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Source: *Michigan Law Review*, Vol. 83, No. 8 (Aug., 1985), pp. 1880-1923

Published by: The Michigan Law Review Association

Stable URL: <http://www.jstor.org/stable/1288954>

Accessed: 26/12/2009 11:06

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THINKING ABOUT THE ELGIN MARBLES†

John Henry Merryman*

In the early nineteenth century, a British Lord removed much of the sculpture from the Parthenon and shipped it to England. Housed in the British Museum and named after their exporter, the Elgin Marbles have become a source of international controversy. The Greeks wish to see the Marbles returned to the Acropolis and their position is supported by a growing movement seeking the repatriation of cultural property. The Elgin Marbles are representative of the many works of art in the world's museums and private collections that could be subject to repatriation. Rejecting the emotional appeal of the Greek position, Professor Merryman analyzes the controversy and the proper disposition of the Marbles on reasoned, principled grounds. He concludes that the Greeks do not have a legal claim to the Marbles and that moral arguments fail to justify the return of the Marbles to Greece. Professor Merryman then turns to general principles that should govern the allocation of cultural property. He rejects cultural nationalism as a basis for the disposition of the Marbles, because cultural nationalism expresses dubious values and is founded on sentiment. The concerns of cultural internationalism — preservation, integrity, and distribution/access — do not clearly support the Greek position. Under the general principle of repose, the Elgin Marbles should remain in the British Museum until the Greek government can offer more compelling reasons for their return.

“This is our history, this is our soul.”

— Melina Mercouri¹

† I am particularly indebted to Thomas Campbell, Mauro Cappelletti, Albert E. Elsen, Paul Goldstein, Antonin Raubitschek, William St. Clair, Cynthia Vroom, and Stephen Weil for their generous contributions of ideas and criticism; to Mike Jacobstein and Alex Ross and their staffs in the Stanford Law and Art libraries for invaluable library support; and to Charles Klein, for diligent and imaginative research assistance. Errors of fact, judgment, and taste are of course mine.

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1. *Quoted in San Francisco Chron.*, May 26, 1983, at 26, col.1.



THE PARTHENON BEFORE RECONSTRUCTION

Photo Credit: Alinari/Art Resource, N.Y.

Between 1801 and 1812 Thomas Bruce, 7th Earl of Elgin and, from 1799 to 1803, British Ambassador to the Sublime Porte² of the Ottoman Empire, removed many of the surviving sculptures on the Parthenon and shipped them to England. He sold them in 1816 to the British Museum, where they are now displayed and are known as "The Elgin Marbles."³

In 1983 the Greek Government, represented by Melina Mercouri, the famous actress who is also the Greek Minister of Culture, requested that the Elgin Marbles be returned to Greece.⁴ The plea has been made before,⁵ but Minister Mercouri's appears to be the first *official* request by the Greek Government for return of the Parthenon sculptures.⁶ The current request was officially declined by the British Government in 1984.⁷

There is, of course, support within Britain for the Greek cause. Neil Kinnock, Labor Party leader, has urged return of the Marbles on moral grounds.⁸ There is a "British Committee for the Restitution of the Marbles."⁹ Minister Mercouri has carried her campaign outside England¹⁰ and has pursued it with great eloquence and passion.¹¹ The

2. The Western powers used the term "Sublime Porte" to refer to the Government of the Ottoman Empire in Constantinople. See 1 S. SHAW, *HISTORY OF THE OTTOMAN EMPIRE AND MODERN TURKEY* 119 (1976). The Sultan was the supreme Ottoman authority, with absolute authority over subjects and property in the empire, subject only to the restraints of Islamic law. See H. INALCIK, *THE OTTOMAN EMPIRE: CONQUEST, ORGANIZATION AND ECONOMY* 112, 129 (1978). The Grand Vizier ("the Bearer of Burdens") was second in command only to the Sultan and was the head of the executive power of the Government. See S. SHAW, *supra* at 58; 1 J. UBICINI, *LETTERS ON TURKEY* 33-34 (1856 & photo. reprint 1973); W. VUCINICH, *THE OTTOMAN EMPIRE* 26 (1965).

3. The history of the Marbles is set out in the REPORT FROM THE SELECT COMMITTEE ON THE EARL OF ELGIN'S COLLECTION OF SCULPTURED MARBLES; & C., H.C., 3 SESS. 49 (1816) [hereinafter cited as REPORT] and Smith, *Lord Elgin and his Collection*, 36 J. HELLENIC STUD. 163 (1916). For recent historical discussions see J. ROTHENBERG, "DESCENSUS AD TERRAM": THE ACQUISITION AND RECEPTION OF THE ELGIN MARBLES (1977); W. ST. CLAIR, *LORD ELGIN AND THE MARBLES* (2d ed. 1983); T. VRETTOS, *A SHADOW OF MAGNITUDE: THE ACQUISITION OF THE ELGIN MARBLES* (1974). There is a collection of materials about the Marbles in 1 J. MERRYMAN & A. ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS* 1-4 to 1-26 (1979).

