of the Marbles. But Dr Hunt, who accompanied Lord Elgin as Chaplain to the Embassy, has preserved and now has in his possession a translation of the second Firman... but as he has had it not with him in London, to produce before your Committee, he stated the substance, according to his recollection...*³⁶

The fact that the Select Committee could not even be bothered to ask Hunt to produce the only allegedly original document (albeit in an Italian translation) from his home outside London shows the Committee's utter lack of interest in establishing Elgin's title. Elgin had, in his letter to the Prime Minister in 1811, admitted that his successor as British Ambassador,

³³ See fn.17 above.

³⁴ Hitchens, op. cit., p.61.

³⁵ One firman, issued in the summer of 1801, allegedly granted access to the Acropolis for general purposes with permission to draw, model and remove, then supplemented by a second firman granting special licence to excavate in a particular place. See Report from the Select Committee of the House of Commons on the Earl of Elgin's Collection of Sculpted Marbles, House of Commons, London, 1816 at p. 4.

³⁶ Greenfield, op. cit., p.74.

Mr Adair, had told him that "the Porte denied that the persons who had sold the Marbles to me had any right to dispose of them", but Mr Adair was not called to give evidence of Turkish denial, and nor was Elgin asked to explain either the displeasure of the Porte, or his belief that the Marbles had been 'sold' to him when he had paid no money for them other than bribes.

The weakness in Elgin's title was, however, clear from such evidence as the Committee bothered to gather: the unseen Firmans would not have authorised the ripping down and export of the Marbles, and Elgin had abused his position as Ambassador to enrich himself with inherent parts of the temple. Some of the MPs who voted to pay £35,000 – about half of Elgin's actual expenditure – made clear that they condemned his conduct but were prepared to take advantage of it so long as he did not make a profit out of the transaction, and at £35,000 that objective would be achieved.

There was, in the debate, no thought for the nascent Greek independence movement, although one prescient MP, Hugh Hammersley, did propose an amendment whereby

*Great Britain holds these marbles only in trust till they are demanded by the present, or any future, possessors of the city of Athens; and upon such demand, engages, without question or negotiation, to restore them, as far as can be effected, to the places from whence they were taken, and that they shall be in the meantime carefully preserved in the British Museum.*³⁷

Hammersley's motion was too hypothetical to be put to the vote, but it reflected a view amongst many MPs who voted in favour of the acquisition. It was a bargain at £35,000 (the

³⁷ St Clair, "Lord Elgin and The Marbles" p.255.

experts had all valued the Marbles more highly) and at that price Elgin would be denied any profit so it would not be a precedent for other British Ambassadors to abuse their office for private gain. Elgin himself was distressed at the offer, but so were his finances. Ironically the government's money never reached his grasping hands, as it was intercepted by his creditors.

RESPONSIBILITY OF GREAT BRITAIN

The legal actors in public international law are States. Although Elgin obtained the Sculptures initially for his own benefit (intended to decorate his estate at Broomhall) his actions as Ambassador triggered the responsibility of the State for which he acted. The six most cogent pieces of evidence in this regard are that:

- he used his role as ambassador to obtain the *Firman* – or the apparent license – in July 1801;
- he specifically benefited from a situation that had arisen owing to British military success in Egypt against Napoleon;
- the Italian copy of the alleged *Firman* made reference only to Lord Elgin as ambassador ('our sincere Friend his Excellency Lord Elgin, Ambassador Extraordinary from the Court of England'), not in his private capacity, and the permission granted by the signatory, the deputy Grand Vizier, was in conformity with 'what is due to the friendship, sincerity, alliance and good will subsisting *ab antiquo* between the Sublime and ever durable Ottoman Court and that of England';

- shipments of the Sculptures back to England were to be sent to Lord Elgin 'care of the Foreign Office in London';³⁸
- a number of the shipments of Sculptures that left the port of Piraeus for Britain were taken by, or accompanied by, HMS naval ships;³⁹ and
- the so-called permission for the final shipments of marbles to leave Piraeus in February 1810 was obtained by Lord Elgin's successor as Ambassador to Constantinople, Sir Robert Adair.⁴⁰

Under international law, the conduct of an ambassador can engage the responsibility of a state.⁴¹ This can be the case, even when that conduct is outside his ambassadorial duties.⁴² While Lord Elgin's own personal motive may have been that of private acquisition (or, as he later claimed, bettering the situation of the fine arts in Britain), he used his ambassadorial influence and reputation in order to gain some sort of permission from the Ottoman authorities who in turn responded positively precisely because of the favour in which the 'Court of England' had come to be held. Even the House of Commons Select Committee

³⁸ William St Clair, *Lord Elgin & The Marbles – The controversial history of the Parthenon sculptures*, 3rd edn, Oxford University Press, Oxford, 1998 at p 114.

³⁹ This included 44 cases of marbles on the *HMS Braakel* in February 1803 and the final shipment of five cases of marbles on the *HMS Hydra* in April 1811. In March 1810 48 cases were taken by a chartered ship with escort from the *HMS Pylades*. *ibid* at pp 113, 158 and 160.

⁴⁰ *Ibid* at p 156.

⁴¹ See Article 4(2), Draft Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001.

⁴² Article 7, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001.

noted that he had used his standing as ambassador improperly in order to obtain the concession.⁴³

In any event, Lord Elgin's taking of the Sculptures from Athens could also be considered a State action by subsequent events, notably upon Parliament's purported acquisition thereof by the 1816 statute. Even if conduct is not directly attributable to a state, the state can still be responsible if it acknowledges and adopts the conduct as its own.⁴⁴ The 1816 acquisition was a ratification by Britain of the earlier takings by Lord Elgin, which thus engaged Britain's international responsibility. So whether Lord Elgin's actions as ambassador were attributable to Great Britain, or Great Britain in the alternative ratified his earlier actions with the 1816 acquisition, the taking of the Parthenon Marbles from Athens can be attributed to Great Britain for the purposes of international law.

There is an additional question as to Ottoman responsibility. Did the Ottoman State have authority to alienate or relinquish title to those public monuments on its territory? Professor Jeanette Greenfield suggests that public buildings and religious monuments (such as the Acropolis monuments and any attached Sculptures) benefit from a strong presumption against state divestment.⁴⁵ In any event, Greece in 1801 was an occupied nation, and should have benefited from the protection offered to occupied nations, which included protection to its religious monuments. As we have seen, the only licence Elgin could ever produce was the Italian translation of what purported to be a Firman, which did not extend to the

⁴³ See Report from the Select Committee of the House of Commons on the Earl of Elgin's Collection of Sculpted Marbles, House of Commons, London, 1816 at pp 6-7.

⁴⁴ Article 11, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission, 2001.

⁴⁵ Jeanette Greenfield, *The Return of Cultural Treasures*, 3rd edn. Cambridge University Press, Cambridge, 2007, at pp 81-2

removal of the Marbles. In so far as the local Governors acquiesced in the looting, that acquiescence was unlawfully obtained by copious bribes.

THE BRITISH MUSEUM ACT (1963)

The Marbles, having been thus acquired by the government, were transferred by Act of Parliament on 1st July 1816, to the Trustees of the British Museum. This Act offensively enshrined in British law the description of the Marbles as “the Elgin Marbles”, and purported to pass to the trustees the title that the government had acquired from Lord Elgin. However, Lord Elgin’s title – or lack of it – was vulnerable to the general principle of private international law, that “the proprietary effect of a particular assignment of movables is governed exclusively by the law of the country where they are situated at the time of the assignment”.⁴⁶ So far as concerns the purported transfer to Elgin (procured by bribery and the turning of a blind eye) the applicable law was therefore that in force at Athens in 1801–1803. Over the past two centuries, the British Museum has conspicuously failed to show that, under the governing system of law in force at Athens at the time of the removals, Lord Elgin obtained any form of title other than a bald and unlawful possession, and any form of title that he was capable of conveying lawfully to the British Museum.

Sharia law in Greece under Ottoman occupation would have required express permission from the Ottoman authorities for removal of the Marbles, which Elgin did not have – the Firman, at least in its Italian translation, did not permit the seizure. It would follow, in international law, that the Marbles never became a lawful part of Elgin’s property.

⁴⁶ *Winkworth v Christie Manson & Woods Ltd* [1980] Ch. 496, p.513, quoting *Cheshire & North's Private International Law*, 10th ed. (1979), p.527.

As for the 1816 acquisition and purported transfer to the Trustees, the *lex situs* of the assignment was England, where the 1816 domestic legislation may well be effective to make the Trustees the owners under English domestic law. This would not prevent an international court from refusing to recognise their ownership under international law.

The museum is an independent institution, established and governed by statute, currently the British Museum Act of 1963. That Act continues the role of the Trustees as a body corporate: there are twenty-five, fifteen appointed by the Prime Minister, five by the trustees themselves, one by the Queen, and four by royal societies. Although the trustees claim total independence, it is clear that the Prime Minister's power to appoint most of them could bend the body to the government's will: if it wanted the Marbles returned, the Prime Minister could begin by appointing persons as trustees who were known to favour this course. However, they would currently be bound by their statutory duties to "keep the objects comprised in the collection of the museum within the authorized depositories" (Section 3(1) of the British Museum Act 1963), although they might, in their discretion, send them on loan, outside the UK (Section 4). They may permanently part with an object only if "in the opinion of the Trustees the object is unfit to be retained in the collections of the museum and can be disposed of without detriment to the interests of students" (Section 5(1)(c)).

Under this power to dispose of an object "unfit to be retained in the collections of the museum", it might be possible for the Trustees to decide, as a matter of morality, that it was wrong to keep stolen property and right to re-unite the Marbles with the Parthenon. But the Trustees refuse to accept this interpretation, and it is not likely that English courts would overrule them. In one recent case the High Court ruled that the power did not extend to

allow the Trustees to return artworks, even though they had been stolen by the Gestapo.⁴⁷ In any event an action now by the Greek government in an English court would be met by the statute of limitations, which provides a deadline for actions which must be brought within six years after the cause arose. One important reason for taking action in an international court is that national limitation laws do not apply.

LORD DUVEEN AND THE CLEANING SCANDAL.

The Acropolis sculptures, re-described by the 1816 law as “the Elgin Marbles”, were exhibited in “The Elgin Room” of the Museum until 1939. It was dingy and somewhat cramped, but the Marbles with their “brown gold patina” were at least displayed in their original honey-coloured warmth. They were gently washed, from time to time, to remove the soot and grime that had settled on them in North London. But in the late 1930s they were improperly and incompetently ‘whitened’ by use of copper rods and wire brushes and lavish application of the scouring agent carborundum. Original surfaces had been cut away, large sections of surface had been scraped off; a worker had sat in a side room for months applying a hammer and chisel to remove the patina from the figures of the frieze to make them “whiter than white”. A secret inquiry concluded.

⁴⁷ In *Attorney-General v Trustees of the British Museum* [2005] EWHC 1089 (Ch) the Trustees of the British Museum unsuccessfully sought the consent of the Charity Commission under section 27 of the Charities Act 1993 to return certain drawings to the descendants of a Jewish lawyer murdered by the Nazis in Czechoslovakia. Section 27 enables the Commission to authorise the trustees of a charity in certain circumstances to waive on behalf of the charity its entitlement to receive any property, where the charity trustees would otherwise have no power to waive this entitlement, but in all the circumstances regard themselves as being under a moral obligation to do so. The ruling that section 27 cannot be invoked even in morally compelling cases to justify the relinquishment of objects by national museums labouring under statutory prohibitions on disposal led to the enactment of the Holocaust (Return of Cultural Objects) Act 2009 which relaxed the prohibition in Nazi-related cases.

*The damage that has been caused is obvious and cannot be exaggerated.*⁴⁸

This was a scandal and should have been a public scandal, but the trustees were determined to hush it up. As one of them, the Archbishop of Canterbury, wrote to the Director,

*I had the opportunity of a short talk with the Lord Chancellor this afternoon and he was of the opinion that no such express publication of what has happened to the Elgin Marbles should be published... Certainly the last people to whom I think any statement should be voluntarily sent would be the Greek Government!*⁴⁹

That was because, of course, the museum's case for holding on to the Marbles largely depended on its guarantee that they would be better protected in the Elgin Room than atop the Parthenon, in the traffic and fumes of Athens, or in a museum run by Greeks. The truth, on the contrary, was that whilst in the custody of the museum, an attempt was made over two years, 1937-1939, to change their colour, and that some had been permanently damaged by methods that no competent custodian would dream of using. Although the press got wind of the problem in 1939, it was artfully covered up: two workers were made scapegoats and the Museum misleadingly presented the episode, for half a century, as a minor matter. As late as 1999 museum officials instructed Culture Secretary Chris Smith to mislead Parliament by stating that "the Parthenon sculptures had been kept in very good condition – very good care has been taken of them."⁵⁰ That was untrue.

⁴⁸ See I.D. Jenkins, 'Cleaning and Controversy, The Parthenon Sculpture 1811-1939', THE BRITISH MUSEUM, OCCASIONAL PAPER 146 (2001).

⁴⁹ Letter from Canterbury to Forsdyke dated 14 December 1938 (available at, http://www.britishmuseum.org/about_us/news_and_press/statements/parthenon_sculptures/1930s_cleaning/correspondence.aspx).

⁵⁰ W. St Clair, "The Marbles in London", in: *The Parthenon. The Repatriation of the Sculptures* (University of Indiana Press, 2004), p131.

How did this disaster – which controverts the Museum’s claim to be a better guardian of the Parthenon heritage than any institution in Greece – come to pass? It was the consequence of the trustees abdicating their responsibility and allowing the Marbles to fall under the influence of Sir Joseph – later Lord – Duveen, in whose gallery they repose today. He made his fortune as a fraudulent art dealer, buying paintings in Europe and enhancing and mis-attributing them for subsequent sale to naïve American collectors.⁵¹ His unsavoury reputation was well known to the Trustees. He had suborned the art expert, Bernard Berenson, who gave the false attributions to paintings that Duveen would knowingly sell at extravagant prices on the pretext that they were old Masters.⁵² He then evaded tax on his profits and was convicted in America in 1910. He was frequently in the courts, as a defendant when his victims realised they had been gulled,⁵³ or as a plaintiff, suing victims for libel when they revealed his frauds. After the war he came to England, where he was protected by plaintiff-friendly libel laws (although they did not stop the gossip) and his money, artfully directed to political parties and royalty, soon secured him a knighthood and later a peerage.⁵⁴ He determined to refurbish his reputation by association with the Elgin Marbles so he donated a large gallery in which to house them.

Duveen made no secret of his determination to alter the Marbles by having them cleaned until they were “whiter than white”. He may have been ignorant of the fact that they were originally honey-brown, although his biographers think that he was out for his own reputational dazzle. He is recorded to have said “Wait until you see them with their London

⁵¹ St Clair, “Lord Elgin and the Marbles” (Oxford, 1998) p 294 and see Colin Simpson “The Partnership. The Secret Association of Bernard Berenson and Joseph Duveen” (1987).

⁵² St Clair (above) p.294.

⁵³ *Hahn v Duveen* 133 Misc. 871 (N.Y. Misc. 1929).

⁵⁴ See Simpson, (above) pp.24-5; 164

grime removed and in their first purity. They will be luminous".⁵⁵ Museum experts knew that this would be an historical and archaeological distortion and that the surface of ancient artefacts should not be tampered with. Nonetheless they went along with Duveen's demands for the brightest of lighting in the gallery and the removal – by wire brushes – of some of the exteriors. Duveen's foreman ordered museum employees to scour the Marbles and actually to chisel away some of their precious details so they would shine more brightly. As Sir Jacob Epstein put it, in a letter to *The Times* in 1939, "the ignorant and disfiguring scraping had ruined these priceless objects".⁵⁶

It is difficult not to attribute blame – or at least reckless indifference – to the Trustees for the damage which ensued at Duveen's direction. The inquiry found as a fact that "A foreman employed by Lord Duveen in connection with the new Parthenon Gallery had expressed Lord Duveen's desire that the sculptures should be made as clean and white as possible".⁵⁷ The foreman had gone around pointing out that "one of the slabs chosen for Lord Duveen to show in his new gallery was not white enough" and he ordered workmen to "brighten it up... the sculptures should be made as clean and as white as possible for Lord Duveen".⁵⁸

It is quite obvious that the Trustees and museum Director, in return for Duveen's donation of "his" gallery, allowed him to treat the Marbles as his own and to damage and distort them

⁵⁵ Ian. Jenkins, "Cleaning and Controversy. The Parthenon Sculptures 1811–1839", British Museum Occasional Paper no.146, p.11.

⁵⁶ Letter to *The Times*, 22 May 1939.

⁵⁷ British Museum, *Interim Report by the Board of Enquiry Appointed by The Standing Committee of the Trustees of the British Museum at a Meeting on 8th October 1938* (available at http://www.britishmuseum.org/about_us/news_and_press/statements/parthenon_sculptures/1930s_cleaning/the_interim_report.aspx); Jenkins, op. cit., p.46.

⁵⁸ I.D. Jenkins, *Documentary evidence for the cleaning of the sculptures 1937–8* (available at http://www.britishmuseum.org/about_us/news_and_press/statements/parthenon_sculptures/1930s_cleaning/documentary_evidence_1937-8.aspx).

until their altered state became obvious. Duveen's foreman had of course paid money to the three museum employees who did the damage, as an inducement to scour and scrape in a manner that went far beyond the museum's own cleaning protocols. The inquiry reports were kept secret for half a century, while the museum meanwhile pretended that little or no damage had been done: a workman had merely used "unauthorised" techniques. Only when William St Clair exposed the scandal in 1998 did the museum "come clean", and publish the Reports as annexes to a paper by its loyalist Ian Jenkins. What is remarkable about this document and indeed about all museum-published books, is that they attribute no blame at all to Duveen, whom they always – even today – present as an unblemished philanthropist. The Elgin Marbles have been proudly displayed in the Duveen Galleries since 1962, enabling them to glorify the image of a man who made his money by art fraud and bribery.

The display itself is deliberately distorting – as Professor Mary Beard explains, "it has been designed to disguise the fact that large sections of the frieze are in Athens...Overall the effect (and the intention) of the gallery design is to efface what remains in Athens... the Duveen effect is to squeeze that memory out".⁵⁹ In the Duveen Gallery, the visitor cannot possibly recapture the glory of the Parthenon, or gain any perspective or coherence in a frieze, part of which remains in Athens. In this "something for everyone" Museum, the Marbles are deracinated and diminished.

TO RUSSIA WITHOUT LOVE.

Although the Trustees will apparently not trust Greece with a "loan" of the Parthenon sculptures in their possession, they are content to allow the Director to play with their Marbles to serve "cultural diplomacy" – Neil MacGregor's idea of the museum promoting

⁵⁹ Mary Beard, "The Parthenon" (Profile Books, 2010) p167-8; 205

human rights, by lending its treasures to countries where rights are notably lacking. In pursuit of this proclaimed objective, the River God Ilissos, pilfered by Elgin from the Parthenon pediment, travelled to a museum in Russia in 2014, at a time when that country was being subjected to sanctions on account of its invasion of the Ukraine. President Putin welcomed the transaction when he personally inspected the God at The Hermitage Museum in St Petersburg (where he had recently closed down the British Council) but thereafter sent more troops into the Ukraine. Far from discouraging rogue states, Mr Macgregor's "cultural diplomacy" has served to encourage them. when the museum lent the Cyrus Cylinder to Iran in 2010, President Ahmedinejad exploited the exhibition for propaganda purposes, staging at its opening a pageant in which Cyrus wore the uniform of Basij militia, the government's death squad. Sending Marbles, piecemeal, for exhibition in pariah states is hardly an act of which Pericles would have approved.

The delivery to Russia did, however, raise interesting legal issues, because the loan required an export licence, and the granting and withholding of such licences is clearly a matter of government concern and capacity to intervene.⁶⁰ *The Times*, which was permitted to break the story exclusively, and "spun" it as a coup by the Director, did not enquire whether export licences were applied for, or, on the assumption that they were granted, why a government agency had permitted the loan at a time when it was imposing other sanctions on Russia.