4. See 50 PARL. DEB., H.C. (6th ser.) 379 (1983) (Written Answers).

5. See discussion of earlier appeals for return of the Marbles in W. ST. CLAIR, *supra* note 3, at 272-73; T. VRETTOS, *supra* note 3, at 104-06.

6. In 1898 Ioannes Gennadios, the Greek Minister in London, asked that the architectural fragments from the Parthenon held by the British Museum be returned. That request was denied. I. GENNADIOS, *O LORDOS ELGIN* 232 (1930).

7. See 58 PARL. DEB., H.C. (6th ser.) 188 (1984) (Written Answers).

8. N.Y. Times, Jan. 7, 1984, at 3, col. 2.

9. See Browning, *The Case for the Return of the Parthenon Marbles*, 141 MUSEUM 38 (1984) (Professor Browning is Chairman of the Committee.).

10. In Ginger, *Mercurial Melina's Marbles*, 243 CONTEMP. REV. 311 (1983), Stephanie Ginger reports that at the UNESCO Conference of Ministers in Mexico in July, 1982, 56 backed the return, 26 abstained, and none opposed. Ginger further reports that at the 35th General Assembly of the International Arts Association (AICA) in Helsinki in 1983, a resolution favoring re-

appeal is direct and emotional: these sculptures are Greek. They belong in Greece, in Athens, on the Acropolis, on the Parthenon:

This is our history, this is our soul. . . . You must understand us. You must love us. We have fought with you in the second war. Give them back and we will be proud of you. Give them back and they will be in good hands.¹²

and

[T]hey are the symbol and the blood and the soul of the Greek people. . . . [W]e have fought and died for the Parthenon and the Acropolis. . . . [W]hen we are born, they talk to us about all this great history that makes Greekness. . . . [T]his is the most beautiful, the most impressive, the most monumental building in all Europe and one of the seven miracles of the world.¹³

It is difficult to resist that kind of argument. If the matter were to be decided on the basis of direct emotional appeal, the Marbles would go back to Greece tomorrow. In a confrontation between Greece and Britain over the Marbles, Greece is clearly the sentimental favorite.

It is a *deformation professionnelle* of lawyers to be suspicious of emotionally compelling arguments. Too often the emotional case is weak on the facts or the law or both. We know how we feel when we read Byron or listen to Melina Mercouri, and feeling is certainly important in discussing the proper disposition of cultural property. But feeling alone is an unreliable guide to the resolution of important controversies. Our position ought to be based at least in part on reasoned, principled grounds. How should we think about the Marbles?

What Did Elgin Take?

Elgin removed (or took from the ground where they had fallen or from the fortifications and other structures in which they had been

turn of the Marbles passed with 58 in favor, 3 abstentions, and 2 (Britain and Denmark) opposed.

11. The worthiest predecessor to Minister Mercouri was Byron, whose influence is described in notes 80-84 *infra* and accompanying text. There is some evidence that Byron's indignation was selective. At one point he spoke of a French attempt on the Marbles as an effort to "rescue" them. LORD BYRON, *Childe Harold's Pilgrimage*, Canto II n.6, *reprinted in* BYRON: POETICAL WORKS, 877 (F. Page ed. 1970).

12. San Francisco Chron., May 26, 1983, at 26, col. 1 (reporting on a Mercouri press conference). The same Associated Press report states that Minister Mercouri was "at times apparently near tears as she ran her fingers over the white marble sculptures" during a visit to the British Museum.

13. *Q & A: Melina Mercouri*, N.Y. Times, Mar. 4, 1984, at E9, col. 1. The reference to "the seven miracles of the world" is of course hyperbole. Neither the intact Parthenon nor the Marbles was included among the Seven Wonders of the Ancient World. According to popular tradition, the Seven Wonders of the Ancient World are the Pyramids at Giza, the Hanging Gardens of Babylon, the Statue of Zeus at Olympia, the Temple of Artemis at Ephesus, the Mausoleum at Halicarnassus, the Colossus of Rhodes, and the Lighthouse at Alexandria. See, e.g., 10 ENCYCLOPAEDIA BRITANNICA 666 (15th ed. 1985).