⁶⁰ "Do museums and galleries need to apply for export licences? Yes, museums and galleries must apply for export licences. A museum or gallery is more likely to be arranging a temporary loan of an object for an exhibition abroad rather than seeking a permanent export. A temporary licence application by a national museum or gallery is not normally referred to an Expert Adviser" (Arts Council England, *UK Export Licensing for Cultural Goods, Procedures and guidance for exporters of works of art and other cultural goods*, 2015). The Guidance remarks elsewhere however that the Minister may withdraw or modify a licence at any time.

This whole episode belies the UK government's repeated claim that it has no power over the actions of the "independent Trustees". It did have power to permit or refuse the export of the River God through its agent, the Arts Council of England. It could influence the Trustees to enter into the non-binding mediation over the future of the Marbles that UNESCO has sought. The very fact that the Prime Minister, as head of the government, has the power to appoint a majority of the Trustees indicates that these appointees could be expected, and could if necessary be required, to heed the government's view of the national interest.

The Trustees maintain, in their publications, the position that they will only "discuss" the future of the Marbles; it is not for "debate", let alone a matter to "mediate". Their bookshop, near the Duveen Gallery, offers their millions of visitors an array of books on the Parthenon sculptures, carefully excluding the leading work by William St Clair, *Lord Elgin and The Marbles* (now an Oxford University Press paperback) which exposed the Duveen cleaning scandal and which contains a devastating indictment of Elgin.⁶¹ It also excludes the best-written (and least expensive) popular book about the Marbles debate, a brilliant polemic by Christopher Hitchens.⁶² This petty censorship demonstrates the intellectual cowardice of an institution supposedly dedicated to the truth. But very occasionally, the mask slips. Neil MacGregor, as he was posing for *The Times* photographers beside Ilissos on its temporary plinth in St Petersburg, incautiously confessed: "It looks much better [here] than it does in London".⁶³ If the River God looks much better at the Hermitage, how much, much better would he look alongside all the other statues captured by Elgin, when reunited with his counterparts in the New Acropolis Museum?

⁶¹ W. St Clair, *Lord Elgin and The Marbles* (Oxford Paperbacks, 3rd edn, 1998).

⁶² C. Hitchens, op.cit.

⁶³ V. Ward, 'Elgin Marbles: Museum must come clean over deal with Russia, says Geoffrey Robertson QC', *The Telegraph* (5 December 2014).

THE CASE FOR THE BRITISH MUSEUM, REFUTED

The British Museum opposes any reunification of the Sculptures at Athens, however short-lived and however distant in time. Although its Trustees have their hands tied by the terms of the 1963 Act, they have never suggested that the ban on de-accession should be removed. Nor does the 1963 Act bar a long-term loan (which the Greek government has, in the past, requested) but this has not been considered. recent statements by the Museum, rejecting UNESCO mediation, make clear that the Trustees believe that "their" Marbles must never be returned to Greece. If the British Museum prevails, the world will never again see all the surviving pieces together in the place where they were created. If asked "do you oppose for all time the collective presence of the Sculptures at Athens, however ardently the people of the world would like to see them reunited?" the British Museum would answer 'yes'. In this manner does the British Museum show its disrespect for the integrity of monuments and for the study of architectural elements in their original setting. But this disrespect can be challenged by legal action.

The Trustees oppose any referral of this controversy to independent evaluation or to third party resolution. This is despite the sophisticated and effective mechanisms that have been developed in recent years to provide such evaluation and resolution, and runs counter to a consistent policy within Europe and elsewhere in favour of the consent-based amicable resolution of cultural property disputes (and disputes generally).⁶⁴

The British Museum cannot today deny that the Parthenon Sculptures would be curated to the highest standards at Athens, and it has never denied that the Acropolis Museum is the

⁶⁴ See for example Civil Procedure Rule 26.4 and N. Palmer, 'Waging and Engaging – Reflections on the Mediation of Art and Antiquity Claims' in: *Litigation in Cultural Property – Papers from the International symposium of November 11th 2011 at Geneva* (Art Law Centre, Geneva, 2012), p.91 *et seq.*

optimum environment for any collective and integrated display of the objects. Nor does it deny that a collective and integrated display of the entire monument, along with all the ancillary artefacts, is in principle desirable. Although the Director of the British Museum has spoken of the exiled fragments as works of art in their own right, that is not their primary character. To characterise them as free-standing objects in a "something for everyone" museum is an irrational reason for justifying their continued absence from the edifice upon which they were originally installed or for implying that they can tell us more as isolated fragments.

In 2001, a Parliamentary Select Committee summarised the British Museum's case in six propositions.

Proposition 1. *"the Elgin marbles are properly and legally held by the British Museum"*

They are 'legally' held, if at all, only as a result of the legal lock-up imposed by the 1816 and 1963 Acts. But title by English domestic law does not convey or connote a right of retention under public international law or under the international law of human rights. In short, any domestic title may be overridden by international law, in proceedings brought in international courts.

The 1816 Act of Parliament "vested" the Marbles in the Trustees of the British Museum, regardless of whether Elgin himself had good title – it referred to "ancient marbles and sculptures" which have been "collected" or "assembled" by him. One might ask, why was an Act of Parliament needed to make the Trustees the owners? The Trustees had acquired title to numerous other things before 1816, whether by gift or purchase. No statute was required to convey or confirm their title. If Lord Elgin had title by virtue of his acquisition

from the Ottoman authorities he could surely have passed title to the Trustees without the need for any statutory underpinning.

The plain inference is that Parliament passed the Act in order to correct and repair Lord Elgin's lack of title, rather than to transmit to the Trustees a title that Lord Elgin already had. There is ample evidence in the debate that Parliament knew of the defects in Elgin's title, and presumably intended to pass a law that would cure them, and to justify the payment of £35,000 for the nation to acquire the Marbles. This inference exposes the Act as a device to sanitise a bald possessory title (itself obtained by unlawful removal) and to upgrade possession into ownership, to the exclusion of any surviving interest on the part of the Ottoman Empire, the city of Athens or the people of Greece. It was, in effect and in purpose, a laundering device – the first “whitewashing” of the Parthenon sculptures.

No international tribunal should accept a title acquired under such dubious conditions. Any such Tribunal must take account of the current state of international law,⁶⁵ the growing influence of international law on domestic law,⁶⁶ and the British Museum's professional undertaking to keep abreast with developments in the law.⁶⁷ These last-mentioned developments must include developments in international human rights law and customary international law, both of which can profoundly affect the integrity and direction of museum collections and collecting practice. In other words, legal developments are not confined to developments in English domestic law. A state cannot under international law legitimise the unlawful acts of its citizens in foreign countries by its own retrospective

⁶⁵ See for example *Kuwait Airways Corporation v Iraqi Airways Company* [2002] 2 A.C. 1075, at [114] per Lord Steyn.

⁶⁶ *Ibid.*

⁶⁷ Museums Association Code of Ethics (UK), Clause 10.2. “Keep up to date with *developments in the law*, museum practice, social policy and public expectations.” (Emphasis added).

legislation, any more than the Nazis could pass laws vesting title in expropriated artworks in their own museums. International law strikes down amnesties passed by local Parliaments to immunise perpetration of international crimes. An international court should withhold force and credit from a law passed in 1816 which purports to legitimise the unauthorised looting of a temple belonging to another country.

Proposition 2. *"they are displayed there [in the British Museum] in the unique context of a museum of world cultures which permits the intellectual and visual comparison of the art of great civilisations"*

The fallacy of this argument has been exposed in numerous academic papers⁶⁸ and in Chapter 1. The Greek proposal is to exhibit the Sculptures at a specially designed museum at Athens, already fully functional and highly praised in its conception and execution. The Acropolis Museum contains most of the other fragments from the Acropolis and is within vision of the monument itself. That is the most compelling context in which to view the Sculptures. The value of the local and true context far exceeds that of incarceration in the Duveen Gallery.

Proposition 3. *"the marbles are now irrevocably established as museum pieces and their return to the structure of the Parthenon to which they originally belonged is not envisaged"*

This is not an argument against re-unification. It is obvious to everyone that the Marbles cannot be stuck back on the Parthenon. The question is whether the "Elgin" Marbles belong

⁶⁸ E.g. W. St Clair, 'Imperial Appropriations of the Parthenon' in: JH Merryman (ed), *Imperialism, Art and Restitution* (Cambridge University Press, 2006), pp.94-95.

in a gallery in North London, or with the rest of the surviving Marbles in a museum beneath the Parthenon.

Proposition 4. *"the marbles are freely accessible in the British Museum to over 5 million visitors a year, three quarters of whom are from abroad"*

The Sculptures would of course be equally accessible in Athens, and in a far preferable context. The proportion of overseas visitors would probably exceed 75% once the massive initial attendance expected from the Greek public had subsided. The Acropolis Museum is already visited by hundreds of thousands of people a year. It has been estimated that less than 40% of the visitors to the British Museum visit the Duveen Gallery where the Sculptures are held, and there is no evidence at all that they would not visit if the sculptures were not amongst its many exhibits. At the Acropolis Museum, of course, the corresponding figure would be 100%. Visitors to the British Museum who do walk through the Duveen Gallery do not linger long – there are Egyptian mummies and other treasures to see before closing time. In the Acropolis Museum, all its exhibitions, videos and literature are dedicated to the Marbles.

Proposition 5. *"removal of the marbles to Athens would encourage similar claims for other objects from other countries which would undermine the comparative principle at the heart of the British Museum's purpose"*

The "comparative principle" is not absolute. It must yield to justice and to the imperatives of cultural and institutional integrity. Claims from other countries must be addressed on their merits, none will be for objects as important and precious as the Marbles. The British

Museum owes in any event an ethical responsibility to involve and respect the interests of 'originating communities'.⁶⁹

The assertion about the precipitation of claims is unsubstantiated. The Parthenon Sculptures differ from other museum objects in UK museums in that they emanate from a unique and surviving monument, and their return to the parent structure would carry negligible weight as a 'precedent' for other acts of return. The true position, as maintained by Frederic Harrison as long ago as 1890, is that the Parthenon Sculptures "...stand upon a footing entirely different from all other statues. They are not statues, they are integral parts of a unique building, the most famous in the world..."⁷⁰ This uniqueness was also acknowledged by the UK Foreign Office, which advised that the Marbles had "a close association with the history and national life of Greece and that they fall into a small and narrowly restricted category of works of art which should remain in the [Greek] national heritage... It seems to us... that the Elgin Marbles represent a special case to which special arguments apply and which would not necessarily constitute a precedent if it were decided to return them to Greece".⁷¹

Proposition 6. *"removal of these and other objects from the British Museum would discourage potential donors from making gifts to the British Museum."*

⁶⁹ Code of Ethics for Museums, Museums Association UK, 2008, para 7.5. "All those who work for or govern museums should ensure that they. [...] 7.5 Respect the interests of originating communities with regard to elements of their cultural heritage present or represented in the museum. Involve originating communities, wherever practical, in decisions about how the museum stores, researches, presents or otherwise uses collections and information about them."

⁷⁰ F. Harrison, 'Give Back the Elgin Marbles', *The Nineteenth Century*, December 1890, at 980-987.

⁷¹ Select Committee on Culture, Media and Sport, *Seventh Report – Cultural Property, Return and Illicit Trade, Appendices to the Minutes of Evidence* (2000), Appendix 12 – Memorandum submitted by the British Committee for the Restitution of the Parthenon Marbles, Annex C – A Brief History of British Concern (available at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmcmuned/s/371/371ap17.htm>).

This proposition is unsubstantiated as to fact, and the very opposite may be the case. The psychological and behavioural effect of a relinquishment of the Sculptures upon potential donors is entirely speculative. In any event the hypothetical detriment as regards future donors is irrelevant when set against the overriding imperatives of law, justice and cultural and institutional integrity. It is entirely possible that once the legal merits of the claim are advanced and promoted – for instance, by the commencement of legal action – certain donors will regard the museum's conduct in preventing reunion as shameful, and will direct their charitable donations elsewhere until the situation is resolved.

UNLOCKING UK LAW

The only argument invoked by the Museum that even plausibly supports the Museum's retention is short-term and devoid of any moral basis, namely that the 1816 and the 1963 Acts vest the Marbles in the British Museum Trustees and prohibit them from parting with possession. Section 3(4) of the 1963 Act reads

Objects vested in the Trustees as part of the collections of the Museum shall not be disposed of by them...

Although a long-term loan of the Marbles is entirely possible under existing domestic law. But given the 1816 and 1963 Acts, legislation will probably be required to enable the permanent return of the Parthenon Sculptures, such legislation -- directed to the relinquishment of objects from national museums -- is clearly within both the power and the experience of the UK Parliament. To legislate for the release of the Parthenon Sculptures would be neither an unprecedented step nor a conspicuous break with legal tradition.

Within the United Kingdom there is a long history of releasing cultural objects to nations, communities and individuals. This history is shared by museums and other institutions in the United Kingdom. Museums appear to harbour no principled objection to returning objects to their original social or physical site where this satisfies some wider objective.

On three recent occasions the UK Parliament has legislated to enable national institutions to relinquish objects to overseas claimants. The statutes in question are the Human Tissue Act 2004 (section 47), the Holocaust (Return of Cultural Objects) Act 2009 and the Australian Constitution (Public Record Office Copy) Act 1990. The first two statutes relate to specific classes of material held in national museums: human remains and Holocaust-related cultural objects. The third statute relates to the Public Record Office at Kew.⁷² It recites that “The copy of the Commonwealth of Australia Constitution Act 1900 which at the passing of this Act is on loan to the Commonwealth of Australia shall cease to be included in the public records to which the Public Records Act 1958 applies”. Although the 1900 Act was no more than the official copy of the statute which granted Australia independence under its own Constitution, it had an iconic importance to the people of Australia. There was no doubt at all that the UK owned the document – it was an Act of the Imperial Parliament, required by law to repose in the UK Public Records Office – but the moral “rightness” of de-accessing an object of symbolic importance to a friendly state justified legislation which removed it from the Public Records Act prohibition.

The Parliament of the United Kingdom has found it equitable and practicable to loosen the ties that restrain national museums from relinquishing certain categories of object,⁷³ so it is unreasonable and discriminatory for Parliament to maintain the statutory bars on the

⁷² The Australian Constitution (Public Record Copy) Act 1990.

⁷³ Viz, human remains and Holocaust-related cultural objects.

relinquishment of other cultural objects which affect no less profoundly the sensibilities of peoples, nations and communities of origin, all the more so when such objects, when relocated, enhance appreciation of a magic moment in world history.⁷⁴ The Parthenon Sculptures exemplify such an object. These precedents show that there would be nothing unusual or difficult in the British government amending the 1963 Act to permit (or indeed require) de-accession of the "Elgin" Marbles. And there is nothing to prevent a long-term loan being set in place by the Museum in the meantime.

⁷⁴ While this could be considered unreasonable, whether it is discriminatory from a human rights perspective appears unlikely (see Article 14 of the European Convention on Human Rights, which prohibits discrimination in conjunction with one of the substantive rights protected by the Convention), in our case there is no differentiation of treatment in relation to *persons*. The different treatment of objects in a museum collection would not amount to discrimination under human rights law.

CHAPTER 4. GREECE DEMANDS REUNIFICATION

Greece has always, since attaining independence, demanded the return of the Marbles and has by now exhausted all available political and diplomatic avenues for a negotiated resolution. The importance of this fact is two-fold. Firstly, as a matter of law, it helps to refute the claim made by some academics that Greece has lost (or “waived”) its right to sue the UK because it has, for a long period, not bothered to assert its rights, or that too much time has passed for Greece to now file a legal action against the UK. Secondly, the record destroys the argument of those who still maintain that the way to reunify the Marbles is to rely on diplomatic or political action. No sensible reading of the record could show other than that the UK is determined to keep the Marbles in the British Museum forever, and that Greece is entitled to conclude that only legal action can possibly recover them.

The Marbles have always been central to Greece’s identity and their restitution a matter of national priority. As explained by Greece’s Culture Minister Melina Mercouri during a speech before the Oxford Union in June 1986, “the Parthenon Marbles... are our pride. They are our sacrifices. They are our noblest symbol of excellence. They are a tribute to the democratic philosophy. They are our aspirations and our name. They are the essence of Greekness”.⁷⁵

Given the cultural value of the Marbles to Greece, from the moment that Greece became an independent state and consistently since then, Greece has sought the return of the Marbles from the British Government. The evidence shows that the Greek authorities have, over the past two centuries, consistently and repeatedly sought to advance this claim and that

⁷⁵ M. Mercouri, *Speech at the Oxford Union* (June 1986), available at: <http://www.greece.org/parthenon/marbles/speech.htm>.

requests for return reached the British authorities through a variety means, including direct correspondence, public statements, confidential approaches through intermediaries and communications with the British Museum.

It would not be an exaggeration to say that the Greek demand for the Marbles is the most famous and longstanding request for the restoration of cultural heritage in the world.⁷⁶ Requests for the return of the Marbles were so frequent, so clear and so widely disseminated and discussed (and still are, increasingly, to this day), that any claim by the UK Government or the British Museum that they were not aware of Greece's position on the matter, or else assumed that its claim had been abandoned, would be risible. Indeed, the British Museum has repeatedly recognised that ownership of the sculptures was "long disputed by the Greek Government"⁷⁷ and the Foreign Office accepts that the return of the Marbles has been a "perennial question" for the UK.⁷⁸

It is particularly striking that UK officials for many years accepted that the arguments advanced by Greece in favour of return were compelling. At various times before the U-turn a few decades ago, parliamentarians and government officials were themselves so convinced that the Marbles should be returned that the impetus for reconsidering the issue of restitution often came from within the British state. The experts on Greece with the UK Foreign Office repeatedly offered official advice stating that the Marbles should be

⁷⁶ Background information to ICOMOS Draft Resolution 2014, available at:

<http://www.marblesreunited.org.uk/2014/11/icomos-passes-resolution-to-support-unesco-mediation-for-parthenon-marbles/>

⁷⁷ British Museum Website, *Facts and Figures*, available at:

http://www.britishmuseum.org/about_us/news_and_press/statements/parthenon_sculptures/facts_and_figures.aspx

⁷⁸ T. Vrettos, *The Elgin Affair* (Arcade Publishing, 1997), pp.208–209, citing, Foreign Office, *British Foreign and State Papers*, 371/33195.

returned⁷⁹ and that they fell into a narrow category of works of art “which should remain in the [Greek] national heritage”.⁸⁰

However, after Greece’s claim received official international endorsement through a UNESCO Declaration in the 1980s, the UK Government made a U-turn and its approach became one of categorical rejection of any possibility of repatriation of the Marbles to Athens. Supporters of the British Museum have argued that despoliation in 1801 cannot be rectified, because the Greeks did not complain at the time or in the decades that followed – they accepted Elgin’s *fait accompli* until Melina Mercouri’s campaign began in the 1980s. In legal terms, the argument runs, Greece lost its rights by sleeping on them. This is a perversion of history, which requires detailed rebuttal.

DEMANDS FOR THE MARBLES AFTER INDEPENDENCE

Lord Elgin began looting the Acropolis in 1801 and transferred the last part of the sculptures to England in 1812.⁸¹ At the time, Athens had been under Ottoman occupation for almost three and a half centuries.⁸² The Greek people therefore had no say in the matter of the Marbles’ removal and there was no Greek state to raise an official objection to the transfer. But the Greek position on Lord Elgin’s loot was clear. British MP John Morritt, who

⁷⁹ 1941 Memorandum by the Foreign Office to the Treasury, cited in C. Hitchens, *The Parthenon Marbles. The Case for Reunification* (Verso, 2008), p.74; T. Vrettos, op. cit., pp.208-209, citing, Foreign Office, *British Foreign and State Papers*, 371/33195.

⁸⁰ 1961 Statement by Head of the Department at the Foreign Office, during consultations with the British Ambassador in Athens. See, Select Committee on Culture, Media and Sport, *Appendices to the Minutes of Evidence* (2000), Appendix 12 – Memorandum submitted by the British Committee for the Restitution of the Parthenon Marbles, Annex C – A Brief History of British Concern.

⁸¹ W. St. Clair *Lord Elgin and the Marbles* (Oxford University Press, 1997), p.94 and p.215.