used as building materials) portions of the frieze, metopes, and pediments. The frieze, a three-foot-high horizontal band carved in low relief, originally extended 524 feet around the Parthenon's main inner chamber and depicted the Panathenaic Procession. Elgin acquired approximately 247 feet of the frieze. The metopes, a series of ninety-two four-foot square panels sculpted in high relief, surrounded the top of the Parthenon's outer colonnade and recounted assorted historical and mythical battles. Elgin acquired fifteen metopes, predominately from the south side Lapith and Centaur series. The pediments, the low triangles at the ends of the building formed by the pitch of the roof, were filled with a series of sculptures in the round. Elgin acquired seventeen pedimental figures. In addition, he collected assorted architectural fragments from the Parthenon.¹⁴

The metopes and frieze were integral parts of the Parthenon's structure. In removing them, substantial portions of the adjoining masonry were damaged. The cornice, the projecting decorative molding that crowned the frieze and the metopes, received the most damage. The remaining portions of the cornice on the south side have been described as "a series of jagged blocks sticking up like broken teeth."¹⁵ The artist Lusieri, who was in charge of the removals for Elgin, admitted that "I have even been obliged to be a little barbarous."¹⁶ Like the removals themselves, the resulting damage to the structure of the Parthenon has to be considered in judging the legality and morality of Elgin's actions.

14. Not all of the missing Marbles are in England. The Louvre has one slab of the frieze and one metope. There are two heads in Copenhagen and other fragments in Heidelberg, Vienna, Palermo and The Vatican. One British advocate of repatriation estimates that 95% of the "exiled sculptures" are in the British Museum. Thompson, *Why the Marbles are Not Just a Museum Piece*, *The Guardian*, June 27, 1983, at 9, col. 1. There is a catalog of the Elgin Collection, which also includes the drawings and casts prepared by Elgin's artists and artisans, in REPORT, *supra* note 3, at 70.

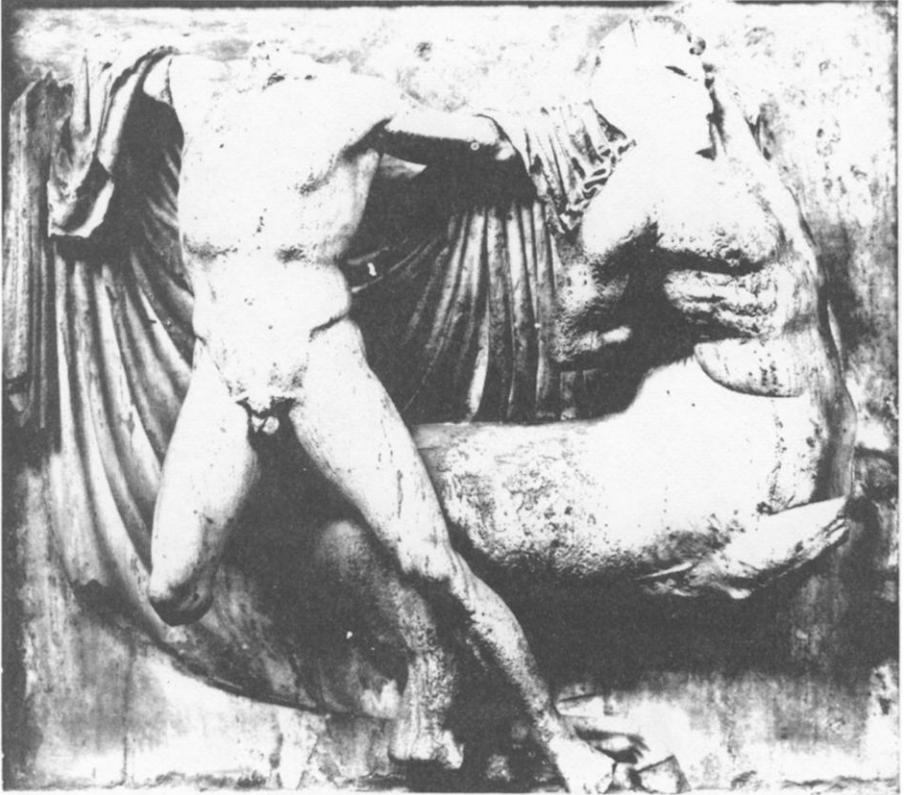
15. W. ST. CLAIR, *supra* note 3, at 103. On the damage to the structure of the Parthenon see J. ROTHENBERG, *supra* note 3, at 171-78; W. ST. CLAIR at 102-04, 112-13, 139; T. VRETTOS, *supra* note 3, at 78-80.