⁸² Athens was occupied by the Ottomans under the leadership of Sultan Mehmed II in 1456, starting a drawn out siege of the Acropolis which eventually resulted in its capture in 1458. See J.M. Hurwit, *The Athenian Acropolis. History, Mythology and Archaeology from the Neolithic Era to the Present* (Cambridge University Press, 1999), p.294.

spent the spring of 1795 in Athens, testified before the UK Parliament about the Greeks' attachment to the Parthenon Marbles and their opposition to any form of transfer. Asked whether the Greeks were concerned by a possible removal of the Marbles from Athens, Mr Morritt stated that during his stay in Greece, he had found it impossible to remove some neglected fragments of the frieze. This was because, in his words, the Greeks were "decidedly and strongly desirous that the marbles should not be removed from Athens".⁸³

The achievement of independence in 1832 for the first time created a Greek state with the international standing needed to advance its claim for return with the British authorities. This was recognised in political spheres as well as cultural ones. The first guide to the antiquities of Athens, published in free Greece by Kyriákos S. Pittákis (a prominent classical archaeologist who was to be appointed, the following year, to the executive post of Ephor of Antiquities)⁸⁴ stated that "in the state of independence we are entering we will have the right to reclaim from the English nation the masterpieces of our ancestors to put them back in the divine place Phidias chose for them".⁸⁵

The British Museum concedes that calls for the repatriation of the Marbles to Greece commenced as early as 1833.⁸⁶ That same year, the realisation of the full extent of the

⁸³ A.H. Smith, 'Lord Elgin and his Collection', 36 (1916) *THE JOURNAL OF HELLENIC STUDIES* 163, p.339, citing Mr Morritt's testimony before the Committee (Select Committee, *Report on the Earl of Elgin's Collection of Sculpted Marbles*, 25 March 1816, pp.51-52).

⁸⁴ 'Ephor' or 'Director' or 'Conservator' of Antiquities designates the official appointed to guide Greek archeological policy, a post held by German-educated Ludwig Ross from 1833 to 1836. See S.L. Dyson, *In Pursuit of Ancient Pasts. A History of Classical Archaeology in the Nineteenth and Twentieth Centuries* (Yale University Press, 2008), pp.73-74.

⁸⁵ K.S. Pittakis, *L'ancienne Athènes*, p.379 (translation from French: "Je crois que dans l'état d'indépendance [sic] où nous entrons, nous aurons le droit de réclamer auprès de la nation Anglaise les chefs d'œuvres de nos ancêtres, pour le remettre à la place que le divin Phidias leur avait choisie" (unofficial translation)).

⁸⁶ http://www.britishmuseum.org/about_us/news_and_press/statements/parthenon_sculptures/facts_and_figures.aspx ("the suggestion that the Parthenon sculptures be removed from the British Museum and sent to

damage caused by Lord Elgin's loot prompted the adoption of legislation in Greece for the protection of cultural heritage,⁸⁷ and the establishment by the King of Greece of a new body, the Secretariat (or Ministry) for Ecclesiastical Affairs and Public Education. This new government agency was mandated to support the excavation of lost masterpieces of art, look after those already existing and "exercise vigilance to ensure that they are not taken abroad" – the Marbles debacle had made the preservation of Greece's cultural heritage a matter of national priority.⁸⁸ And the newly formed Greek Ministry would play an instrumental role in advancing some of the earliest claims for return of the Marbles in the following years.

By 1835, the Greeks had commenced the restoration of the Acropolis,⁸⁹ and the Archaeological Society of Athens⁹⁰ wrote to the Trustees of the British Museum pleading for

Athens is not new. Such a possibility was first mooted in Britain by Hugh Hammersley MP in the House of Commons debate of 7 June 1816. Calls from individual Greeks for their removal began in 1833).

⁸⁷ Art Association of Australian and New Zealand, *Restoring, de-restoring, reinventing Antiquity. How the classical profile of the Acropolis of Athens was reshaped in the last two centuries*, 5–7 December 2014 (available at: https://www.academia.edu/9937090/Restoring_de-restoring_reinventing_Antiquity_How_the_classical_profile_of_the_Acropolis_of_Athens_was_reshaped_in_the_last_two_centuries).

⁸⁸ Special Decree on the Creation and Competence of the Secretariat for Ecclesiastical Affairs and Public Education of 3/15 April 1833, see General Archives of the State, *Acropolis von Athen*, (Alitheia, 2014), p.19.

⁸⁹ Art Association of Australian and New Zealand, *Restoring, de-restoring, reinventing Antiquity. How the classical profile of the Acropolis of Athens was reshaped in the last two centuries*, 5–7 December 2014 (available at: https://www.academia.edu/9937090/Restoring_de-restoring_reinventing_Antiquity_How_the_classical_profile_of_the_Acropolis_of_Athens_was_reshaped_in_the_last_two_centuries).

⁹⁰ Formed in 1837, the Archaeological Society of Athens was a private entity mandated and empowered by the Greek state to conduct excavations on its behalf. All works undertaken by the Society were conducted together with the Archaeological Directorate of the State under the supervision of the Conservator of Antiquities and anything found at these works belonged to the State. See V. Petrakos, *The Archaeological Society of Athens. 150 Years (1837–1987)*, (Archaeological Society, 1987), pp.20–21.

the return of these marbles immediately so that they could be reinstated within the temple.⁹¹ The Museum deliberately avoided dealing with their request for return.

The King of Greece ordered that the Greek Ambassador in London put forward the first formal claim for restoration in 1836. The Greek delegation were told to “make it clear that the legality of Lord Elgin’s act was abundantly doubtful, as also [that] even if he had a firman from the Sublime Porte, the act of removing all works of art that are closely associated with the ancient glory of Greece could have been disputed in the name of human rights [and that] that it would be sad for antiquity-lovers and not at all to the credit of the British people if this restoration remained incomplete owing to looting committed in the name of Britain by the late Earl of Elgin”.⁹² The Greek government was rebuffed by the Foreign Secretary, Lord Palmerston.⁹³

Another official claim was pursued in 1844 when the Archaeological Society and the Greek Conservator of Antiquities contacted the Trustees of the British Museum on behalf of the Greek authorities. In 1846 the British government, as if to acknowledge the shameful detention of the Marbles, presented the King of Greece with “a complete set of casts from the Marbles of the Parthenon in the Elgin Collection”, which “the Trustees of the British Museum ha[d] prepared as a present to the Greek nation... free of all expense”. The “free of

⁹¹ This was one of a series of letters from Bracebridge to the Trustees, which ‘began as an offer of help to the British but became part of an appeal on behalf of the Greeks for the return of marbles from the Acropolis in the British Museum’. See I. Jenkins, ‘Acquisition and Supply of Casts of the Parthenon Sculptures by the British Museum, 1835–1939, 85 (1990) *THE ANNUAL OF THE BRITISH SCHOOL AT ATHENS* 89, p.106 and fn 4, referring to O.P. 13; cf. C.4066, 28 August 1835 O.P. 13, 28 November 1835; C.4157, 9 January 1836; O.P. 30, 21 April 1844.

⁹² Letter sent by the Greek Minister for Ecclesiastical Affairs and Public Education on 6/18 July 1836, in: General Archives of the State, *Acropolis von Athen*, (Alitheia, 2014), at 139.

⁹³ General Archives of the State, *Acropolis von Athen*, (Alitheia, 2014), at 121.

all expense present" was an inadequate and insulting substitute – a gift not made from generosity, but as a cover for a selfish acquisition.

Many influential intellectuals, both in the United Kingdom and elsewhere, also continued to take up Greece's cause. The influential British newspaper *The Nineteenth Century* published a debate on the topic in 1890–1891.⁹⁴ As part of this debate Frederic Harrison – a prominent Oxford academic, historian and jurist – published an article entitled 'Give back the Elgin Marbles' setting out the case for return in terms that are still relevant today. In his words.

*The Parthenon Marbles are to the Greek nation a thousand times more dear and more important than they can ever be to the English nation, which simply bought them. And what are the seventy-four years that these dismembered fragments have been in Bloomsbury when compared to the 2,240 years wherein they stood on the Acropolis? ... Athens is now a far more central archaeological school than London. Of course the sneer is ready, "Are you going to send all statues back to the spot they were found?" This is all nonsense. The Elgin marbles stand upon a footing entirely different from all other statues. They are not statues, they are integral parts of a unique building, the most famous in the world...*⁹⁵

At about the same time, the Municipality of Athens – the *de facto* governmental authority with competence over the Acropolis – transmitted yet another official claim to the United Kingdom for the Marbles in a resolution addressed to the UK ambassador requesting their

⁹⁴ Frederick Harrison, editor, wrote in 1890 in favour of the cause, to provoke a reply by Knowles in March 1981. See F. Harrison, 'Give Back the Elgin Marbles', *The Nineteenth Century*, December 1890, pp. 980–987; J. Knowles, 'The joke about the Elgin Marbles', *The Nineteenth Century*, March 1891, 495–506.

⁹⁵ Ibid.

return. The Municipality Council of Athens made “an appeal to the gracious Government of Queen Victoria and the British Parliament in favour of the return of the Parthenon friezes”.

Although Greek demands were rebuffed time and time again, they continued to be pressed during the 19th century from the time that Greece became a State. At the time, no international court or tribunal competent to adjudicate Greece’s claim for return had been established and the international law on the return of cultural property and on self-determination was much less developed than it is today. Greece repeatedly protested the removal and sought restitution from the UK, mainly through diplomatic channels.

Calls for the restoration of the Marbles to Athens continued in the 20th century, when the UK government began not only to acknowledge the Greek claim but also to accept that it was justified. The Foreign and Commonwealth Office (FCO) – the UK government department that deals with the foreign relations of the UK, led by the Foreign Secretary – advised the government that the Marbles should be returned to Greece. This happened for the first time in 1924, when Harold Nicholson – a British official working at the Near Eastern Department of the Foreign Office – urged that Britain take “the opportunity to put right an ancient wrong”. Instead it accepted an offer from the art dealer Sir Joseph (later Lord) Duveen to finance the building of a new gallery at the British Museum intended to house the Marbles.⁹⁶

⁹⁶ W. St Clair ‘Imperial Appropriations of the Parthenon’, in J. H. Merryman, op. cit. p.86; W. St Clair, op. cit. (1999), quoting from *Chamberlain Papers*, NC 18/1/1022, University of Birmingham Library.

THE UK FOREIGN OFFICE. MARBLES SHOULD BE RETURNED

By the time of the Second World War, Greece had been repeating its pleas for the return of the Marbles for over 100 years. Its arguments for repatriation were so persuasive that they commanded support not only within Greece and from other countries but also in Britain itself. In the British Parliament, the matter was raised many times – and the UK Foreign Office advised as early as 1924 that the Government should return them. This advice was expanded and repeated during World War II, when senior officials in the UK Foreign Office advised the British Government to pledge to return the Marbles at the conclusion of the war.⁹⁷

The Foreign Office commissioned an expert opinion, which recognised in the clearest terms that “everything point[ed] to a decision in principle to return the Elgin Marbles to Greece”.⁹⁸ The Foreign Office opinion began by noting the “perennial question of the return of the Elgin Marbles to Athens.” During consultations, the British Museum also indicated its full awareness that,

the Greeks regard [Lord Elgin’s actions] as a spoliation of their national heritage under Turkish tyranny... The point is that the Acropolis of Athens is the greatest national monument of Greece, and that the buildings to which the Marbles belonged

⁹⁷ T. Vrettos, op. cit., p.205.

⁹⁸ C. Hitchens, op. cit., p.74; T. Vrettos, op. cit., pp.208-209, citing, Foreign Office, *British Foreign and State Papers*, 371/33195.

*are still standing or have been rebuilt. The return of the Marbles would... gratify Greek sentiment.*⁹⁹

Ultimately, the Government did not act on the Foreign Office advice, although it won hearts and minds in Greece by other means, in helping the fight against Nazi occupation.

In the years afterwards, further claims for return of the Marbles were made directly by the Municipality of Athens and the Academy of Athens, and the Archaeological Society. In 1961, the British Foreign Office was asked to state its position on the question and it recognised the merits of Greece's claim. The Head of the relevant Department at the Foreign Office, stressed that the Marbles had

*a close association with the history and national life of Greece and that they fall into a small and narrowly restricted category of works of art which should remain in the [Greek] national heritage... It seems to us... that the Elgin Marbles represent a special case to which special arguments apply and which would not necessarily constitute a precedent if it were decided to return them to Greece.*¹⁰⁰

This statement by the Foreign Office is startling in that it expressly recognises that the 'floodgates' argument – today repeated *ad nauseam* by the UK as a reason for rejecting the demand for return of the Marbles – is ill-founded. It recognises that restoring the sculptures to the Acropolis would by no means constitute a precedent for emptying the

⁹⁹ T. Vrettos, op. cit., pp.206–207, citing the Memorandum by the British Museum dated 31 December 1940 received by Mr R James Bowker on 8 January 1941.

¹⁰⁰ Select Committee on Culture, Media and Sport, *Appendices to the Minutes of Evidence* (2000), Appendix 12 – Memorandum submitted by the British Committee for the Restitution of the Parthenon Marbles, Annex C – A Brief History of British Concern.

world's leading museums of all their art, and would not even affect other Greek artefacts situated in the United Kingdom or even the British Museum.¹⁰¹

Despite the clear advice of the Foreign Office that the Marbles should be returned, Prime Minister Macmillan did not pursue the matter,¹⁰² and further requests by the Greek Ambassador were ignored.

A military junta took power and ruled Greece from 1967 to 1974. The junta's policies, which included censorship and rejection of both ancient and modern Greek literature and culture, led to the imprisonment of many Greek scholars and intellectuals, as well as the cessation of contacts with Western philhellenes.¹⁰³ These political and cultural developments led to a temporary "unspoken moratorium" over the Marbles question.¹⁰⁴

After the fall of the military dictatorship in 1974, however, the Parthenon sculptures began to take on a new role as a symbol of the revived democracy in Greece, and claims for the return of the Marbles were renewed.

GREEK CLAIMS AT UNESCO

The restoration of democracy to Greece in 1974, and the country's accession to the European Community in 1981 gave the debate on return a new impetus. Then, in 1982, the Greek government – led in its efforts by Culture Minister Melina Mercouri – launched an international campaign for the restitution of the Marbles.

¹⁰¹ HL Deb 27 October 1983 vol 444 c404.

¹⁰² Select Committee on Culture, Media and Sport, *Appendices to the Minutes of Evidence* (2000), Appendix 12 – Memorandum submitted by the British Committee for the Restitution of the Parthenon Marbles.

¹⁰³ C. Hitchens, op., cit., p.81.

¹⁰⁴ C. Hitchens, R. Browning, G. Binns, *The Elgin Marbles: Should They be Returned to Greece?* (Verso, 1997), p.70.

As part of this campaign a formal claim was presented to UN body that deals with cultural matters – UNESCO – at a specially-convened World Conference on Cultural Policies held in 1982 in Mexico City.¹⁰⁵ During this gathering of over a hundred Ministers of Culture from all continents, Ms Mercouri delivered a passionate speech about the need to repatriate the Marbles.

....we well understand that the museums cannot be emptied. But I insist on reminding you that in the case of the Acropolis marbles we are not asking for the return of a painting or a statue. We are asking for the return of a portion of a unique monument, the privileged symbol of a whole culture...

The UK delegation rejected Greece's claim. Paul Channon, Britain's Minister for the Arts, unveiled a new excuse that the UK has used ever since. He told the UNESCO conference that his Government could not interfere in the affairs of a private establishment like the British Museum, where the marbles were held.¹⁰⁶ Still, the Greek cause secured the support of 55 UNESCO states (with only 12 voting against) and as a result, at the end of the two-week conference, Recommendation No. 55 was adopted. It stated that.

Considering that the removal of the so-called Elgin marbles from their place in the Parthenon has disfigured a unique monument which is a symbol of eternal significance for the Greek people and the whole world,

¹⁰⁵ World Conference on Cultural Policies, *Final Report* (UNESCO, 1982), pp.13–14.

¹⁰⁶ 'Greece is Pressing Britain for Return of Antiquities', *The New York Times* (21 November 1982).

Considering it right and just that those marbles should be returned to Greece, the country in which they were created, for reincorporation in the architectural structure of which they formed part,

Recommends that Member States view the return of the Parthenon marbles as an instance of the application of the principle that elements abstracted from national monuments should be returned to those monuments;

*Recommends that the Director-General give his full support to this action which comes properly under the heading of the safeguarding of the cultural heritage of mankind.*¹⁰⁷

British Arts Minister Paul Channon disagreed, concluding instead that “it remain[ed] the Government’s view that [the Marbles] should remain in the British Museum”.¹⁰⁸ This constituted, of course, a complete U-turn on the position previously expressed by British officials, that the Marbles were, in principle, to be returned¹⁰⁹ and that they fell into a narrow category of works of art “which should remain in the [Greek] national heritage”.¹¹⁰

On 12 October 1983, Greece also advanced another official claim directly with the UK government, seeking “the return of all the sculptures which were removed from the

¹⁰⁷ See the Recommendation No. 55 adopted by the Conference, in: UNESCO, *Final Report of the World Conference on Cultural Policies*, Mexico City, 28 July – 6 August 1982, p.96.

¹⁰⁸ HC Deb 07 March 1983 vol 38 cc558–60.

¹⁰⁹ C. Hitchens, op. cit., at 74; T. Vrettos, op. cit., pp.208–209, citing, Foreign Office, *British Foreign and State Papers*, 371/33195.

¹¹⁰ Select Committee on Culture, Media and Sport, *Appendices to the Minutes of Evidence* (2000), Appendix 12 – Memorandum submitted by the British Committee for the Restitution of the Parthenon Marbles, Annex C – A Brief History of British Concern.

Acropolis of Athens and are at present in the British Museum".¹¹¹ That same day, the British Foreign Office issued a statement claiming that the Marbles were the property of the Trustees of the British Museum, and reiterated the views expressed by Channon that the Marbles "should remain in the British Museum".¹¹² This is the new official line that has been parroted by British Museum and British government officials ever since.

An official (negative) reply from the British authorities to Greece's claim was communicated to the Greek ambassador some months later, on 10 April 1984.¹¹³ The authors of this reply did not explain why they were rejecting Greece's request, other than by reciting the fact that an Act of Parliament would have been needed to empower the British Museum Trustees to return the sculptures and that this measure had been discussed, and rejected, by Westminster.¹¹⁴

The official British response showed that its strategy of evasiveness continued, the British Government pointing to the British Museum as the body competent to decide over the Marbles' destiny, and the Museum's Trustees avoiding addressing the issue by claiming that their hands are tied by a statute limiting their ability to alienate items in the Museum's collection, without ever suggesting an amendment to the statute or showing any willingness to consider Greek requests for a long-term loan (see Chapter 3).

In September 1984, Greece again formally requested the return of the Marbles through a newly-available UNESCO written procedure for seeking the return of cultural treasures.¹¹⁵

¹¹¹ Diplomatic Archives of the Ministry of Foreign Affairs, Doc. No. Φ.1075.1/ΑΣ 0299.

¹¹² Statement by the Foreign Office dated 12 October 1983.

¹¹³ Diplomatic Archives of the Ministry of Foreign Affairs, Doc. No. Φ.1075.1/ΑΣ 0132.

¹¹⁴ Aide Memoire by the UK Government dated 10 April 1984.

¹¹⁵ Unesco Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its restitution in case of Illicit Appropriation, Report of the Fourth Session (Athens and Delphi,

This time it took almost a year for Britain to formally reject the Greek request, once again on the unsatisfactory basis that the trustees of the British Museum were prohibited by law from disposing of these sculptures and returning them to their countries of origin.¹¹⁶

UNESCO continued to support the Greek claim and in 1989 and 1993, the UNESCO Committee decided to take a more proactive approach to the 'Marbles issue'. However, it was notified by Greece of its intention to build a new museum in Athens to house the Parthenon marbles on their return, and the building of the new museum provided a reason to delay Greek demands until the museum was completed.

Meanwhile back in the UK, the British public continued to discuss and debate the Marbles and by 1998 a MORI Institute opinion poll had found that a substantial majority of the population in the UK was familiar with the issue, and was in favour of returning the Marbles to Greece.¹¹⁷ Many MPs also supported return by an overwhelming majority among both Tories and Labour.¹¹⁸ Other UK polls conducted since then have yielded similar results.¹¹⁹

Greece, 2-5 April 1985), (UN Doc CLT-85/CONF.202/2), Paris, 15 February 1984, para. 4; J. Greenfield, op.cit., p.70.

¹¹⁶ UNESCO General Conference, 24th Session, Paris 1987, Report by the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation, 29 June 1987 (Doc 24 C/94), para.7. ; Final Report by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation on its Activities (1990-1991), Un Doc. 26 C/92, Annex, p.11].

¹¹⁷ Ipsos-MORI, *Public and MPs would return the Elgin Marbles*, 25 September 1998 (available at: <https://www.ipsos-mori.com/researchpublications/researcharchive/2001/Public-and-MPs-would-return-the-Elgin-Marbles.aspx>).

¹¹⁸ Ibid.

¹¹⁹ This includes a 1998 poll by UK Channel 4, in which 92.5% voted for return, a 2000 CNN poll in which 82% voted for return, a 2000 survey conducted by The Economist indicating that 66% of the MPs interviewed would vote in favour of the return of the Marbles to Greece if the issue were put to the House of Commons, a

As European political cooperation increased, the Greek cause also gained widespread support across the continent. A written declaration adopted by the European Parliament in January 1999 endorsed Greece's claim in unequivocal terms stating that the Parliament "supported the return of Marbles" on the basis that they formed an integral part of European cultural and architectural heritage and were removed from Athens during its occupation by the Ottoman Empire. The declaration, which was signed by 339 MEPs, including many from the UK, called on the British Government to "give positive consideration to Greece's request for the return of the Elgin Marbles to their natural site".¹²⁰

The momentum of the international and domestic movement for return, and the international pressure on the United Kingdom, galvanised the House of Commons' Select Committee on Sport, Media and Culture to hold an inquiry on "Cultural Property, Return and Illicit Trade" starting in 1999. Because this seemed to offer an amicable way for the UK to decide, on the merits of the argument, in favour of reunification, the Greek Government

2002 MORI poll in which 40% voted for and only 16% against, a 2009 Guardian poll in which 95% voted for return, a 2012 IQ2 Debate where 75% voted in favour of return, a 2012 poll run by the Journal of the Museums Association in which 73% voted for return, and a 2014 Guardian poll in which 88% voted for return. See Greek Embassy in Paris, *The Return of the Parthenon Marbles – Update*, June 2002 (referring to, among other, Opinion Poll run by Channel 4 in 1996, BBC Online Survey in 1999); 'Stones to die for', *The Economist*, 16 March 2000; IPSOS-MORI Website, *Return of the Parthenon Marbles*, 15 October 2002 (available at <https://www.ipsos-mori.com/researchpublications/researcharchive/1053/Return-Of-The-Parthenon-Marbles.aspx>); 'Is it time to return the Parthenon Marbles?', *The Guardian*, 24 June 2009 (available at <http://www.theguardian.com/culture/poll/2009/jun/24/elgin-marbles>); 'Stephen Fry's Parthenon Marbles plea backed in debate vote', *BBC News*, 11 June 2012 (available at <http://www.bbc.com/news/uk-18373312>); 'Should the Parthenon Marbles be Returned? Have your say', *The Museums Journal*, 31 May 2012 (available at <http://www.museumsassociation.org/museums-journal/news/01062012-should-parthenon-marbles-be-returned-to-greece>); 'Should Britain return the Parthenon marbles to Greece?', *The Guardian*, 12 February 2014 (available at <http://www.theguardian.com/commentisfree/poll/2014/feb/12/george-clooney-elgin-marbles-monument-men-poll>). See Greek Embassy in Paris, *The Return of the Parthenon Marbles – Update*, June 2002.

¹²⁰ EP Written Declaration 8/98 on the return of the Elgin Marbles, January 1999.

co-operated and submitted a memorandum reiterating its position.¹²¹ This was shared by many organisations and individual experts who made submissions in support of Greece's claim.¹²² However, the Committee's report failed to confront the issue. Its conclusion made reference to the British Museum's Trustees' lack of power to alienate certain property held by the Museum, and recommended that primary legislation be introduced to deal with "special cases" when disposal was to be expressly permitted.¹²³ Despite the mass of evidence overwhelmingly in favour of reunification, this committee entirely failed to the crucial question of whether the Marbles were a "special case". Its recommendation was in any event ignored – no such legislation was ever introduced.

Still, the Greek Government persisted in its efforts to leave 'no stone unturned' and secure a diplomatic solution for its case. It sought to advance its claim for return within the UNESCO framework for over 30 years. Between 1982 and 2005, UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation adopted at least eight resolutions on the Marbles, in 1983, 1989, 1991, 1994, 1997, 1999, 2003 and 2005 calling on the UK government to negotiate.¹²⁴ The UNESCO Committee has since then issued further resolutions on the Marbles in 2007, 2009, 2010, 2011, 2012 and 2014.¹²⁵

¹²¹ All relevant documentation from the procedure before the Committee is available here. <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmcumeds/371/0060501.htm>.

¹²² See e.g. the Memorandum Submitted by the British Committee for the Restitution of the Parthenon Marbles and the Memorandum Submitted by Dr Jeannette Greenfield. All submissions are available at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmcumeds/371/371ap01.htm>.

¹²³ House of Commons, Select Committee on Culture, Media and Sport, *Seventh Report*, para. 199 (available at <http://www.publications.parliament.uk/pa/cm199900/cmselect/cmcumeds/371/37107.htm#a21>).

¹²⁴ Final report by UNESCO's Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, 3rd Session, Istanbul, Turkey, 9–12 May 1983, UN Doc. CLT-83/CONF.216/8; Final Report by the Intergovernmental Committee for Promoting

In July 2013, Greece requested that UNESCO deploy its good offices to encourage the UK to take part in a mediation with a view to resolving the long-standing issue of the Marbles. In response to this, UNESCO sent an official letter to the UK government and the Director of the British Museum, requesting that the UK parties enter into mediation with Greece.

It was only on 26 March 2015 that the Trustees of the British Museum and the UK Government deigned to reply, in separate letters addressed to UNESCO. Both letters rejected the initiative outright. In the words of the UK Government.

the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Sixth Session, Paris, 1989, UN Doc. 25 C/91; Final Report by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation on its Activities (1990–1991), UN Doc. 26 C/92, Annex, p.11; 1996–1997. Report by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation on its Activities (1996–1997), UN Doc 29 C/REP.12 p.11, Annex 1; Report by the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation on its Activities (1998–1999), UN Doc 30 C/REP.14, Annex 1., Recommendation No. 1; 2002–2003. Report on the Activities (2002–2003) and the twelfth Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, UN Doc. 32 C/REP/15, Annex III; Report on the Activities (2004–2005) and the twelfth Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, UN Doc. 33 C/REP/15, Annex.

¹²⁵ Report on the Activities (2006–2007) and the twelfth Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, UN Doc. 34 C/REP/14, p.3; Report on the Activities (2008–2009) and the twelfth Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, UN Doc. 35 C/REP/14, p.7, ANNEX; Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, UN Doc.CLT-2010/CONF.203/COM.16/5, Paris , 2010, Sixteenth session, p.1; Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Seventeenth Session, Paris, 2011, Recommendations, UN Doc. CLT-2011/CONF.208/COM.17/5, pp.1–2; Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Eighteenth Session, Paris, 2012, Recommendations and Decision, UN Doc. ICPRCP/12/18.COM/6, p.3; Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, Recommendations and Decision, Nineteenth Session, Paris, 1–2 October 2014, UN Doc. ICPRCP/14/19.COM/8, p.5.

[T]he Parthenon sculptures in the British Museum were legally acquired by Lord Elgin under the laws pertaining at the time and the Trustees of the British Museum have had clear legal title to the sculptures since 1816. Neither the British Government nor the British Museum are aware of any new arguments to the contrary since 1985, when a formal Greek request for the return of the sculptures was turned down by the British Government.¹²⁶ We have seen nothing to suggest that Greece's purpose in seeking mediation on this issue is anything other than to achieve the permanent transfer of the Parthenon sculptures now in the British Museum to Greece and on terms that would deny the British Museum's right of ownership, either in law or as a practical reality. Given our equally clear position, this leads us to conclude that mediation would not carry this debate substantially forward.

In addition to the matter of clear legal title, a further relevant factor is that the Trustees of the British Museum are prevented by law from de-accessioning objects in the Museum's collections unless they are duplicates or unfit for retention.¹²⁷

Nothing could be clearer: the UK position is that it will not mediate. And that no political or diplomatic solution to the Marbles issue is possible.

The 2015 UK refusal to undertake mediation is the culmination of almost two centuries of efforts by Greece to engage the British Government and the British Museum in meaningful

¹²⁶ See UNESCO General Conference, 24th Session, Paris 1987, *Report by the Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation*, 29 June 1987 (Doc 24 C/94), para.7.

¹²⁷ Letter from Ed Vaizey MP and Rt Hon David Lidington MP dated 26 March 2015 (available at: https://www.britishmuseum.org/pdf/150326_Parthenon_Sculptures_in_the_British_Museum_DCMS_and_FC_O.pdf).

discussions concerning the return of the Marbles to their original and natural location. As this chapter has shown, Greece has continuously advanced claims for restitution since it first became an independent state, and the 'perennial question' of the Marbles had vexed UK governments since that time. But now, perhaps in anticipation of a legal claim that could be brought by Greece as international remedies for the return of seized cultural property are becoming available, the UK Government has been much more emphatic in insisting that restoration is out of the question. The convenient buck-passing between the British Government and the British Museum Trustee stymies any proposal for compromise. There is no prospect of securing the return of the Marbles through UN-sponsored mediation; nor are there active negotiation channels which offer any realistic possibility of return in the near future. The only option left to Greece to assert its right is, therefore, seeking redress in the international arena. It seems Greece has no alternative, if it ever hopes to regain the Marbles.

TIME DOES NOT BAR GREEK CLAIM

Greece cannot be precluded from invoking the UK's responsibility in an international court by reason of the delay that has elapsed since the Marbles were looted by Lord Elgin in the early 19th Century. Some scholars argue that any case brought by Greece should be thrown out for being too late,¹²⁸ and the United Kingdom has used this argument against Greece in another case involving alleged violations of international law. In *Ambatielos*, the British representatives argued that "[e]ven if there had been more justification in the Hellenic Government's claim, it has been guilty of such delays in pursuing the matter, that the United

¹²⁸ J.H. Merryman, 'Thinking about the Elgin Marbles', 83 (1985) MICHIGAN LAW REVIEW 1881, pp.1900-1901; M. Kersel, 'The Politics of Playing Fair, or, Who's Losing their Marbles?', in: Y. Rowan & U. Baram (eds.), *Marketing Heritage. Archeology and the Consumption of the Past* (Rowman Altamira, 2004), p.47.

Kingdom Government should not at this stage be required to submit the case to arbitration".¹²⁹ These arguments were rejected by the arbitral tribunal on the basis that the Greek Government had made "repeated representations at intervals which [could] not be regarded as abnormal" and that the alleged delay had not caused the UK to suffer any harm in the preparation of its defence.¹³⁰ Can the UK, in the teeth of this ruling, raise a similar defence to legal proceedings over the Marbles?

British authorities have never, to date, advanced arguments to the effect that Greece's claim is time-barred. For instance, the *aide memoire* that accompanied the official UK negative reply which was communicated to the Greek ambassador on 10 April 1984 makes no mention of the extinction of the Greek claim due to the passage of time,¹³¹ nor do the recent statements by the British Museum and the UK government attempt to raise a time-based objection.¹³² Ironically, if the United Kingdom were now to argue that Greece's claim is precluded by the passage of time, this would then raise the question whether the UK is itself estopped from making such an argument by its failure to advance it previously.

The ICJ recognised in the *Certain Phosphate Lands in Nauru* case that "delay on the part of a claimant State *may render* an application inadmissible". But the court also noted that international law "does not lay down any specific time-limit in that regard... it is therefore

¹²⁹ ICJ, *Ambatielos*, UK Counter-Memorial of 4 February 1952, para. 105. The ICJ refused to deal with the UK claim regarding delay, holding that the arguments in defence directed to the admissibility of the *Ambatielos* claim were outside the terms of the Anglo-Greek Declaration of July 16, 1926, which it was the Court's task to interpret (See ICJ Judgment of 1 July 1952, pp.22-23).

¹³⁰ The arbitral tribunal dismissed the *laches* claim advanced by the United Kingdom on the ground that it did not suffer any harm in the preparation of its defence (*Ambatielos*, UNRIIA, vol. XII (Sales No. 63.V.3) (1956), pp.103-104). See also A.R. Ibrahim, 'The Doctrine of Laches in International Law', 83 VA. L. REV. 647 (1997), p.682.

¹³¹ Diplomatic Archives of the Ministry of Foreign Affairs, Doc. No. Φ.1075.1/ A Σ 0132.

¹³² Both letters are available at: http://www.britishmuseum.org/about_us/news_and_press/press_releases/2015/unesco_mediation_proposal.aspx.

for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible".¹³³

Concepts such as "acquiescence", "recognition" and "estoppel" have been developed to bar claims in the field of state title over territory, where the passage of time, together with the exercise of sovereign rights over a given area and the absence of objection by other states, can be recognised as a specific mode of acquisition of international title.¹³⁴ But because of the special interests and bonds of people to their cultural heritage, these doctrines cannot apply in the same way to the restitution of cultural property.¹³⁵ Cultural heritage is often bound up with the very identity of cultural groups, their traditions and practices, and so long as their members retain relevant parts of this tradition, the lost property will continue to be important to their collective life.¹³⁶

On this basis, delay and the passage of time has a more limited impact on the admissibility of claims concerning the return of cultural items than in other international disputes. This is evidenced by the fact that statutes of limitations usually do not apply to claims for the return of cultural property. Both the Hague Convention for the Protection of Cultural

¹³³ *Case Concerning Certain Phosphate Lands in Nauru*, ICJ Reports (1992), 240, pp. 253-254, para. 32. This principle has also been recognised by arbitral tribunals, see. *Grand River Enterprises Six Nations Ltd and Others v. United States*, ICSID/UNCITRAL, ICSID Case No Case ARB/10/5, award (January 12, 2011) and *Canfor Corporation v. United States of America, Tembec Inc., et al. v. United States of America and Terminal Forest Products Ltd. v. United States of America*, Order of the Consolidation Tribunal, 7 September 2005, paras. 163-169.

¹³⁴ R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963), p.40.

¹³⁵ E. Nahlik, (1983) "The problem of the international protection of works of art in time of peace" New York State Historical Association Acquisition and Deaccession Policy, History News 12, p.12. Cf. J.H.. Merryman, op. cit., p.535 (citing New York cases).

¹³⁶ J. Thompson, *Cultural Property, Restitution and Value*, Working Paper 2001/1, p. 6. Available at: <http://www.cappe.edu.au/docs/working-papers/Thompson5.pdf>

Property in the Event of Armed Conflict of 1954¹³⁷ and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property¹³⁸ have no provision on prescription. In addition, the International Council of Museums has made clear that "in no event shall the State, which holds the cultural property in question, be able to invoke any statutes of limitation".¹³⁹ Professor Merryman, the academic who has argued most prominently in favour of a time-bar, claims that the expiry of a domestic limitation period (such as the six-year period set by the English 1980 Limitation Act) affects Greece's rights in an international court. This argument is misconceived, because domestic law time limits, whilst they might be effective in domestic law, cannot limit rights in public international law.

Greece advanced its first formal claim for return of Elgin-looted Marbles through diplomatic channels as early as 1836 and continued to advance claims to the UK, directly and indirectly, at regular intervals until the present day. (The history of Greek claims appears to be unknown to some academic commentators – the most prominent, Professor

¹³⁷ The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of (1954), available at. http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html

¹³⁸ The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), available at. http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹³⁹ Venice Committee, Unesco Doc. SHC-76/CONF.615/5.5. An isolated suggestion at the international level that a limitation period for applies to return of cultural property comes from the Cultural Heritage Law Committee of the International Law Association, a non-governmental organisation which has consultative status with a number of UN specialised agencies. In its Draft Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material, the Committee stated that "cultural material that has reposed in the territory of a state for at least 250 years shall be exempt from return to its place of origin". However, even this outlier position would not preclude a claim by Greece at this time. See ILA, Berlin Conference 2004, Report of the Cultural Heritage Law Committee, p. 7; W. St. Clair Lord Elgin and the Marbles (Oxford University Press, 1997), at 94 and 215. A 250-year deadline has not expired in this case, where the Marbles arrived in Britain from Greece at the beginning of the 19th century.

Merryman, for instance, incorrectly assumes that its first demand for return of the Marbles was not made until the 1980s).

Since 1836, the claim for return of the Marbles has been stated repeatedly, consistently and regularly through a variety of channels and by a number of different sources. Greece made it abundantly clear at all stages that restitution of the Marbles was the desired form of reparation. And both the UK Government and the British Museum were at all times fully aware of this.

The ICJ has ruled that even informal communications preceding communication of a formal state position or filing of a legal application before a court were to be taken into account in assessing delay.¹⁴⁰ It is sufficient that the respondent state is made aware of the other state's views on the claim as a result of communications, even if these take the form of press reports of speeches or meetings rather than formal diplomatic correspondence.¹⁴¹

The better view is therefore that international law requires the timely notification of a claim to the respondent state, but does not set any specific formal requirement for such notifications or require the formal institution of proceedings. Accordingly, Greece's repeated requests for restitution of the Marbles through both direct and indirect channels, formal and informal approaches were sufficient to put the United Kingdom on notice of its claim and should qualify as an "invocation of responsibility", thereby precluding any claim of undue delay.

¹⁴⁰ *Case Concerning Certain Phosphate Lands in Nauru*, Oral Proceedings, CR 1991/16, pp.20-21.

¹⁴¹ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, p 120.

The UK could also argue that Greece should not be allowed to start a legal action against the UK because Greece has by now waived its legal right to the Marbles' return. According to the doctrine of implied waiver, consent by a state to particular conduct by another State, if freely and validly given, may excuse the wrongfulness of that conduct under international law.¹⁴² But a State will not lightly be presumed to have given up its rights. If an international court is to infer a waiver from the conduct of the State concerned, that conduct must be unequivocal,¹⁴³ clearly indicating the waiving state's intention to renounce and abandon its rights or claim.

In this case, it is unimaginable that Greece would be found by a court to have abandoned its rights over the Marbles, or its entitlement to bring a claim for their return.¹⁴⁴ The record shows a consistent and clear claim for the return of the Marbles, from independence until the present day. Moreover, the power differential that characterised the relationship between the UK and Greece in the 19th century, and for the most part of the 20th, should also be taken into account in assessing the effect of the manner in which Greece was asserting its rights.¹⁴⁵

The UK might also allege that Greece acquiesced in the UK's seizure of the Marbles and is now 'estopped' from changing its mind. The ILC Articles on State Responsibility list among the grounds precluding the invocation of responsibility not only cases in which a state

¹⁴² Article 20 ILC Articles.

¹⁴³ ILC Articles commentary, para 45(5); *Case Concerning Certain Phosphate Lands in Nauru*, ICJ Reports (1992), 240, para. 13; see also, C. Tams, 'Waiver, Acquiescence and Extinctive Prescription', in: J. Crawford, A. Pellet, S. Olleson (eds), *The law of international responsibility* (Oxford University Press, 2010), p. 5.

¹⁴⁴ In relation to the argument that Greece abandoned its property in the Marbles themselves, see Opinion of Professor Palmer, Chapter 8.

¹⁴⁵ *Case Concerning Certain Phosphate Lands in Nauru*, ICJ Reports (1992), 240, para.36.

“validly waived the claim”,¹⁴⁶ but also cases where “the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim”. In such cases, there may be a basis for a court to stop the indolent State from pursuing the sleeping claim for the first time.