16. Letter from Lusieri to Elgin (Sept. 16, 1802), *reprinted in* W. ST. CLAIR, *supra* note 3, at 112.



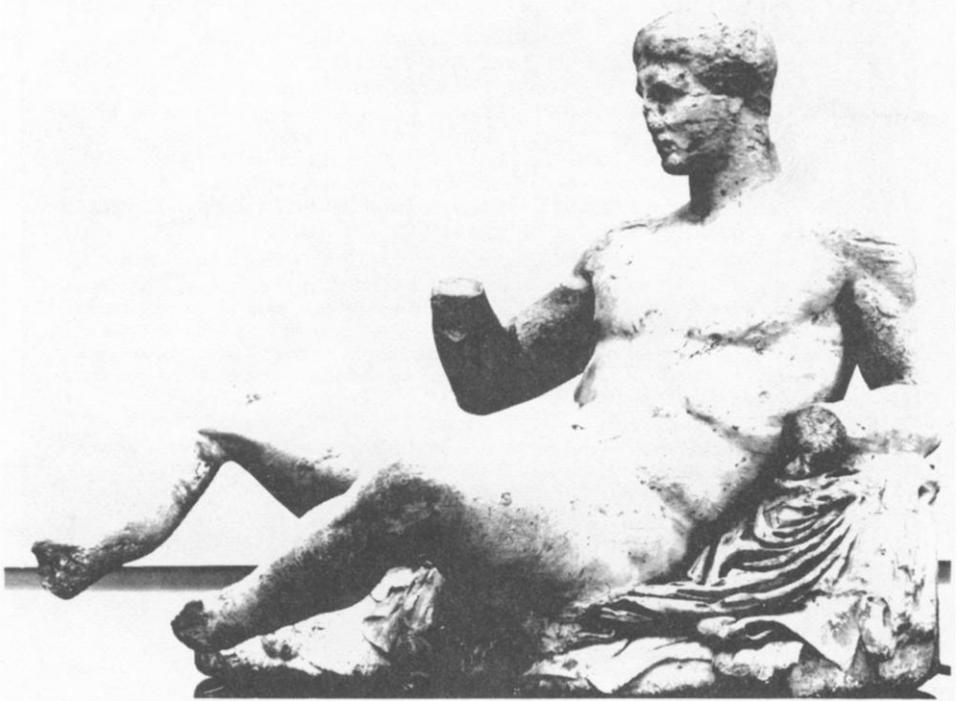
**FRIEZE
RIDERS IN THE PROCESSION:
NORTH FRIEZE SLABS XXXVI & XXXVII**

By Courtesy of the Trustees of the British Museum



**METOPE
LAPITH AND CENTAUR: SOUTH METOPE XXVII**

By Courtesy of the Trustees of the British Museum



**PEDIMENT
RECLINING FIGURE: EAST PEDIMENT D**

By Courtesy of the Trustees of the British Museum

CULTURAL PROPERTY

The Marbles are a familiar and glamorous example of a class of objects called with increasing frequency "cultural property."¹⁷ The term refers to objects that have artistic, ethnographic, archaeological, or historical value.¹⁸ Most nations control cultural property in the interest of its retention, preservation, study, enjoyment, and exploitation.¹⁹ These interests may reinforce each other: for example, Mayan sites in Mexico are more likely to be preserved if monumental Mayan sculptures cannot be exported to foreign markets. There are situations, however, in which the preservation of cultural objects is actually

17. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (1956) [hereinafter cited as The Hague Convention of 1954] and the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (1972), *reprinted in* 10 INTL. LEGAL MATERIALS 289 (1971) [hereinafter cited as 1970 UNESCO Convention], are two major recent examples. For further examples and discussion see B. BURNHAM, *THE PROTECTION OF CULTURAL PROPERTY: HANDBOOK OF NATIONAL LEGISLATIONS* (1974); 1 L. PROTT & P. O'KEEFE, *LAW AND THE CULTURAL HERITAGE* (1984).

18. The Hague Convention of 1954, *supra* note 17, art. 1(a), defines cultural property as: movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.

The 1970 UNESCO Convention, *supra* note 17, art. 1, provides a more inclusive definition:

For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue or similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

The Elgin Marbles clearly fall within either definition.

19. See the works cited in note 17 *supra* and K. MEYER, *THE PLUNDERED PAST* (1973), for collections of national legislation on cultural property.

endangered by retentive legislation: objects that would be well-housed and preserved abroad are allowed to deteriorate in warehouses or inadequately maintained and staffed museums or, often worse, at unprotected and unexcavated sites at home.²⁰ In such cases the retention and preservation interests work against each other. This matter is discussed below.