But ICJ case law has established three stringent requirements for the application of the doctrine of estoppel, none of which is satisfied in the case of Greece. First, estoppel may be based on either an explicit or tacit statement of fact or representation,¹⁴⁷ but only if the representation is “clear and unequivocal”¹⁴⁸ and “clearly and consistently evince[s] acceptance”.¹⁴⁹ There can be no suggestion that Greece has “made it fully clear that it had agreed” not to bring a claim against the United Kingdom in respect of the Marbles or that it recognised the UK’s (or the British Museum’s) title over them. Since this is the standard applied by the ICJ,¹⁵⁰ the first condition for estoppel is not fulfilled and an international claim would not be stopped on this basis.

The second requirement under international law¹⁵¹ is that of reliance, i.e. the party invoking estoppel must establish that the opponent induced it, by its representation, to act

¹⁴⁶ Article 45(a) ILC Articles

¹⁴⁷ N. Antunes, ‘Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement’, *International Boundaries Research Unit* (2000), p. 4; see also M. Wagner, ‘Jurisdiction by Estoppel in the International Court of Justice’, *CALIFORNIA LAW REVIEW* (1986), p. 1781.

¹⁴⁸ *North Sea Continental Shelf (Denmark v Federal Republic of Germany; Netherlands v Federal Republic of Germany)* [1969] ICJ Rep 4, 120, para. 30.

¹⁴⁹ *North Sea Continental Shelf (Denmark v Federal Republic of Germany; Netherlands v Federal Republic of Germany)* [1969] ICJ Rep 4, 120, para. 30.

¹⁵⁰ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Jurisdiction)* [1998] ICJ Rep 275, p.303.

¹⁵¹ See e.g. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) (Jurisdiction)* [1998] ICJ Rep 275, 303; *North Sea Continental Shelf (Denmark v Federal Republic of Germany; Netherlands v Federal Republic of Germany)* [1969] ICJ Rep 4, p.26.

or to refrain from acting in a particular way.¹⁵² To satisfy this requirement, the United Kingdom would need to show that it has “taken distinct acts in reliance” on the Greek representation.¹⁵³ In this case, there is no evidence that British authorities believed that Greece was ever discontinuing such a claim, or that it adjusted its conduct accordingly.

Third, the party seeking to rely on estoppel needs to prove that it has suffered a “change of position”,¹⁵⁴ some injury or damage as a result of its good faith reliance upon the other party’s representations,¹⁵⁵ or that this has produced some benefit on the part of the other State.¹⁵⁶ In this case, there was no evidence of detriment to the UK or benefit for Greece arising from the alleged delay.

The lack of detriment to the UK should also defeat any attempt to bar a legal action today on the basis of the doctrine of laches, the broadest potential bar to filing a claim where significant time has passed since the claim arose.¹⁵⁷ The underlying concept is that undue delay in the presentation of an action before an international tribunal will work inequity between the litigating parties.¹⁵⁸

¹⁵² *Case concerning Barcelona Traction Light and Power Co (Belgium v Spain)* (Judgment) [1964] ICJ Rep 4, p.17.

¹⁵³ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)*, ICJ reports 2008, para. 228.

¹⁵⁴ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Jurisdiction) [1998] ICJ Rep 275, p.303. *North Sea Continental Shelf (Denmark v Federal Republic of Germany; Netherlands v Federal Republic of Germany)* [1969] ICJ Rep 4, p.26.

¹⁵⁵ *Case concerning Barcelona Traction Light and Power Co (Belgium v Spain)* (Judgment) [1964] ICJ Rep 4, p. 25.

¹⁵⁶ N. Antunes, *op. cit.*, p.35.

¹⁵⁷ See Ibrahim, *op. cit.*, p. 647, also noting that unlike statutes of limitations, which are legislatively created and mechanically applied in courts of law, the doctrine of laches developed as an affirmative defence in courts of equity – historically outside the statute of limitations’ purview.

¹⁵⁸ Ibrahim, *op.cit.*, p.651.

But for this to be a bar to a legal claim today, the delay must have caused significant prejudice to the party invoking it – in this case, to the UK – for instance through a loss of evidence or a material change in the position of the defendant that occurred due to the plaintiff's delay.¹⁵⁹ On this basis, any argument that laches precludes Greece's claim should fail. In the present case, there was no prejudice to the UK, which has always been aware of the claim and maintains a full documentary record in its archives (except for the missing Firman, which was missing 200 years ago). The British government could not suggest it has suffered any detriment, whether procedural or substantive, as a result of the period of time elapsed between the looting of the marbles and the formal initiation of proceedings before an international court. Indeed, any reliance on Greece's supposed abandonment of the claim could only have been to the UK's advantage, since it allowed it to continue to enjoy the Marbles undisturbed.

CONCLUSION

The evidence proves that, from the moment it achieved independence and consistently since then, Greece has sought the return of the Marbles from the British Government through all possible channels, to the point where it has now exhausted available diplomatic options. As a result Greece's late filing should not be considered to be the result of "undue delay", or

¹⁵⁹ A. Hawkins and others, 'A Tale of Two Innocents. Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art', 64 I (1995) FORDHAM LAW REVIEW 49, pp.67-68. To the extent claims of laches require the existence of prejudice for the party advancing them, this doctrine overlaps to a large extent with cases of estoppel by silence, where a state has detrimentally relied upon another state's inaction over an extended period of time. The key differences between these two doctrines in international law are the absence of any discussion of reliance in connection with laches and the nature of the prejudice complained of. In cases of estoppel, in fact, the alleged prejudice is generally substantive (such as incurring responsibilities or expenses), successful pleas of laches require a procedural detriment (such as the loss of documentary and witness evidence due to the passage of time). See ECtHR, *Cyprus v Turkey* (Appl. No. 25781/94), Judgment (Just Satisfaction), 12 May 2014, para. 26.

excluded on the basis of implied waiver, estoppel or laches. Greece should not be debarred from initiating legal proceedings before an international court to recover the Marbles.

Nonetheless, the very existence of such defences as laches, waiver and acquiescence serve to put Greece on notice that jurisprudential patience is finite. As of the 26 March 2015, when the UK and the Museum Trustees rejected the UNESCO request for mediation, Greece has nowhere to go other than to court. If it delays now, and resorts again and for some years to political and diplomatic channels that have proved useless, it runs a real risk that it will be non-suited in any legal claim it may decide to bring in the future. It is now, or never.

CHAPTER 5. INTERNATIONAL CUSTOMARY LAW

THE RIGHT TO REPOSSESS PRECIOUS HERITAGE

The British government complacently considers itself immune from legal attack over its determination to keep the Marbles in Britain forever. It has locked them up by legislation – the 1816 statute “vesting” title in the Museum Trustees, in return for an acquisition payment to Elgin (in fact, paid to his creditors) of £35,000, and the 1963 Act which prevents the Trustees from disposing of them permanently. This complacency is likely to prove justified if legal action were brought in England, where the two statutes would probably be interpreted by English courts as barring restitution. But what of international law, and its growing concern to protect cultural property? And of human rights jurisprudence, being developed under the European Convention of Human Rights, to which both UK and Greece are parties? This chapter surveys the developments in jurisprudence, and international covenants that articulate principles about the right of peaceful states to claim restoration of stolen cultural objects of high worth. It sets out some of the evidence for the existence of an international law rule which would entitle Greece to reclaim the Marbles.

International law, unlike local law which is dependent on domestic parliamentary legislation, evolves through the creative interplay of several sources. Conventions and treaties, custom and the practice of states, general principles recognized by civilised nations, and to a lesser extent, judicial decisions and the writings of jurists. Its rules, or “norms” are authoritatively declared in decisions and “advisory opinions” by the International Court of Justice (ICJ). Although this court has decided some inter-state property disputes, it has not thus far considered whether a rule requiring the return of looted cultural property has

“crystallised” sufficiently to be declared a norm of international law. It is time that it did so. The behaviour of ISIS, in destroying ancient monuments and looting in order to traffic their artefacts, has aroused a global concern and the British Museum itself has been at the forefront of the campaign for intervention to preserve (and in time, return) precious cultural property seized in Syria and Iraq. Justification for such intervention requires a clear basis in international law, which the Court has not yet had occasion to articulate, but which the Court could recognise in an ICJ “advisory opinion” on the return of the Marbles. Such opinion could – and should – be sought by UNESCO, pursuant to its duty to preserve the world’s heritage, or by the General Assembly of the United Nations. Greece should, in its own interests, ask UNESCO to seek this opinion, and since the UK has consistently refused UNESCO mediation, an ICJ reference is the obvious next step. This procedure would permit other countries, and other recognized cultural institutions, to join in the court proceedings to determine the rules of customary international law relating to the right to return of ancient and highly-valued cultural property.

There are already a number of established ‘norms’ or rules, of international law relating to cultural property. In conflicts, for example, parties are obliged to protect historic monuments and works of art and religion and “any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited”.¹⁶⁰ Any occupying power is obliged to “return illicitly exported property to the competent authorities of the occupied territory”.¹⁶¹ The sources for these rules go back to customs that have emerged during centuries of warfare. Might they not now logically extend to a third party like Elgin, who

¹⁶⁰ International Law Commission, International Customary Law Study, Rule 40.

¹⁶¹ Ibid, Rule 41

illegally removed items crucial to the cultural heritage of an occupied country – especially since, as explained in Chapter 3, Britain has imputed responsibility in international law for its Ambassador's depredations? New international law rules emerge by logical extension from existing rules, once it can be shown that the new rule both reflects the practice of states and the existence of what international lawyers call "*opinio juris*" – ie a view by states they must conform to such practice as a matter of legal duty. No state today could think for a moment that its Ambassadors could act as Elgin did, in despoiling an historic monument, without some form of international retribution to require or enforce return. An extension of the existing rules to enable return of the Parthenon Marbles would be justified by state practice (reflected, for example, in court decisions, the behaviour of public bodies and statements by UN bodies such as UNESCO) that states are obliged to return unique heritage they have wrongfully taken, even if such a rule is not always observed. This chapter sets out case law which supports such an extension, together with Conventions and museum ethical rules and academic literature, all pointing to the fact that by now a norm has crystallised which entitles a state to retrieve wrongfully taken cultural property of great historic significance.

There is support for such an extension in UNESCO Conventions, agreed in 1970 and thereafter, which acknowledge the right of states to reclaim the "keys to their heritage" which have been wrongfully taken. A right arises under the Convention only in respect of property taken after a state has signed up to it, but the principle can apply by analogy to underpin a customary rule that applies to cultural property wrongfully seized at an earlier time. Indeed, international law at the time of Parliament's purchase from Elgin (1816) required the return of heritage items seized in war, and (as explained later in this chapter) the principle that justified the return of Napoleon's stolen treasures could be extended to cover Elgin's depredations. As a reflection of modern "*opinio juris*", many museums –

sometimes as a result of state-to-state requests (such as Australia's request to the UK to allow repatriation of human remains robbed from Aboriginal graves two centuries ago) have acknowledged at least an ethical duty to return cultural property highly valued by indigenous groups. There is, moreover, an impressive quantity of juristic writings and court decisions that recognize in state sovereignty itself the power to possess, and repossess, items of great heritage significance to their people. Can all these straws in the legal wind, so to speak, now be made into a brick that will shatter the walls of the Duveen Gallery and permit the Grexit of its Marbles, back to where they belong?

The international law norm for which Greece can contend might best be expressed in terms of its right to reconstitute the Parthenon –the existing Acropolis building of world heritage status in its possession – with statues which are part of its unity and were unlawfully ripped from it by Britain's Ambassador. This rule would be limited to monuments of outstanding and enduring international importance ("world heritage status" being a necessary but not sufficient qualification) which have been significantly reduced in their integrity by deliberate despoliation or wrongful removal of their fixtures or contents by or on behalf of another state which continues to detain them. The state to which the monument belongs should be entitled to recover these fixtures and contents, so long as it can prove that they will be appropriately stored in a place where they will not be in danger of destruction and in circumstances which allow the monument to be appreciated in its full glory. This was already recognised by UNESCO when it articulated, in considering the case of the Marbles,

“the principle that elements abstracted from national monuments should be returned to those monuments”.¹⁶²

There are other ways in which the international law rule could be formulated, and many would contend for a wider principle requiring, for example, the return of high-value heritage objects taken from weak or unformed states by great powers or their colonial administrators, or taken in circumstances that were illegal or unauthorized, or simply taken – bought, begged or borrowed – against the interests of the people to whom they should belong. These broader rules may crystallise in time, but to obtain an opinion from the ICJ confirming its entitlement to retrieve the Marbles, Greece need not go so far. The Parthenon is unique, and the importance of its restoration, in the sense of bringing its frieze sculptures together in a glass-ceilinged museum it overlooks, can have few if any parallels.

CULTURAL PROPERTY CASE LAW.

The most important case – because it was a decision of the International Court of Justice – was decided in 1962.¹⁶³ It involved a dispute between Thailand and Cambodia over the territorial location and ownership of the Temple of Preah Vihear. Cambodia alleged that Thai authorities had unlawfully removed statues from the Temple. Having found as fact that the Preah Vihear was situated in territory over which Cambodia was sovereign, the ICJ concluded that in principle the ‘sculptures, stelae, fragments of monuments, sandstone model and ancient pottery’ removed from the Temple by Thai authorities after 1954¹⁶⁴

¹⁶² See the Recommendation No. 55 adopted by the Conference, in. UNESCO, *Final Report of the World Conference on Cultural Policies*, Mexico City, 28 July – 6 August 1982, p.96.

¹⁶³ *Case Concerning the Temple of Preah Vihear* (Cambodia v Thailand) [1962] International Court of Justice 6.

¹⁶⁴ The year in which Thai forces were first stationed at the site.

should be restored to Cambodia. The Court found that such cultural restitution was “implicit in, and consequential on, the claim of sovereignty itself.”¹⁶⁵ This decision significantly strengthens the equation between statehood and title to antiquities, through its assumption that public ownership of ancient artefacts is an essential element of national sovereignty.¹⁶⁶ The *Case Concerning the Temple of Preah Vihear* can serve as the starting point for an international law rule based on the sovereignty of a despoiled state, according it the power to possess and hence to repossess momentous heritage items wrongfully taken from it. Of course the Temple trimmings were insignificant to Cambodia compared with the importance of the Parthenon to Greece.

A further parallel might be drawn with the return of the statue of Venus of Cyrene from Italy to Libya in 2008. The statue had been found in 1913 by Italian troops in Cyrenaica following its annexation by Italy and it was removed to Rome and placed in the Roman National Museum, having become under Italian law the property of the Italian State. Following extensive legal challenge, the decision to return the Venus was in 2008 upheld by the Council of State,¹⁶⁷ the highest court in Italy for administrative law. Among other conclusions the Council found that there existed a rule of customary international law which obliged recipient States to return all cultural objects which have been taken as a result of colonial domination or acts of armed conflict. The Council also ruled that the statue did not qualify as property of the Italian state and that, even if it did, the retentive Italian legislation which ostensibly prohibited the return of the statue must give way to

¹⁶⁵ [1962] International Court of Justice 6 at 36. “As regards the fifth Submission of Cambodia concerning restitution... [it is] implicit in, and consequential on, the claim of sovereignty itself.”

¹⁶⁶ In the event the ICJ held that Cambodia had adduced no concrete evidence to prove that any of the alleged items had actually been removed by Thai authorities. It followed that the Court’s decision on this matter remained one of principle only.

¹⁶⁷ Decision of the Council of State of Italy, 8th April 2008.

Italy's international obligation to return cultural objects removed or retained in the prescribed conditions. The acknowledged rationale for the removal to Rome (that it was conducted to preserve the Venus from the perils posed to its integrity by local military operations) was a departure from the normal Italian policy of keeping cultural objects in their context, and did not justify continued detention. Finally the Council of State held that no time limits operate in favour of a State which has acquired cultural objects displaced through colonial domination or armed conflict.

There are illuminating parallels between this case and that of the Parthenon Sculptures. Greece, like Libya, was occupied territory¹⁶⁸ at the time of the taking. The Venus of Cyrene, in common with the Parthenon Sculptures, was not an isolated object found in a random place remote from its original context. Rather, it was something contextually integral to the extensive archaeological site of Cyrene, a site important enough to have been inscribed on the World Heritage list.¹⁶⁹ Moreover, the Italian authorities and adjudicating bodies relied on a conjunction of the 1970 UNESCO Convention¹⁷⁰ and the 1983 Vienna Convention¹⁷¹ to conclude that Italy was obliged to return the Venus. Indeed, Italy and Libya signed in 1998 a joint declaration by which Italy undertook to return "all manuscripts, artefacts, documents, monuments and archaeological objects brought to Italy during and after the

¹⁶⁸ The question of whether Greece was an occupied territory in 1801, however, is certainly debatable [elsewhere we say this was def the case]. In 'Thinking About the Elgin Marbles', *Mich LR* 83, 1881 (1985), JH Merryman claims the Ottomans were the recognised rulers of Greece at the time. However, David Rudenstine disputes this in 'The Legality of Elgin's Taking. A Review Essay of Four Books on the Parthenon Marbles' 8 *Int'l J Cultural Prop* 356, 357 (1999). Note also that the western powers did not formally accept the Ottoman Empire into the 'European concert' of nations until the Paris Treaty of 1856, following the Crimean War.

¹⁶⁹ In 1982. The Acropolis became a World Heritage site in 1987.

¹⁷⁰ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970.

¹⁷¹ Vienna Convention on Succession of States in respect of State Property, Archives and Debt, 1983.

Italian colonisation of Libya, *pursuant to the 1970 UNESCO Convention...*" (emphasis added).

A final point of similarity is that in 1911–1915 (the period of annexation of the Cyrenian territory and removal of the Venus of Cyrene) Libya did not exist as an independent State. Like Greece in 1816, Libya was until around the time of the removal of the Venus part of the Ottoman Empire, becoming an independent kingdom only in 1951. This did not inhibit the Italian Council of State from endorsing the decision to return the Venus to the modern State which now occupies the territory from which the Venus was removed.

A number of national court decisions – from superior courts in the UK, the Republic of Ireland and the US – confirm more generally that the sovereignty (power) of a state includes control of the “keys to its ancient history”. It has the right to repossess items of great importance to the cultural development of its people. Of course the treasures in these three cases could not compare with the Parthenon Sculptures, either in art or in international significance, but the judicial approach in each case is favourable to the rule of return suggested by the ICJ in the *Preah Vihear Temple* case and that of the Italian State Council in the case of the Cyrene Venus.

*Webb v Ireland*¹⁷²

In a claim before its Supreme Court, the Republic of Ireland asserted ownership over recently discovered ninth-century ecclesiastical treasures. These objects had been found by private searchers on land within the territory of the Republic. In an innovative judgment, charting a region virtually untouched by Irish common law, Chief Justice Finlay said,

¹⁷² [1988] IR 353

It would, I think, now be universally accepted, certainly by the People of Ireland, and by the people of most modern States, that one of the most important national assets belonging to the people is their heritage and knowledge of its true origins and the buildings and objects which constitute keys to their ancient history. If this be so, then it would appear to me to follow that a necessary ingredient of sovereignty in a modern State and certainly this State, having regard to the terms of the Constitution, with an emphasis on its historical origins and a constant concern for the common good, is and should be an ownership by the State of objects which constitute antiquities of importance which are discovered and which have no known owner. It would appear to me to be inconsistent with the framework of the society sought to be protected by the Constitution that such objects should become the exclusive property of those who by chance may find them.

The result was the award of the objects to the Republic of Ireland, the country in which they had been deposited and excavated, and the State in which ownership had vested, presumably when the Republic came into being as an independent political unit. The successful claimant was a political entity which did not exist at the time of original deposit and which 'inherited' its proprietary rights over the hoard from its political predecessor, the United Kingdom. The Claimant State came into existence only some eleven hundred years after the artefacts in question were created. The artefacts were deposited at a time which preceded their discovery by many centuries. Despite these local circumstances, however, the principle adopted by Finlay CJ is capable of universal application. It has been found competent to guide and inform tribunals outside Ireland, such as the English Court of Appeal.

Iran v Barakat Galleries Ltd¹⁷³

This decision of the English Court of Appeal arose from a claim by Iran involving the contemporary illicit trade in cultural objects allegedly taken from a grave site in the Jiroft Valley. Relying on Iranian domestic law, Iran asserted both the ownership of, and the immediate right to the possession of, the objects at the time of their removal. The English Court of Appeal gave voice to critical matters of international policy concerning the respect that a nation's heritage (the 'keys to its ancient history') should command from fellow nations. The Court referred to international agreements relating to cultural material, to which the United Kingdom was not party but which the Court regarded as representative of the contemporary mood of international responsibility for displaced cultural treasures. The Chief Justice said.

...it was essential for every State to become alive to the moral obligations to respect the cultural heritage of all nations and that the protection of cultural heritage could only be effective if organised both nationally and internationally... In the Supreme Court of Ireland, Finlay CJ said that it was universally accepted that one of the most important national assets belonging to the people is their heritage and the objects which constituted keys to their ancient history; and that a necessary ingredient of sovereignty in a modern State was and should be an ownership by the State of objects which constitute antiquities of importance which were discovered and which had no known owner.

¹⁷³ [2009] QB 22, [2007] EWCA Civ 1374.

In *Barakat* the Court extended the support for national ownership which had been expressed in *Webb* to a country which did not come into existence until some 4,000–5,000 years after the creation and depositing of the objects.

*Autocephalous Greek-Orthodox Church of Cyprus v Goldberg*¹⁷⁴

There is also the *Church of Cyprus* case which came before the Supreme Court of Indiana. The Autocephalous Greek Orthodox Church claimed, on grounds of ownership, the restitution of mosaics from northern Cyprus. In upholding the Church's claim¹⁷⁵ the Court accepted without question that the State of Cyprus had a sufficient interest to be joined as a co-plaintiff with the Church.

... a short cultural memory is not an adequate justification for participating in the plunder of the cherished antiquities that play important roles in the histories of foreign lands. The UNESCO Convention and the Cultural Property Implementation Act constitute an effort to instill respect for the cultural property and heritage of all peoples. The mosaics before us are of great intrinsic beauty. They are the virtually unique remnants of an earlier artistic period and should be returned to their homeland and their rightful owner. This is the case not only because the mosaics belong there, but as a reminder that greed and callous disregard for the property, history and culture of others cannot be countenanced by the world community or by this court...we should not sanction illegal traffic in stolen cultural property that is clearly documented as belonging to a public or religious institution. This is particularly true where this sort of property is "important to the cultural heritage of

¹⁷⁴ 917 F.2d 278, 1990 U.S. App. Decision.

¹⁷⁵ *Ibid.* ("... the Church has a valid, superior and enforceable claim to these Byzantine treasures, which therefore must be returned to it").

*a people because of its distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people.*¹⁷⁶

The decisions in *Webb*, *Barakat* and *Goldberg* confirm the interest of a modern State in those cultural objects which possess four characteristics.

- i. they were originally installed or deposited in a place within that State,
- ii. they have been displaced in consequence of acts unauthorised by the law of that State, and
- iii. they have retained since their removal from the State a paramount cultural or historical association with that State.
- iv. In each case the permanent absence of the object, without lawful authority, from its original and intended cultural environment would have depleted and diminished the cultural ancestry of the modern country within which that place is now located.¹⁷⁷

¹⁷⁶ Ibid.

¹⁷⁷ Compare in that respect the relationship between the bust of Nefertiti and the workshop where it was found, as expounded by Professor Kurt Siehr. *Imperialism, Art and Restitution* (edited by John Henry Merryman) (Cambridge University Press, 2006) p 126-128. (Henceforth '*Imperialism*, etc')

Four principles can be inferred from these decisions, together with the *Venus of Cyrene* and the Cambodian Temple case, each of which is applicable to the Greek claim to the Parthenon Sculptures.¹⁷⁸

- i. the sovereign right of nations to possess, enjoy, regulate the disposition of and generally exert dominion over the keys to their ancient history;
- ii. the value of cultural objects to the identity and well-being of nations and communities;
- iii. the duty of nations to co-operate with one another in returning unlawfully removed national treasures to their country of origin;¹⁷⁹ and
- iv. the legitimate interest of nations in seeking the recovery of national cultural symbols.

CONVENTIONS AND PRACTICE

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property has 128 state parties, including Greece and the UK. It declares that cultural property “constitutes one of the basic

¹⁷⁸ These decisions also reflect an emerging sensitivity to the distinctive non-commercial value of cultural objects, its importance to nations and its transcendence over economic interests. Other examples are examined later in this Chapter.

¹⁷⁹ See *Iran v Barakat* [2007] EWCA Civ 1374 at [155], “There is international recognition that States should assist one another to prevent the unlawful removal of cultural objects including antiquities. There are a number of international instruments which have, in part, the purpose of preventing unlawful dealing in property which is part of the cultural heritage of States, although there still remains a question about their effectiveness. The United Kingdom is party to some of them ... None of these instruments directly affects the outcome of this appeal, but they do illustrate international acceptance of the desirability of protection of the national heritage.”

elements of civilisation and national culture", that "it is incumbent on every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export", and that "it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage *and that of all nations*". Parties undertake, pursuant to Article 13(d), to "facilitate recovery of such property by the State concerned in cases where it has been exported".

Of course the UNESCO Convention is not retrospective and does not redistribute rights to antiquities that were removed a century and a half before it came into being. But for the purposes of international customary law, the Convention illuminates state practice at the time it was formulated, and *opinio juris*, namely that it was legally wrong to steal antiquities, and that dispossessed states had a right to recover them.

There have recently been promulgated Operational Guidelines to the Convention, which by including the following Guideline 103 indicate a way of approaching pre-convention removals.

"For items of illegally exported, illegally removed or stolen cultural property imported into another State Party before the entry into force of the Convention for any of the States Parties concerned, States Parties are encouraged to find a mutually acceptable agreement which is in accordance with the spirit and the principles of the Convention, taking into account all the relevant circumstances".¹⁸⁰

¹⁸⁰ Guideline 103. The Guidelines also point out that the 1970 Convention "does not in any way legitimize any illicit transaction of whatever nature which has taken place before the entry into force of this Convention nor limit any right of a State or other person to make a claim under specific procedures or legal remedies available

Guideline 103 was approved for final adoption on 18th May 2015 at the Meeting of States Parties to the Convention.¹⁸¹ The UK is, of course, in breach of their guideline through its refusals to accept UNESCO mediation. But the importance of the UNESCO Convention and its rules is again its potential as a source for an international customary law norm asserting the inalienability of a nation's vital cultural property.

In a more general sense there has emerged a practice on the part of European States, directed towards the repatriation to countries of origin of those items of cultural property which are supremely important to the cultural heritage of the peoples of those countries. Examples within Europe include the return of the Axum obelisk to Ethiopia by Italy, the return of the Venus of Cyrene to Libya by Italy,¹⁸² the return of the Icelandic manuscripts from Denmark to Iceland in 1971, the return of coins from Germany to Greece in 1989, the return of antiquities from Italy to Ecuador in 1982, the return of the Lion of Judah to Ethiopia by Italy, the return of *El Negro* from Spain to Botswana, the return of the "Hottentot Venus" by France to South Africa and the return of the human remains of 1905 Genocide victims from Germany to Namibia.

It is possible to formulate from these and other instances certain principles which further support the basis for a customary international law claim by Greece to recover the Marbles. The first principle that can be extracted is that the duty of repatriation applies only to those cultural artefacts that are of supreme importance to the cultural identity of a people, and the Marbles would provide a pre-eminent example. The second principle is the compelling mandate to preserve the unity of cultural property of great or historic importance. Cultural

outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention".

¹⁸¹ UNESCO doc. C70/14/2.SC/5/Rev. of June 2014.

¹⁸² See T. Scovazzi, 'The Return of the Venus of Cyrene', Vol.XIV-4 ART, ANTIQUITY AND LAW (2009), p.355.

property which has been dissected and dismantled, fragmentized and distributed among different countries with resultant denaturing and devastation of its integrity, should be restored to its original eminence by the repatriation of those components that comprise the whole. The Parthenon marbles would obviously qualify under both these heads. Finally, the duty of repatriation would apply only in those cases where the cultural artefact could be restored to its original eminence by the repatriation of cultural property that has been looted, requisitioned, made the subject of a forced sale, or otherwise acquired through some form of illegality, such as theft, illegal excavation, illegal removal from a cultural site, or lack of title on the part of the original acquirer (or the original disposer of the property). Given the evidence summarised in chapter 2 about the original acquisition of the Parthenon marbles by Lord Elgin, there is certainly a compelling argument that the Marbles were wrongfully acquired.

It can therefore be convincingly argued that an international law rule has emerged entitling a Sovereign state to require the return of property of supreme importance to its national heritage which has been wrongfully taken and retained by another state, and that there exists a correlative duty on that state to facilitate the return. Although such a rule has not been declared in these precise terms it reflects centuries-old customary rules of conflict and modern developments of rules to protect cultural property in peacetime. Although it may be that a norm which would require the return of the Parthenon Marbles has only crystallised recently, a century or two after Elgin's looting, it nevertheless entails an obligation today to return the looted property. Indeed, it could be argued that this obligation entered international law at the very time the British Parliament bought the Marbles – in the aftermath of the Battle of Waterloo.

CULTURAL PROPERTY IN TIME OF WAR

There are now, as mentioned earlier, international war law rules against pillage of historic monuments and which require return of illicitly exported cultural property. Prior to the eighteenth century, there was no customary rule for the protection of religious or cultural monuments in times of war. To the victor went the spoils, as the saying went. Taking property as war booty could be justified by the victorious commander, although acts of theft and pillage by soldiers were punishable as war crimes. Shakespeare's *Henry V* hangs a soldier who steals from civilians, just as Cromwell, on the march to Drogheda, put to death troopers who were guilty of theft from farmers *en route*.

By the mid-eighteenth century, however, treaties began to incorporate provisions for the return of cultural objects looted during wartime.¹⁸³ By 1758, the leading international jurist Vattel saw fit to write in *The Law of Nations* that,

"For whatever reason a belligerent plunders the country, he should spare buildings that are the pride of mankind and do not strengthen the enemy, such as temples, tombstones, public buildings, and all other works of art distinguished for their beauty." (Emphasis added)

Vattel's contribution was to provide doctrinal recognition of cultural property as distinct from land, ships, bullion, commodities, arms and other movable possessions.¹⁸⁴ The doctrine

¹⁸³ Treaties of Munster (1648), Whitehall (1662), Nijmegen (1678), Lunden (1679), Ryswick (1697), Utrecht (1713).

¹⁸⁴ See Margaret Miles, *Art as Plunder. The Ancient Origins of Debate of Cultural Property*, Cambridge University Press, Cambridge, 2008 at p 301.

had an influence on state activity and by the nineteenth century it was 'generally accepted that the looting of works of art was contrary to the usages of modern warfare.'¹⁸⁵

A British Admiralty decision from this time confirms the fact. During the War of 1812, a British vessel captured an American vessel on the high seas and claimed the cargo as prizes of war. The cargo contained paintings from Italy bound for the Philadelphia Academy of Arts and Sciences. A petition was filed on behalf of the owner of the paintings before a British Admiralty Court, sitting at Nova Scotia. The Court held that objects of artistic value were 'part of the common heritage of all mankind and thus protected from seizure during war', ordering that they be returned to the owner.¹⁸⁶ The case is a snapshot of the legal treatment of valuable cultural property under international law, and an indication that Vattel's earlier propositions had hardened into custom.

The clearest example of a state practice involving the return of cultural property occurred at the conclusion of the Napoleonic Wars. During Napoleon's conquest of the Continent, he had amassed a vast collection of artistic treasures from the defeated nations which were placed in the Musée Napoléon in Paris. A number of spoliations had been accomplished through the imposition of terms in peace treaties, the most notorious being the Treaty of Tolentino (1797) in which the Papal States agreed to hand over to France 100 works of art from the Vatican collections, including the Apollo Belvedere and the Laocoön, as well as

¹⁸⁵ Kevin Chamberlain, *War and Cultural Heritage*, 2nd edn., Institute of Art and Law, Wales, 2013, at pp 7-8.

¹⁸⁶ *The Marquis de Somerueles*, [1813] Stewart's Vice Admiralty Reports 482 (U.K.). Note also the later American case of *United States v Herce*, in which the judge granted an application by the District Attorney that a disputed work by El Greco currently held by the FBI should be lodged at the Metropolitan Museum of Art pending termination of the action, "because of the great public interest involved". Judge Brieant went on to conclude that 'the right of the public to have such a work of art, a masterpiece which is not only a part of the national heritage of Spain but also a part of the heritage of all mankind, made available for public view is a substantial one.'

500 manuscripts from the Papal archive. The same terms were applied to the remaining Italian states upon their eventual defeat,¹⁸⁷ which led to the taking of the famed Bronze Horses from San Marco in Venice and the Medici Venus from Florence.¹⁸⁸ In his other campaigns, Napoleon had succeeded in obtaining for France masterpieces from the royal collections of Prussia and the Netherlands.

Following Napoleon's defeat at Waterloo in 1815, the Allied Nations were confronted with large amounts of looted art at the Musée du Louvre (as the Musée Napoléon would henceforth be called). Following the Military Convention, it was decided that all cultural objects spoliated during the Napoleonic Wars were to be promptly returned to their states of origin. The leading proponents of this policy – and those with the greatest influence – were members of the British delegation: the British Foreign Secretary, Viscount Castlereagh, and the Duke of Wellington. In committing themselves to the return of these works, both represented Great Britain in the pursuit of an allied policy that sought the restitution of spoils to their countries of origin, and both expressed what must certainly have been the commonly held view of the time: that Napoleon's takings had violated the rules of international warfare and of 'justice'.

In his Note of 11th September 1815 to the Allied Ministers assembled at Paris, Viscount Castlereagh made very clear what the policy regarding works of art was to be. He explained how a number of allied sovereigns had made representations claiming the return of statues, paintings and other works of art of which their "respective States have been successively and systematically stripped by [the] Government of France, contrary to every principle of

¹⁸⁷ See Treaties between France and Parma (1796), Modena (1796) and Venice (1797), each of which gave to France 20 paintings from public collections.

¹⁸⁸ See Margaret Miles, *Art as Plunder*, above, at pp 320–22.

justice, and to the usages of modern warfare". Castlereagh acceded to these claims, referring to the duty of the allies "to effectuate what justice and policy require" in returning these "spoils". Why allow France to keep cultural acquisitions "which all modern conquerors [ie until Napoleon] have invariably respected as inseparable from the country to which they belonged?" The relevance of these words, uttered as a statement of principle in the year before the British Parliament purported to lock up the "Elgin" Marbles, is plain. Britain was insisting upon a duty to return cultural objects "inseparable to the country to which they belong" which had been wrongfully "stripped" from them. This brings us close to the principle which would require the return of the Marbles, namely that no State, whether through the use of force or otherwise, may remove the cultural heritage of another State. Napoleonic France tried, and as a remedy to this breach, the works were returned to their "ancient seat".

If this rule existed in a time of war, it would be illogical if a similar taking of one State's cultural property by another State could not be a violation simply because it had taken place during times of peace. Provided that the actor involved in the wrongful taking is a State or its agents, this would generally be sufficient for the purposes of public international law, to qualify as a breach of the custom. The obligation upon each State to respect the integrity and inviolability of other States is the corresponding duty to a State's right to its own territorial sovereignty.

Viscount Castlereagh's statements appear to apply to more than mere wartime takings. If great cultural artefacts are impregnable, this applies to the pilfering Ambassador just as much as to the pilfering General. The States of Europe had been "successively and systematically stripped" by France "contrary to every principle of justice" and "to the usages of modern warfare". The principles of justice and the usages of warfare are distinct here.

The spoiliations violated *both* concepts, according to Castlereagh. And Wellington's letter provides additional support, explaining that "Artists, Connoisseurs, and all who have written upon it, agree" that all the artworks taken by Napoleon "ought to be removed to their ancient seat". Wellington is reflecting a universal belief (not simply that of generals or jurists) that art must be returned. Overall the statements by these leading allies can be understood as expressing a general prohibition on cultural spoliation, not merely one reserved for times of war.

While the takings of Lord Elgin may have occurred during 'peacetime', even this notion can be questioned. Shortly after the removal of the Sculptures from the Parthenon, war was declared between Great Britain and Ottoman Turkey. The war lasted between 1806 and 1809. During this time, a large number of the Sculptures taken off the Parthenon remained in Greece, packed up and awaiting departure at the port of Piraeus. Lord Elgin himself, in a letter to the First Lord of the Admiralty, requested a warship to be sent to recover them and suggested the use of force. To Sir John Stuart, military Commander-in-Chief, he asked for a show of British military strength to convince the Voivode to hand them over. He also promised Stuart to donate any marbles thus rescued free to the British Museum.¹⁸⁹ It was only after peace was restored, that the Sculptures left the port and made the journey to Britain. 48 cases travelled on a chartered ship with the *HMS Pylades* as military escort, while the final five cases travelled on another warship, the *HMS Hydra*. Although the eventual departure from Ottoman territory may have occurred during peacetime, it had some of the trappings of a wartime manoeuvre – not unlike the one Lord Elgin had envisaged.

¹⁸⁹ St Clair, above, at pp 152–5.

The second question that arises is whether the custom that existed in 1815 has continued until the present day. The customs of cultural property protection were codified in the American Lieber Code of 1863, as well as within the Hague Conventions of 1899, 1907 and 1954 (which the British government has at last committed to ratifying) and in the Roerich Pact agreed to by the States of the Americas in 1935.¹⁹⁰ Cultural returns were provided for in the Versailles Treaty of 1919 (Article 245 and 247). And of course the Allied Forces established the Monuments, Fine Arts and Archives Section (MFAA or 'Monuments Men') in order to effectuate the London Declaration of 1943 and obtain the return of art looted by the Nazis to their countries of origin.¹⁹¹ Moreover, the British government, in co-operation with the British Museum, is at time of writing (June 2015) actively endorsing and applying the custom in relation to cultural objects being looted and sold by ISIS: it has set up its own team of "monuments men" to collect endangered items in Iraq and to transfer them temporarily to the British Museum, undertaking to return them when it is safe to do so.

The one glaring modern discrepancy to any continued State practice is the actions of the Soviet Union and its Trophy Brigade at the end of the Second World War. However, Russia's actions (as well as its attempts at vesting ownership of looted cultural objects in the state) must be seen as a breach of a rule of customary international law (that of restitution) rather than as the survival of the primitive "spoils of war" doctrine. Courts are willing to deny Russia any right under international law in this regard. In one recent case, *Matter of Flamenbaum*,¹⁹² an American Court ordered the restitution of a 3,000-year-old gold tablet that had been taken by the Red Army from a Berlin museum at the end of the Second World

¹⁹⁰ Which required respect and protection to be accorded to historic monuments "in time of peace as well as in war".

¹⁹¹ Note that as implied, the returns effectuated were to States, rather than to individuals.

¹⁹² (2013) 95 AD3d 1318.

War. The New York Court of Appeals specifically denied that there existed a 'spoils of war' doctrine in favour of the Russian State.¹⁹³

CONCLUSION

Whether an international law rule is framed as a sovereign right of a state to reclaim "the keys to its ancient history" or in terms of a duty of a state which has wrongfully acquired such property to restore it to the historic monument from which it was stripped, it is clear that there is sufficient source material, in terms of state practice, Convention principles, court decisions and juristic writings and general public conception to demonstrate to a Court that such a rule is in existence today. Whatever limit is placed on the definition of the cultural property covered by the rule, that definition would apply to the Parthenon Marbles as the primary example of the right to have supreme historic heritage restored. Alternatively, if the rule were framed in relation not to state sovereignty but to an entitlement of the international community to appreciate monuments of world heritage status, and a consequent duty on all states to facilitate their integral restoration, the United Kingdom would incur a duty to amend its laws so as to permit restitution of the Parthenon. The time is ripe for the International Court of Justice to decide what customary international law now requires, and it can readily do so by way of an advisory opinion requested by UNESCO, on the question of restoring the Parthenon Sculptures. The UK's adamant refusal in 2015, of UNESCO's offer to mediate or negotiate the issue, leaves that organisation duty bound to seek the court's opinion.