Despite national laws limiting the export of cultural property, some of it still finds its way abroad. There has been much discussion and a significant amount of international and national legislation about this traffic in recent years.²¹ Where cultural property from nation *A* illegally makes its way to the territory of nation *B*, a variety of responses is possible. The smuggler may be criminally prosecuted by the authorities of nation *A*, if they can catch him. If the stolen cultural property is brought into the United States, the smuggler may be tried for violation of the Interstate Stolen Property Act.²² If the illegally removed property was taken without the owner's consent, a civil action for damages is another possibility. In most cases, however, the remedy sought will be restitution or, as it is more often called when dealing with cultural property, repatriation. Punishment of the offender is desirable, and money damages would help to assuage the loss, but repatriation is often the preferred objective.

In theory, repatriation should be easy. Cultural property is, for most legal purposes, like other property: the owner can recover it, subject to the possible rights of good faith purchasers. The courts of all nations are open to such actions.²³ If *X* steals my painting and takes it to Mexico, I can sue in a Mexican court for its recovery. Thus, to refer to the case of the Marbles, if Greece believes that they were stolen, it can sue the British Museum in a British court for their return. The probable outcome of such an action is discussed below.

20. See, e.g., Schumacher, *Peru's Rich Antiquities Crumbling in Museums*, N.Y. Times, Aug. 15, 1983, at C14, col. 1.

21. Useful discussions can be found in the *Symposium on International Art Law*, 15 N.Y.U. J. INTL. L. & POL. 757 (1983) [hereinafter cited as *Symposium*]; Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275 (1982), reprinted as P. BATOR, *THE INTERNATIONAL TRADE IN ART* (1983) [hereinafter cited as P. BATOR, with page references to the reprint]; Merryman & Elsen, *Hot Art: A Reexamination of the Illegal International Trade in Cultural Objects*, J. ARTS MGMT. & L., Fall 1982, at 5, reprinted in *THE PENAL PROTECTION OF WORKS OF ART 151* (S. Berman ed. 1983) (International Institute of Higher Studies in Criminal Sciences, Quaderni di Scienze Criminali) [hereinafter cited as Merryman & Elsen, with page references to the original article].

22. 18 U.S.C. §§ 2311-2319 (1982). The Act has been applied in this way in two widely discussed cases: *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974).

23. A recent example is *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982), in which the court ordered two Dürer paintings, missing since the end of World War II and eventually discovered in a private collection in Brooklyn, returned to East Germany.

Where the object was not stolen, however, the law is different. Suppose *X*, the owner of a Titian painting in Genoa, sells it to a Swiss collector who hides it in his luggage and smuggles it out of Italy. Under Italian law such a painting cannot legally be removed from Italy without a permit that, in the case of a work by Titian, would almost certainly not be granted.²⁴ In addition, since the work would not be going to a European Economic Community member country, an ad valorem tax would be due. The smuggler has thus violated Italian law twice. In such "illegal export" cases, the legal situation differs significantly from that in the theft cases. Italy may wish to have the painting returned to Italy, but it is not the owner. Accordingly, Italy would have no standing before a foreign court to recover the Titian. *X*, the Genoese seller of the painting, obviously cannot recover it, since he sold it.

A British decision clearly illustrates the distinction between theft and illegal export. The case involved Medici family papers that had been illegally removed from Italy.²⁵ The government of Italy sought to enjoin their sale by Christie's, the London auctioneers. Some were technically state papers and hence the property of the Italian government; the court enjoined their sale. The remaining papers, while of intense historical interest to Italians, not being state papers, were not the plaintiff government's property. Even though their removal from Italy violated Italian law, the British court would not enjoin their sale at auction.²⁶ Traditional private and public international law thus provide no remedy for the state seeking the return of illegally exported but not state-owned property.

Art-rich nations concerned about "cultural drain" have focused their efforts on achieving more favorable treatment of their claims to the repatriation of illegally exported cultural property. One approach is for the state to declare itself owner of all cultural property of the kind that it wishes to retain, as several Latin American nations have done.²⁷ The state, as owner, can then claim standing to sue for the return of subsequently "exported" cultural property. Such a declaration may have the very important incidental effect of exposing the

24. Italy, Law of June 1, 1939, no. 1089, 5 Rac. Uff. 3403, 2 Leg. Ital. 1425.

25. *King of Italy v. De Medici*, 34 T.L.R. 623 (Ch. 1918).

26. The distinction between theft and illegal import was implicitly reasserted in *Attorney-General v. Ortiz*, [1983] 2 W.L.R. 809 (House of Lords) (in a case involving a Maori carving illegally exported from New Zealand), *affg.* [1982] Q.B. 349 (Court of Appeal).

27. A number of Latin American countries, including Mexico, Guatemala, Ecuador, and Costa Rica, have laws declaring state ownership of cultural property. See L. PROTT & P. O'KEEFE, *supra* note 17, at 188-97; see also *United States v. McClain*, 593 F.2d 658, 665-66 & nn. 10-12 (5th Cir. 1979) (discussing the Mexican law); *United States v. Hollinshead*, 495 F.2d 1154, 1155-56 (9th Cir. 1974) (discussing the Guatemalan law).