¹⁹³ See also the English judgment of *City of Gotha and Federal Republic of Germany v Sotheby's and Cobert Finance S.A.* [1998] 1 WLR 114 which dealt with a painting that had probably been taken by Soviet forces from Germany at the end of the Second World War.

CHAPTER 6. EUROPEAN RIGHTS TO PROPERTY AND PRIVACY

The European Convention on Human Rights is binding on Greece and the United Kingdom, as well as on forty-five other states, pursuant to their membership of the Council of Europe. It has a court, in Strasbourg, which rules on whether the conduct of governments in those states is consistent with the basic human rights standards set out in the Convention. States judged to be in breach have a duty to amend their laws so as to remedy that breach. Most obviously, the UK's retention of what it terms the "Elgin" Marbles violates the right of the Greek people to enjoy their historic possessions, protected under Article 1 of the First Protocol of the European Convention. The UK may also be in breach of a right on the part of the Greek nation and people to enjoy cultural property, which could be spelled out of the Article 8 right to privacy. The 1816 Act vesting the Elgin Marbles in the British Museum, and the 1963 law preventing the museum from "de-accessing" its exhibits, effectively bar any local remedy, leaving the Greek government, apart from encouraging UNESCO or the UN to seek an international customary law solution itself through the ICJ, to explore its remedies under European law as a member of the Council of Europe.

Most cases in Strasbourg are brought by individuals against their own state, and they have to satisfy "admissibility" requirements, for example that the applicants are "victims" and that they have "exhausted domestic remedies" – i.e. have taken, and appealed, cases in their domestic courts. These technical admissibility rules are more relaxed in the case of inter-state actions, and for these and other reasons the question of whether the UK's detention of the Marbles was compliant with the Convention would be most appropriately raised by an action brought by Greece against the UK.

RIGHT TO ENJOY PROPERTY

Article 1 of the First Protocol to the ECHR ("A1P1") guarantees the right to the peaceful enjoyment of one's possessions.

ARTICLE 1. Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

Enjoyable possession has been denied in respect of the Acropolis itself and the Parthenon atop it, by any standards an historic monument of unparalleled beauty and significance. It is a unique symbol of the cultural history of Greece and of the civilised world at large. In its present state it also bears witness to the adverse effects of physical dissection and cultural depredation. It is of course a possession of Greece. It stands on Greek territory and is in public ownership. The disfigurement of the Parthenon by Lord Elgin impairs the Greek nation's legitimate enjoyment of that portion of the original monument which remains, and frustrates the intellectual and aesthetic satisfaction of visitors to Greece. The Parthenon, as a relevant "possession", includes those other buildings that form the Acropolis, including the Erechtheion, the Propylaea and the Temple of Nike. As a sovereign state in occupation of the public land on which they stand, Greece is indisputably the legal owner of these monuments. And because these possessions constitute cultural monuments of national (and universal) importance, they cannot be fully enjoyed in the absence of those sculptural elements that are integral to their structure. The pediment sculptures, the metopes and the frieze of the Parthenon are integral elements to that monument; just as the caryatids and the

columns are to the Erechtheion; the sculptures are to the Propylaea; and the frieze and other sculptures are to the Temple of Athena Nike.

In the eyes of modern Greeks the ancient history of their country is a real and cherished concept, unique to them and a matter of honourable pride.¹⁹⁴ The abstract concept of national heritage is potent and meaningful, for as John Steinbeck says, "without our past how shall we know who we are?" The same is true of the surviving tangible symbols of a nation's history. The deliberate, enduring and largely remediable impairment of the physical manifestations of a country's most distinguished achievements is an inevitable cause of demoralisation and distress, even of humiliation. No surviving artefacts bear a more poignant witness to the Greek sense of history than the mutilated façade and scattered fragments of the Acropolis.

Of course, the rights conferred by A1P1 (along with many other rights guaranteed by the ECHR) are not absolute. States have a wide margin of appreciation by which to justify their interference with property rights. But once Greece mounts the initial hurdles, the United Kingdom will be required to demonstrate that the interference with the rights at issue was lawful, that it pursued a legitimate aim and that it was proportionate.

Protected subjects under A1P1

The right under A1P1 is afforded to every natural person, as well as to every legal person. It will therefore be for Greece to demonstrate that, as a State bringing a claim before the ECtHR, it can effectively represent those subjects who are claiming protection under the Article. A claimant State can raise issues that affect rights protected under the ECHR. This

¹⁹⁴ Of course this is not peculiar to Greeks but is common to all peoples.

was done in *Ireland v United Kingdom*,¹⁹⁵ *Cyprus v Turkey*¹⁹⁶ and, most recently, in *Georgia v Russia*.¹⁹⁷ In those cases, the subjects whose rights were alleged to have been infringed were natural persons. In this case, the right being asserted is a right to a possession which belongs to the State of Greece.

As a State Party, Greece will bring the claim, but the claim must relate to specific violations that have been inflicted on those legal subjects who are protected under the provision. The most obvious starting point is to assert that the possessions at issue belong to the Greek nation, *ie* to all Greek nationals, because they have an inalienable right to objects of national cultural heritage. There is a persuasive argument that the Parthenon monuments are in fact the ‘possessions’ of the Greek nation, which includes every constituent Greek citizen, or alternatively, the citizens of Athens. If the State of Greece can then act as the representative of its citizens before the ECtHR, it will effectively be exercising the property rights of each and every one of its citizens. The established jurisprudence of the ECtHR has accepted that an organisation has capacity to bring an action where the organisation bringing the proceedings is either itself directly affected or genuinely represents individuals who have been directly affected.¹⁹⁸

Advances have been made by other international courts for the protection of collective rights under a human rights instrument. The Inter-American Court of Human Rights has for well over a decade been affording protection for the collective rights of indigenous people against state or state-sponsored violations. The Court has done so, in particular, with

¹⁹⁵ ECtHR, *Ireland v UK* (App. No. 5310/71), Judgment, 18 January 1978.

¹⁹⁶ ECtHR, *Cyprus v Turkey* (App. No. 25781/94), Judgment, 10 May 2001.

¹⁹⁷ ECtHR, *Georgia v Russia* (App. No. 13255/07), Judgment (Merits), 3 July 2014.

¹⁹⁸ See ECtHR, *Open Door and Dublin Well Woman v Ireland* (App. Nos 14234/88 and 14235/88), Judgment, 29 October 1992.

regards to the right to property under Article 21 of the American Convention on Human Rights – an equivalent to the right to property under AIP1.¹⁹⁹ This occurred first in the landmark case of *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,²⁰⁰ in which the Court found that a large expanse of territory over which the State had granted concessions to a logging company was in fact the ‘property’ of the local Awas Tingni group, even though none of the group’s members (nor any group-related entity) held formal title to that land. The Court found that tribal customs, which had included the territory as part of the group’s collective ownership, could render it property protected by Article 21. This enabled the Court to conclude that the Awas Tingni held a *communal* property right to the lands surrounding their habitation. The decision was followed by the same Court in *Moiwana v Suriname*.²⁰¹ Although the indigenous group in that case had no title to the land, the Court held that for such peoples, “their communal nexus with the ancestral territory is not merely a matter of possession and production, but rather consists in material and spiritual elements that must be fully integrated and enjoyed by the community, so that it may preserve its cultural legacy and pass it on to future generations”.²⁰²

Thus a human rights instrument (and most notably one entrenching the right to property) has been interpreted by an important international court to extend rights beyond those of an individual subject. In the area of cultural heritage this seems particularly apt. While a Greek national may not have title to the ruins at Delphi or the Byzantine Monasteries, he or she still has a sense of treating these as ‘possessions’, not belonging to him or herself as an individual, but owned by the nation.

¹⁹⁹ Article 21 – *Right to Property* reads as follows. “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.”

²⁰⁰ IACtHR, *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment of 31 August 2001.

²⁰¹ IACtHR, *Moiwana v Suriname*, Judgment of 15 June 2005.

²⁰² *Ibid*, at para 131.

There is no rule that precludes Greece from being a 'legal person' for the purposes of A1P1. Greece is a sovereign state and by the dictates of public international law has legal personality.²⁰³ Greece also benefits from legal personality within the domestic legal systems of the states of Europe. Greece can own property, it can transfer property, it can enter into contracts, it can bring legal proceedings and, subject to the rules of sovereign immunity, can be subjected to legal proceedings as well. Any possessions owned by Greece within another State, such as its embassy, consular properties or tourism bureaux, would be afforded, as a minimum, the same protection against State encroachment as the possessions of any other legal person within that State. As a result, its possessions should be protected by the right to property recognised and embodied in A1P1.

"Interference" with Peaceful Enjoyment

Greece can contend that its full enjoyment of the monuments is rendered ineffectual, or at least severely diminished, by reason of the United Kingdom's retention of approximately half of the surviving Sculptures. While Greece's *ownership* of the monuments in Athens may not in a strict sense be affected by retention of the removed Sculptures in England, the case law of the ECtHR has shown that State actions which do not deprive or purport to deprive an owner of ownership can nonetheless still constitute interference.²⁰⁴ The Court has interpreted 'interference' in a broad manner. In *Papamichalopoulos v. Greece*, the occupation of land by the Greek Navy for a period of years (without actual expropriation) was considered by the Court to be a 'clear interference' with the rights of the landowners.

²⁰³ M. Shaw, *International Law* (7th edn., Cambridge University Press, 2014), p.142. Interpretation of the ECHR must always take into account international law, see *Lozidou v Turkey* 18/12/96, at para 43.

²⁰⁴ ECtHR, *Papamichalopoulos and others v Greece* (App. No. 14556/89), Judgment of 24 June 1993; ECtHR, *Broniowski v Poland* (App. No. 31443/96), Judgment of 22 June 2004; ECtHR, *Pialopoulos v Greece* (App. No. 37095/97), Judgment of 27 June 2002.

Though the landowners remained owners of the property throughout the period, their enjoyment of it had been severely curtailed.²⁰⁵

The retention could therefore be categorised as an interference which affects “the very substance” of Greece’s ownership of the Acropolis monuments.²⁰⁶ The substance of ownership of such monuments necessarily includes the ability to view, study, understand, appreciate and learn from (thus to *enjoy*) them as they were initially intended to be, that is, as works of combined architecture and sculpture. The further goals of cultural promotion and aesthetic continuity are also in line with a State’s right (or a people’s right) of ownership of a cultural monument.

The attainment of a peaceful enjoyment of one’s possessions is directly related to the condition of those possessions as whole and unperturbed to the fullest extent possible under the circumstances. Of course Greece cannot benefit from the Acropolis monuments in their entirety, because historical circumstances have caused important parts of these monuments to be destroyed or to fall into ruin. However, Greece has undertaken a mission since the 1830s to conserve, reconstruct and care for the monuments to the best of its ability and so to preserve the posterity of Ancient Greece, while providing clear benefits to the culture, identity, research and pedagogy of the nation and the international community. This

²⁰⁵ ECtHR, *Papamichalopoulos and others v Greece* (App. No. 14556/89), Judgment of 24 June 1993, para 41, nor had there been any ‘control of use’ found. And although the use by the Navy had begun in 1967, it constituted a continuing violation according to the Court. See also ECtHR, *Pialopoulos v Greece* (App. No. 37095/97), Judgment of 27 June 2002, the blocking by a local authority of all future development on a plot of land – without expropriation – constituted an ‘interference’ with the peaceful use of possessions.

²⁰⁶ The term comes from *Sporrong v Sweden* (1983) 5 EHRR 35. The definition of the term ‘property’ provided by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, could be elucidating, “Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability” (at 1247–8).

mission is palpably frustrated by the absence of approximately half of the remaining Sculptures in the United Kingdom, a country whose law purports to restrict that portion from travelling home to Greece. In barring the full realisation of these prospects and aspirations, the acts and omissions of the United Kingdom can realistically be viewed as having caused an interference with Greece's enjoyment of its possessions.

Because the most propitious claim would relate to the monuments as entire structures, it will be important to demonstrate that their enjoyment cannot be fully realised unless and until they are reunited with the Sculptures currently held in the United Kingdom. Complete reconstruction of the monuments with the original pieces is impossible; and several other fragments are located in other States.²⁰⁷ However, this does not controvert the Greek position. On the contrary, it highlights two important factors: first, that the Acropolis monuments have already suffered some mutilation and tragedy in their twenty-five-hundred year history, emphasising the importance of restoring to the site what can still at present be restored; and secondly that nearly the entirety of the remaining Sculptures outside Greece today (nearly 98 per cent²⁰⁸) are located within the United Kingdom. The Parthenon and nearby monuments cannot be fully appreciated unless these Sculptures are contextually reunited with their parent edifice. Moreover, the fragments of the Parthenon which reside in museums in other countries would probably be returned if the Trustees of the British Museum were obliged to return the "Elgin Marbles". Follow-up actions could then be brought by Greece, although it is likely that public pressure would force those

²⁰⁷ Of the major remaining Sculptures still located outside of Greece, the British Museum houses all but one slab of frieze and one metope.

²⁰⁸ Professor Anthony Snodgrass, 'The integrity of the monument and the advantages of reuniting the London and Athens Marbles', appearing as Appendix B to the *Submission of the British Committee for the Restitution of the Parthenon Marbles to the Culture, Media and Sport Committee of the House of Commons*, 23 July 2000.

museums to disgorge their fragments in order that the display in the Acropolis Museum could be as comprehensive as possible.

Integrity of Public Monuments

In a claim relating to the Parthenon as the 'possession' at issue, Greece can adduce overwhelming evidence of the importance of the integrity of public monuments. By disrespecting that integrity, the UK is fully interfering with the right of Greece and of its people to enjoy the Parthenon.

The legal systems of European States recognise that interference with property arises when the integrity of public monuments is damaged. All major European States have legislation designed to protect the integrity of monuments, as well as buildings of architectural or historical interest. In the United Kingdom, for example, there has been long-running statutory protection for scheduled monuments, beginning with the Ancient Monuments Protection Act 1882 and continuing to the current Ancient Monuments and Archaeological Areas Act 1979. There are also severe restrictions on removing any fixtures from listed buildings under the Planning (Listed Buildings and Conservation Areas) Act 1990.²⁰⁹ Under both English law and the equivalent Greek law appendages of the nature of the Sculptures, being integrated to the design of the parent monument, would qualify as fixtures. Their

²⁰⁹ In Greece, protection of cultural monuments is provided for by Law 3028/2002. See also the publications of the International Council on Monuments and Sites (ICOMOS). It is noteworthy in this regard that ICOMOS had come out in favour of the proposed UNESCO mediation between Greece and the United Kingdom, its members having passed a resolution to that effect at the 18th General Assembly held in Florence, Italy in November 2014 (Resolution 18GA 2014/40).

status as such would be one of several reasons why their unauthorized removal would, under modern conditions, be illegal.²¹⁰

The fact that all European States have similar regimes for the protection of prescribed monuments and edifices illustrates the vital role attached by government to national policies for heritage protection and symbolises the social value of maintaining the integrity of structures that are historically and culturally important. Given that such policies are in place within its own territory, it is hypocritical as well as misconceived for the UK government to argue that the Sculptures are mere distinct works of art in their own right, conceptually unrelated to the monuments themselves.

The principle of integrity is also a condition of inclusion of a site on the World Heritage List under the Convention for the Protection of the World Cultural and Natural Heritage (Paris, 1972).²¹¹ The inclusion of the Acropolis monuments on this list means that Greece has an obligation, as well as a right, to preserve the integrity of these structures.²¹²

If the claim by Greece were formulated as an assertion that the Sculptures in the British Museum are the 'possessions' at issue, the question of interference would be clear. The United Kingdom has transacted to acquire these objects from its own ambassador, engineered their vesting in the Trustees of the British Museum, condoned and connived at their detention over two centuries, mutilated them by insensitive and ham-fisted treatment, exhibited them in honour of a disgraced art-dealer, bailed one of them without adequate or

²¹⁰ See I. Stamatoudi, 'Legal Grounds for the Return of the Parthenon Marbles', 55 (2002) *Revue Hellénique de Droit International* 513, p.519, For other cases see 'Fixtures' by A. H. Hudson in *Palmer on Bailment* (3rd edn, 2009), Chapter 8.

²¹¹ See the Operational Guidelines of the Convention at paras 87 to 95.

²¹² Also see the Valletta Treaty on the protection of archaeological heritage (1992) and the publications of ICOMOS.

basic legal safeguards to a quasi-hostile foreign power, repudiated the survival of title in either Turkey or Greece, excluded the people of Greece from any realistic and feasible enjoyment of them, and treated them generally as its own property.²¹³ Such interference by the British State would of course constitute a 'deprivation' because it would involve the 'extinction of the legal rights of the owner'.²¹⁴

Public Interest

The benefit for Greece in advancing a human rights claim under the Convention or its First Protocol is that, following proof of a 'possession' and interference with the peaceful enjoyment of that possession, the burden will shift to the respondent State to demonstrate that the interference was in the public interest.²¹⁵ Once Greece has advanced its case, the burden will rest on the United Kingdom to prove that its treatment of the Sculptures, including the statutory scheme which purportedly prohibits their alienation or relinquishment from the British Museum (and hence their departure from the United Kingdom), is both lawful and can in some way be justified as being in the public interest. This will have the effect of requiring the United Kingdom to state, on a 'once and for all' basis, its case for keeping the Sculptures at the British Museum.

In weighing the case for retention against that for restitution, the Court will examine the circumstances underlying the United Kingdom's alleged ownership of the Sculptures. This will trigger questions regarding the initial dispossession of those Sculptures. Again, it will be

²¹³ *Kuwait Airways Corporation v Iraqi Airways Company* [2002] 2 A.C. 1075.

²¹⁴ See Jacobs, White and Ovey, *The European Convention on Human Rights* (6th edn., Oxford University Press, Oxford, 2014), p.514.

²¹⁵ M. Carss-Frisk, *The right to property. A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights*, Human Rights Handbooks, No. 4, Council of Europe, Strasbourg, 2003, at p 8, para 14. ("the burden of proof being on the State").

for the United Kingdom to establish as a starting point the legitimacy of Elgin's acquisition as part of its argument that maintaining the Sculptures in the British Museum is in the public interest. If the United Kingdom is unable to establish that Elgin's removal was licensed, it would find it very difficult to prove both the lawfulness of the retention and the public interest in maintaining that retention.

The public interest purportedly served by the retention of the Sculptures lies in promoting and sustaining the British Museum's stature as a 'universal' or 'encyclopaedic' museum with "something for everyone".²¹⁶ It argues that retention serves the legitimate aim of promoting tourism, which in turn serves the interests of the local population and government. But the enhancement of tourism is no less a cause that might be pleaded by the Greek State in this context – more forcibly, in fact, as tourists would be more likely to visit Athens with a prime purpose of seeing the reunited Marbles than to visit London to see part of them in the anachronistic light of the Duveen Gallery. While the Court is often willing to give a wide margin of appreciation to States in deciding what constitutes a public interest, in this case the UK's public interest would surely be overborne by that of Greece, and indeed, the world in seeing the Marbles reunited under the Parthenon.

The United Kingdom would have to show that the measures which it has adopted strike a fair balance between the vindication of the property right of Greece and the interests of the public at large. This implies that there must be a reasonable relationship of proportionality, judged at the time the case is brought rather than at the time the property was removed.

²¹⁶ Terms employed by the Museum itself, seen particularly in the *Declaration on the Importance and Value of Universal Museums*, ICOM News, no 1, 2004, endorsed by *inter alia* the Director of the British Museum. "we should acknowledge that museums serve not just the citizens of one nation but the people of every nation. Museums are agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation". There can of course be no suggestion that the Acropolis Museum does not subscribe to those ideals or that those ideals are the exclusive preserve of the signatory museums.

Ultimately the matter will come down to a balance between the right of Greece to enjoy its iconic monuments joined with the interest of a global public to see the Marbles reunited in Athens, and the right of the British public (and tourists to London) to benefit from access to the Sculptures at the Duveen Gallery. For reasons of national identity, history and culture, Greece can compellingly claim that it has a more potent and intimate relationship with the Sculptures than the British public (and tourists visiting the British Museum) and that the balancing of material factors must therefore operate in favour of Greece.

To exclude Greece from access to those Sculptures that are stranded in the United Kingdom can hardly be seen as proportional treatment. On the contrary, retention by the Trustees of the British Museum, coupled with the failure of the United Kingdom Government to command or facilitate their relinquishment, has placed a disproportionate and excessive burden on Greece, as well as the people of Greece, while securing to the British public an overall benefit which, while not negligible, is relatively slight in comparison.²¹⁷

The British Museum has sent an unmistakable message that the Sculptures will never be fully reconstituted or reunited in Greece. It has publicly refused to consider a full-scale return of the Sculptures, even on a long-term loan, and the responses both of the Trustees and of the UK government in turning down the UNESCO mediation offer in 2015 indicates a determination to maintain ownership. Additionally, the failure to engage Greece in decisions relating to the Sculptures, whether for the purposes of research, preservation, display or international bailment, shows a gross lack of proportionality on the part of the

²¹⁷ It is perhaps material in this regard that (a) until December 2014 the Sculptures were never exhibited anywhere except in London, and (b) since the bailment of the Ilissos to Russia the British Museum has announced that it is exploring the prospect of other bailments to other countries. It may not be fanciful to regard this impetus toward wider distribution of the Sculptures as an endeavour to widen the scope of the "public interest" notionally promoted by the British Museum.

British Museum. There was no consultation before or after the infliction by Lord Duveen's agents of serious and irreparable harm on the Sculptures in the 1930s, or the potential imperilment of the Ilissos Sculpture during its short-term loan to the Hermitage Museum in St Petersburg in 2014–2015. The fact that the British Museum neither sought nor achieved any balancing of interests in these matters serves only to confirm that the infringement of Greece's peaceful enjoyment of its proudest possession cannot be justified or sustained.

RIGHT TO PRIVACY

Article 8 – Right to respect for private and family life

Article 8 provides that:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 8 of the ECHR protects privacy and punishes its invasion, despite the absence of primary protection in common law and statute. The case law is voluminous, ranging from *Malone* (which forced the UK to introduce a law regulating telephone tapping and secret state surveillance) to cases that have required the state to protect celebrities from paparazzi and media publication of intimate secrets. The courts in these cases treat “respect” for privacy as entailing a positive duty on the state to protect individuals not only from state

agencies, but even from *third* parties such as media organisations. This protection must be accorded either by passing legislation through Parliament, or by the courts on their own initiative in providing remedies. The ECtHR has also emphasised the need for a State to act positively in a manner calculated to allow the effective enjoyment of rights under Article 8. In *Marckx v Belgium*,²¹⁸ the Court was concerned with the manner of establishing the maternal affiliation of an illegitimate child. The Court held that respect for family life implied in particular the existence in domestic law of legal safeguards that rendered possible from the moment of birth the child's integration into his family. In other words, a state had a positive obligation to put in place a legislative and administrative framework to ensure the full realisation of Article 8 rights.

Strasbourg jurisprudence affords a certain degree of encouragement to what would be an admittedly novel claim based on Article 8, principally through the Court's interpretation of that Article as capable of extending to the safeguarding of the life-style of particular communities.

- i. *Chapman v. the United Kingdom*²¹⁹ concerned the lifestyle of gypsy families and the specific difficulties they have to park their caravans. The Grand Chamber recognised that Article 8 of the ECHR protects the right to maintain a minority identity and to lead one's private and family life in accordance with that tradition.

²¹⁸ ECtHR, *Marckx v Belgium* (App. No. 6833/74), Judgment of 13 June 1979.

²¹⁹ ECtHR, *Chapman v UK* (App. No. 27238/95), Judgment of 18 January 2001.

- ii. *G and E v. Norway*²²⁰ concerned the effects of the construction of a dam in Lapland. The applicants were members of the Lapp community who had traditionally used the lands for herding, fishing and hunting. The Commission observed that under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular life-style it may lead as being “private life”, “family life”, or “home”.
- iii. *Ciubotaru v. Moldova*²²¹ concerned a complaint about the refusal of the authorities to issue the applicant with a new identity card confirming his ethnicity as Romanian and the consequent failure to declare his ethnicity to be Romanian, rather than Moldovan. The Court found the facts to fall within the ambit of ‘private life’, noting that along with name, gender, religion, and sexual orientation, an individual’s ethnic identity constituted an essential aspect of his/her private life and identity.

As “minority identity” and “ethnic identity” are proper subjects of protection under Article 8 it would follow logically that “cultural identity” is also protected. In support of this it can be urged that the ECtHR has increasing recourse to other human rights instruments to assist it in the proper interpretation of the ECHR, and to furnish evidence of present-day standards, when considering how to interpret the Convention as a ‘living instrument’.

Specifically in the area of culture, Greece could find support in Article 27 of the Universal Declaration of Human Rights which provides that “everyone has the right to participate in the cultural life of the community”.

²²⁰ ECtHR, *G and E v Norway* (App. Nos. 9278/81 and 9415/81), Decision on Admissibility of 3 October 1983.

²²¹ ECtHR, *Ciubotaru v. Moldova* (App. No. 27138/04), Judgment of 27 April 2010.

Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR) states.

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (emphasis added)

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property states that cultural property “constitutes one of the basic elements of civilisation and national culture”, that “it is incumbent on every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export”, and that “it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage *and that of all nations*” (emphasis added). Under Article 13(d) of the Convention States Parties undertake “to recognise the inalienable right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported”.

The right to self-determination is a human right which States Parties to the ICCPR are legally required to recognise by virtue of Article 1(1) of that instrument. Indeed the right to self-determination is now recognised as a right which all people have under customary international law. This includes the right of peoples to pursue their cultural development. Cultural development would include the right to pursue cultural identity, including the right to the return of such an iconic symbol of a people’s cultural identity as the Parthenon Sculptures. Accordingly, article 8 ECHR should be interpreted in such a way as to take

account of the right of the Greek people to self-determination and all that the right entails.²²²

There remains a lack of precedent on the content and shape of a State's positive obligations under Article 8 and an application to return Marbles would in this respect be a test case. While there is no case in which national cultural identity has been endorsed as a distinct value safeguarded by Article 8, the ECHR is a "living instrument". The lack of a precedent is not a bar to appropriate recognition in an otherwise auspicious case. This is such a case. There is no stronger example than the Parthenon and its exiled fabric of the potent and vital role that monuments and artefacts can play in defining a country's nationhood. As a means of honouring Greek cultural sovereignty and of vindicating the Greek right to self-determination, there can be no more compelling case for redress.

²²² See also Chapter 2 on the question of a nation's sovereignty and the 'keys to its ancient history'.

CHAPTER 7. THE WAY FORWARD

The moral and aesthetic case for the return of the Parthenon Sculptures is compelling, and the legal case is strongly arguable, both under international customary law and various provisions of the European Convention. All that it awaits is a decision by the Greek government to apply to a court which has jurisdiction to hear the claim and which will hand down a decision that the UK government is likely to obey. What earlier chapters have made clear is that there is no alternative to litigation, if ever Greece is to recover the Marbles and that unless the claim is brought fairly soon Greece may be met with the argument that it has "slept on its rights" too long for them to be enforced.

It is palpably clear that the UK will not arbitrate or comply with UNESCO requests to mediate, so there is no "informal" way forward – neither the UK nor the Trustees are willing even to debate the issue. All the international declarations on cultural property urge states to consider rationally and discuss the return of cultural property, but the Trustees are not prepared to consider the return of the Marbles at all. The only non-litigious stone left unturned is a "conciliation" procedure available under the *European Convention for the Peaceful Settlement of Disputes*, (1957) but whatever the merits of this procedure Greece has not yet ratified this Convention and even if it does in the future, the procedure would only require compulsory negotiation before a commission which would have no power to compel the UK to agree a solution. That leaves litigation – the very commencement of which may, of course, bring the UK to the negotiating table and encourage a settlement before the case comes to court. There are two courts to which it could most readily come. Greece could bring the UK before the European Court of Human Rights ("ECtHR") or UNESCO could apply for an advisory judgement by the International Court of Justice (ICJ).

It would be possible to pursue a claim in both forensic arenas. Recently, for instance, Georgia commenced contentious ICJ proceedings against Russia and, when the case was rejected on procedural grounds,²²³ filed a claim with the ECtHR which found it admissible.²²⁴ Thus, if Greece took the UK to Strasbourg, it could still later ask UNESCO to apply for an advisory opinion from the ICJ in the Hague, and actively participate in the court proceedings, as could other States. The Strasbourg case would turn, as chapter six explains, on the Convention rights of Greece to its own property and to an effective remedy for its wrongful detention, while the ICJ case would focus on the evolving international customary law relating to the duty to return uniquely important cultural property when it has been taken and is being held under circumstances similar to the Marbles case.

So what are the objections to hauling the receivers of Elgin's stolen goods before a court of justice, since there is no other way to retrieve them?

It might upset the British.

There is a deep well of gratitude to Britain, not only for its support against Nazi invaders during the war and communist insurgents afterwards, but for the Hellenic movement and the British Navy which defeated the Turkish fleet at the battle of Navarino (1827) to pave the way for Greek independence. But there is no reason to think that people in the UK would be justifiably disquietened if Greece were to act to reclaim its property – most, according to opinion polls, believe that the Marbles should be returned. Besides which, the UK accepts and encourages settlement of disputes by litigation – ever since the *Alabama*

²²³ ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment (Preliminary) of 1 April 2011, [2011] ICJ Reports 70.

²²⁴ ECtHR, *Georgia v Russia (I)* (App. No. 13255/07), Grand Chamber Judgment (Merits) of 3 July 2014 and ECtHR, *Georgia v Russia (II)* (App. No. 38263/08), Decision of 13 December 2011.

arbitration, when Prime Minister Gladstone announced that he would comply with an unjust decision because “the arbitrament of law was infinitely preferable to the arbitrament of the sword”. The British are good at litigation – international courts are full of British lawyers, and enormous profits are made from international arbitrations in the City of London. The UK should not – and likely would not – complain about being taken to a court whose jurisdiction it has accepted.

If Greece loses, that will be the end of its fight to get back the Marbles.

Not so. If Greece does fail, it will very likely be on technical “admissibility” grounds which will have nothing to do with the merits of its claim. A case lost on a legal technicality can often be fought again. Even a decision that customary international law has not evolved sufficiently to require the UK to return the Marbles will not be a defeat, so much as an invitation to fight again in the future. The prospects that Greece will succeed once it comes to a merits adjudication before the European Court or the ICJ, are reasonably good, and you have to be in court to win in court.

It will cost too much money.

This is an understandable concern, at a time of financial melt-down. But launching an international case need not be expensive – there are no routine court costs or awards of legal costs against a losing party. Of course Greece will need to retain lawyers, but it has plenty in its own public service who are perfectly capable of collecting the evidence and making the arguments, whilst there is no shortage of lawyers who would be prepared to act *pro bono* in this righteous cause. Even if Greece hired recognised international lawyers to lead such a team, their costs might well be covered by philanthropists.

It will take a long time.

But how long is never? Either the Marbles will never return to Greece, or there will be litigation and a determination in Strasbourg or the Hague within three to six years.

The usual reason for declining to litigate is the weakness of the case – and that is how Greece’s legal case may well be perceived if there is further delay. What is doing most damage to the campaign for the return of the Marbles is that its protagonists, by failing to take legal action, are perceived as lacking confidence about their case..

Moreover, the prospect of litigation can change the most intransigent defendant, and can lead to compromise through negotiation and mediation, without pushing forward to trial. A ‘friendly settlement’ is often possible, and is encouraged by the ECHR once the parties’ submissions have been exchanged. Greece, for its part, has been open to discussing ‘compromise’ solutions, such as the return of the Marbles to Athens under some form of long-term bailment.²²⁵ The British Museum’s intransigence does mean that only litigation is capable of pushing the UK into accepting alternative dispute resolution. Litigation often “succeeds” without ever coming to final judgment and the commencement of a court case has, in the past, brought museums to accept previously rejected mediation over restitution of cultural objects and artefacts. The case of the Tasmanian Aboriginals against the British National History Museum in 2007 is an example, where the very fact that Counsel for the Tasmanian Aboriginal Centre were able to find a way of bringing the case before a court induced the Museum Trustees to accept mediation which they had previously rejected, and it resulted in a halt to destructive testing of human remains and their return to Tasmania

²²⁵ See Statements by the former Minister of Culture of Greece, E. Venizelos, cited in E. Korka, *The Reunification of the Parthenon Sculptures* (Hellenic Ministry of Culture, 2nd ed., 2003).

for burial – the very objectives of the litigation. So Greece would be well-advised to consider bringing a claim, but it should act promptly. The passage of time will make judicial remedies harder to obtain.

AN INTER-STATE CLAIM IN STRASBOURG

Most cases in Strasbourg are brought by individuals against their own state, but the Convention also provides for inter-state claims. These cases are not common, but are certainly significant. When Ireland sued the UK, the court declared that the British Army's "in depth interrogation" violated the Convention, and in *Cyprus v Turkey* the court ordered compensation for Cypriots deprived of their property during the Turkish invasion. Greece could bring an action against the UK for violating the Convention over the non-return of the Marbles, simply by filing its application in Strasbourg. There are a few technical requirements it would need to overcome, although these are relaxed in inter-state actions. The rule that "domestic remedies" must be exhausted does not apply where there are no domestic remedies to exhaust, where pursuing them would be futile or where what is being challenged is a broad administrative action by the state. The UK might take technical objections, but if Greece overcame this "admissibility" stage and was allowed to argue the merits of the claim, the parties would be called to a hearing, probably before a 'Grand Chamber' of the court comprising at least seventeen judges. At that hearing other member states of the Council of Europe (it has forty-seven state members) could intervene (most favour return of the Marbles) as could NGOs and other "interested parties", whose written submissions the court normally agreed to receive and consider. The process would likely take several years, but a judgement in favour of Greece could require the UK to amend its laws to allow the return of the Marbles to the Acropolis Museum.

THE INTERNATIONAL COURT OF JUSTICE

Were Greece to sue Britain directly in the ICJ, it would need to surmount a high hurdle in the form of a time-bar. Although both the United Kingdom and Greece have accepted the compulsory jurisdiction of the court, the UK declaration is limited to “disputes arising after 1 January 1984, with regard to situations or facts subsequent to the same date”.²²⁶ Although this language does not necessarily preclude jurisdiction over a continuing wrong that began before this date, the ICJ judgement in *Liechtenstein v Germany* raises a real problem. In that case, which also concerned the return of cultural property, Liechtenstein sought to establish the ICJ’s jurisdiction on the basis of a Convention which excludes “disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute”.²²⁷ The Convention had entered into force, as between the parties, on 18 February 1980, while Liechtenstein’s claim concerned cultural property confiscated by Czechoslovakian officers in 1945. The court ruled that because the ICJ proceedings had their source in the confiscation measures taken by Czechoslovakia in 1945, the case was outside its temporal jurisdiction.

If similar reasoning were to be applied by the ICJ in the Marbles case, this would bar an action against the UK over a situation that arose before 1 January 1984. Although the situation that requires redress is a continuing wrong, there is a real prospect that the ICJ would find that the UK had not consented to its jurisdiction on this basis. It is for this reason that any proceedings at the ICJ should be based on a request by a UN body for an advisory

²²⁶ United Kingdom’s Declaration of 31 December 2014, available at.

<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=GB>

²²⁷ Article 27(a) of the European Convention for the Peaceful Settlement of Disputes (1957).

opinion, where the UK declaration for limiting the court's temporal jurisdiction would not apply.

The International Court of Justice may issue an advisory opinion on any legal question at the request of one of the bodies authorised to make such requests by the UN Charter.²²⁸ These authorised bodies include the UN Security Council, the UN General Assembly, and organs and specialised agencies of the United Nations such as UNESCO, which can request advisory opinions on legal questions arising within the scope of their activities.²²⁹ When it receives such a request, the Court will hold written and oral proceedings, concluded by the delivery of the advisory opinion at a public hearing. Although in strict law the opinion is “non binding”, there is little doubt that the UK, to maintain its reputation as an upholder of international law, would comply.

The “advisory opinion” route has a number of advantages. First, the admissibility and jurisdictional hurdles that could preclude Greece from bringing contentious proceedings directly against the UK do not apply to advisory opinions. In order to trigger advisory proceedings before the ICJ, Greece would need only to persuade a competent UN body or agency to seek such an opinion. UNESCO would be the most appropriate candidate, not only because of the Organisation's extensive history of support for Greece's claim, but also because UNESCO has been authorised to request advisory opinions from the ICJ without prior approval by the General Assembly on all legal questions arising within the scope of its activities, including therefore the return of cultural property.²³⁰ Greece would need to

²²⁸ Article 65 of the ICJ Statute.

²²⁹ Article 96 of the UN Charter.

²³⁰ 1946 UNESCO Relationship Agreement, Article 10.2 (“2. The General Assembly authorizes the United Nations Educational, Scientific and Cultural Organization to request advisory opinions of the International

galvanise UNESCO (which should have been stirred into action by the UK's refusal of its mediation request) and specifically to lobby its General Conference.²³¹

The advisory opinion procedure allows other states to take part in proceedings, presenting both oral and written submissions.²³² For instance, over 40 states made submissions in the proceedings leading to the ICJ advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in 2004.²³³ Most state participants would be likely to support the reunification of the Marbles, given the widespread international endorsement of the Greek claim.

CONCLUSION

Greece has a reasonable prospect of establishing a breach of Article 1 Protocol 1 of the ECHR, and some prospect of establishing a breach of Article 8. To avoid technical legal problems, its claim would best be advanced by bringing an inter-state action against the UK under Article 33. Lodging the claim would be inexpensive. The Strasbourg Court could, in finding a breach of the Convention, direct the UK to amend the 1963 Act to permit relinquishment, while remedies for the other breaches could involve an order for restitution consequent upon an order for amendment. At the same time, the Greek government should petition UNESCO, in light of the UK's refusal to mediate, to seek an advisory opinion from the ICJ on whether the norms relating to restitution of uniquely important cultural property

Court of Justice on legal questions arising within the scope of its activities, other than questions concerning the mutual relationships of the Organization and the United Nations or other specialized agencies.")

²³¹ 1946 UNESCO Relationship Agreement, Article 10.3 ("Such request may be addressed to the Court by the General Conference or by the Executive Board acting in pursuance of an authorization by the Conference.")

²³² Article 66 of the ICJ Statute.

²³³ Sir A. Watt, *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)*, in: Max Planck Encyclopedia of Public International Law (available at: <http://opil.ouplaw.com/view/10.1093/law.epil/9780199231690/law-9780199231690-e150>).

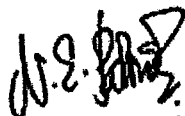
require restitution and reunification of the Marbles. Alternatively, the General Assembly state parties could be lobbied to support a request for such an advisory opinion.

There could hardly be a more propitious time for Greece to raise in international jurisprudence the right of States to retrieve wrongfully taken cultural property of exceptional importance to their history and identity. The armed force known as ISIS is currently ravaging and destroying sites of great cultural and historical significance in Iraq and Syria and Libya, and is putting some precious artwork on sale on the global black market. This conduct has engaged the horrified attention of many states which have evinced a belief that it is contrary to the norms accepted by civilised nations. There would be widespread support for any move that brought the question of despoliation of cultural property before the ICJ so it could enunciate a legal norm in respect of its protection. This is just one way in which litigation over the Marbles could galvanise international institutions to confront the problem of unlawful removal of historic cultural property and to develop rules to guide and even to direct their return, no matter how long ago the despoliation took place. While any legal or lobbying action will be a matter for the Greek government, but by taking it the beneficiaries will not only be the people of Greece but of the world. Universal benefit would flow from the renewal and reintegration of Greece's pre-eminent monument, both as an artefact of unparalleled beauty in itself and as an eloquent symbol of human progress towards civilisation and democracy.

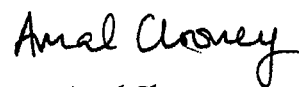
31 July 2015



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