“importer” to criminal liability in the United States under the Interstate Stolen Property Act.²⁸ Another important incidental effect of such a declaration is to make cultural property from that nation brought to the United States without an export permit presumptively “stolen” and hence, under the U.S. Customs Service’s interpretation of its own authority, inadmissible.²⁹

There are both analytical and legal (and, within the exporting nation, political and constitutional) difficulties with the declaration of ownership approach to the illegal export cases. All that has happened in some nations is the formal process of enactment; a few words have been published in the *Gaceta Oficial*. Analytically, it is not clear why this should change the way the importing nation will treat actions to recover works from sites that were undiscovered at the time of enactment, works that have remained in private collections after enactment, and works that the state has done nothing to possess, preserve, house, study, or display since enactment. The political problem is that citizens in the “exporting” nation are likely to oppose implementation of such legislation unless unusually generous compensation is provided (i.e., fair market value in cash). Legally, the nation’s constitution and laws are likely to require a hearing, and perhaps prior compensation, in order to accomplish a transfer of ownership from the individual to the state. Administrative and/or judicial proceedings directed at specifically identified properties are the usual pattern. Thus the declaration of state ownership may be an empty formalism, intended primarily for a foreign audience, or it may be an act of expropriation of questionable internal legality. Either possibility reduces the effectiveness of the “declaration of ownership” strategy.³⁰

28. See *United States v. McClain*, 593 F.2d 658 (5th Cir. 1979); *United States v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974). In both cases the defendants had illegally removed articles from nations with laws proclaiming state ownership (ceramic articles and jewelry from Mexico in *McClain*; a large stone stele from a Mayan site in Guatemala in *Hollinshead*). The theory of the prosecution was that the articles were, under the laws of the foreign nations, “stolen.” Once imported into the United States they became subject to the Stolen Property Act, like any other stolen property in interstate or foreign commerce. The objection that the prosecutions violated the black-letter rule of private international law that one state will not enforce the penal laws of another was rejected. *McClain*, 593 F.2d at 671; *Hollinshead*, 495 F.2d at 1156. A bill introduced in Congress by Senator Moynihan of New York would overrule the *McClain* and *Hollinshead* decisions. S. 605, 99th Cong., 1st Sess. (1985). At this writing it appears unlikely to succeed.

29. U.S. CUSTOMS SERVICE, *Seizure and Detention of Pre-Columbian Artifacts*, POLICIES & PROCEDURES MANUAL SUPP. NO. 3280-01 (Oct. 5, 1982). For a discussion of this Customs Directive see Fitzpatrick, *A Wayward Course: The Lawless Customs Policy toward Cultural Properties*, 15 N.Y.U. J. INTL. L. & POL. 857 (1983).

30. The UNESCO Convention deals pragmatically with the problem of the “rhetorical law” declaring state ownership. It treats an object as stolen only if it is taken from “a museum or a religious or secular public monument or similar institution.” 1970 UNESCO Convention, *supra* note 17, art. 7(b). The Cultural Property Implementation Act of 1983, 19 U.S.C. §§ 2601-2613

A different stratagem is for the state to enact legislation providing for automatic forfeiture of illegally exported cultural property. If effective, such a law would make the state the owner of any illegally exported object, which it could then pursue. New Zealand attempted this approach, but without success. In *Attorney-General of New Zealand v. Ortiz*,³¹ British Courts held that forfeiture required actual seizure of the artifact. Since the object, a Maori carving, had left New Zealand territory and escaped seizure, the case became simply another one of illegal export. If the carving were subsequently returned to New Zealand territory and there seized, then it might become national property,³² always subject to the possible claims of intervening third parties.

Given these problems with the "declaration of ownership" and "automatic forfeiture" approaches, it is understandable that a good deal of the effort to deal with illegal export has gone into attempts to change the way importing nations treat illegally exported artifacts. Art-rich "exporting" nations would like importing nations to deny entry to, seize, and return illegally exported objects. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property³³ is one vehicle of this effort. The United States ratified the Convention in 1972, and implementing legislation was finally enacted in 1982, after a series of unsuccessful efforts.³⁴

(1982), adds the further requirement that the object be documented as part of the inventory of such an institution. 19 U.S.C. § 2601. Such an interpretation of the key term "stolen" would probably have made the *McClain* and *Hollinshead* convictions impossible.

31. [1983] 2 W.L.R. 809 (House of Lords), *affg.* [1982] 2 Q.B. 349 (Court of Appeal).

32. Compare the case of the Mayan Codex removed from Mexico in the nineteenth century and recently stolen from the Bibliothèque Nationale in Paris by a Mexican (a lawyer!) who brought it back to Mexico. Newspaper reports state that the Mexican government asserted ownership and confiscated the Codex, which it claimed was originally stolen from Mexico, rejecting French demands for its return to Paris. *San Francisco Chron.*, Aug. 19, 1982, at 41, col. 3.

33. *Supra* note 14. The Convention and materials relating to its ratification by the United States are set out in J. MERRYMAN & A. ELSEN, *supra* note 3, at 2-169 to 2-204.

34. The statute, called the Cultural Property Implementation Act of 1983, 19 U.S.C. §§ 2601-2613 (1982), is discussed in Fitzpatrick, *supra* note 29, and in McAlee, *The McClain Case, Customs and Congress*, 15 N.Y.U. J. INTL. L. & POL. 813 (1983). In fact, neither the 1970 UNESCO Convention, *supra* note 17, nor the Implementation Act drastically changes the law. Article 7(a) of the Convention, which applies to illegally exported cultural property, merely obliges the United States to "take the necessary measures, consistent with national legislation, to prevent museums and similar institutions" within the United States from acquiring such property. Except as to federal museums, this provision is toothless. Even as to "property stolen from a museum or a religious or secular public monument or similar institution," article 7(b) of the Convention requires the recovering nation to pay "just compensation to an innocent purchaser." Article 9 provides for "concerted" action by the "States Parties to this Convention" if another state's "cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials" to "prevent irremediable injury to the cultural heritage of the requesting State." The Implementation Act underlines the restrictions stated and implied in these provisions. An earlier statute, 19 U.S.C. § 2091 (1982), which prohibits the importation of pre-Columbian monumental

Despite adoption of the Convention and enactment of implementing legislation (like the Cultural Property Implementation Act) by a number of "importing" nations,³⁵ the traffic in illegally exported cultural property continues. Most major market nations are not parties to the UNESCO Convention; indeed at this writing only Canada and the United States, among the fifty-six parties to the Convention,³⁶ are major art importers. Even in the United States and Canada, the terms of the Convention and of national legislation still leave open the possibility of continued traffic in illegally exported works. In the United States, the fact that most museums are nongovernmental complicates efforts to control their actions. The distribution of authority between the states and the nation under American federalism adds a further level of complexity. In any case, the Convention applies only to events occurring after its adoption. While it may exercise some inhibiting effect on future transactions, it has no legal effect on earlier ones. The great legal issues of repatriation of cultural property, of which the Elgin Marbles are probably the most famous example, remain. All of the recent legal activity, national as well as international, may not have solved the problem so much as added to its complexity.

Politically, there is increasing activity within UNESCO and, more recently, the Council of Europe, to encourage the voluntary repatriation of cultural property, independently of any legal obligation to do so. UNESCO became actively involved with cultural property issues in the 1960s. Its first major effort, culminating in the 1970 Convention, was prospective, and did not attempt to deal with events occur-

or architectural sculpture or murals without an export permit from the country of origin, has a much stronger bite.

35. Canada's legislation, the Cultural Property Export and Import Act, ch. 50, 1974-1976 Can. Stat. 1155 (1970), is described in Clark, *The Cultural Property Export and Import Act of Canada: Legislation to Encourage National Cooperation*, 15 N.Y.U. J. INTL. L. & POL. 771 (1983). Canada and the United States have been the most generous of the cultural property-importing nations in their responses to the concerns of nations of origin. See Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U. J. INT. L. & POL. 757 (1983).

36. As of September 25, 1985 there were fifty-six parties to the 1970 UNESCO Convention, *supra* note 17: Algeria, Argentina, Bolivia, Brazil, Bulgaria, Cameroon, Canada, the Central African Republic, Cuba, Cyprus, Czechoslovakia, Democratic Kampuchea, the Democratic People's Republic of Korea, the Dominican Republic, Ecuador, Egypt, El Salvador, the German Democratic Republic, Greece, Guatemala, Guinea, Honduras, Hungary, India, Iran, Iraq, Italy, Jordan, Kuwait, Mauritania, Mauritius, Mexico, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Peru, Poland, Qatar, the Republic of Korea, Saudi Arabia, the Socialist People's Libyan Arab Jamahiriya, Senegal, Sri Lanka, the Syrian Arab Republic, Tunisia, Turkey, the United Republic of Tanzania, the United States of America, Uruguay, Yugoslavia, Zaire, and Zambia. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property: List of States having deposited an instrument of ratification, acceptance or accession (Dec. 15, 1984 & rev. Sept. 25, 1985) (unpublished listing available through the Cultural Property Advisory Committee, U.S. Information Agency).

ring before its implementation. More recently UNESCO and the United Nations General Assembly have focused on the question of restitution of previously acquired cultural property. In 1973, at the request of Zaire, the United Nations General Assembly considered the question of "restitution of works of art to countries victims of expropriation."³⁷ Since then the Secretary General, in collaboration with the Director-General of UNESCO, has submitted two progress reports³⁸ on the implementation of United Nations Resolutions on the question. In 1978, UNESCO formed an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation.³⁹ The Parliamentary Assembly of the Council of Europe issued an order and a resolution on the subject in 1983.⁴⁰ Public and private sensitivity to the desire of Third World nations for the return of artifacts has led to a number of often unpublicized cases of voluntary repatriation.⁴¹

As the pressure for repatriation grows, the necessity for a framework for discussion of cultural property questions grows with it. Although there are significant exceptions,⁴² the topic seems to evoke a tendency to oversimplify, to reach for the facile solution. To some, perhaps, it is not worth the effort: cultural property does not seem important enough to call for deliberate consideration. Sentiment may so overpower others that they become impatient with the argument. Third World/First World politics cloud the discussion. Although every case must be decided on its own facts, the Elgin Marbles, on

37. See 34 U.N. GAOR (Agenda Item 20) at 1, U.N. Doc. A/34/529 (1979).

38. 30 U.N. GAOR (Agenda Item 26) at 1-7, U.N. Doc. A/10224 (1975); 32 U.N. GAOR (Agenda Item 26) at 1-7, U.N. Doc. A/32/203 (1977).

39. See 34 U.N. GAOR Annex (Agenda Item 20) at 8-11, U.N. Doc. A/34/529 (1979), which reproduces the statutes of the Intergovernmental Committee. There is a brief history of the creation of the Committee in *Return and Restitution of Cultural Property* 31 MUSEUM app. 59-61 (1979).

The UNESCO Office of Public Information has issued a document "for use of information media" entitled *Backgrounder: Return or Restitution of Cultural Property* [hereinafter cited as UNESCO Backgrounder]. This document and most of the activity within UNESCO reflect a point of view that is dominant among former colonies and Third World nations.

40. Eur. Parl. Ass. Order No. 421, 35th Sess., 1983 EUR. PARL. DOC. (No. 5110) 1 (1983) (on the movement of art objects); Eur. Parl. Ass. Res. 808, 35th Sess., 1983 EUR. PARL. DOC. (No. 5111) 1 (1983) (on the return of works of art). Both actions contemplated a continuing interest in the subject. The Council's 13th Colloquy on European Law, held in Delphi September 20-22, 1983, had as its topic "The Protection of Cultural Property under International Law." Papers (copies in the author's files) were presented at the Colloquy by Professors Dicke of Switzerland, Goy of France, Rodota of Italy, and de Schutter of Belgium.

41. See the examples listed in UNESCO Backgrounder, *supra* note 39, at 13-14; P. BATOR, *supra* note 21, at 7 n.24; J. MERRYMAN AND A. ELSEN, *supra* note 3, at 2-208 to 2-218.

42. See, in particular, *Symposium*, *supra* note 21; P. BATOR, *supra* note 21; Merryman & Elsen, *supra* note 21.

which everyone has an opinion, provide a convenient and glamorous context for a reasoned discussion of the repatriation issue.

Why Do We Care?

A preliminary question: what difference does it make to us (i.e., to non-British and non-Greeks) whether the Marbles stay in Britain or are returned to Greece? It is easy to see why the British want to keep them and to understand why the Greeks want them back, but why should the rest of us care?

We care about the Elgin Marbles for three reasons. First, they are monuments of human culture, an essential part of our common past. They tell us who we are and where we come from, give us cultural identity. Second, we enjoy them as great art. Like literature and music, they enrich our lives. Third, the Marbles dramatically illustrate an important fact: the Metropolitan Museum in New York, the British Museum in London, the Louvre in Paris, the Hermitage in Leningrad and indeed all of the great Western museums contain vast collections of works from other parts of the world. If the principle were established that works of foreign origin should be returned to their sources, as Third World nations increasingly demand in UNESCO and other international fora, the holdings of the major Western museums would be drastically depleted. The Elgin Marbles symbolize the entire body of unrepatriated cultural property in the world's museums and private collections. Accordingly, the preservation and enjoyment of the world's cultural heritage and the fate of the collections of the world's great museums are all in some measure at stake in a decision about the Marbles.

THE LAW

If the British government refuses to return them we will take them to the courts.

*Melina Mercouri*⁴³

The Greek case for return of the Marbles,⁴⁴ like the cases of other

43. Quoted in ARTNEWSLETTER, May 31, 1983, at 8.

44. Neither Minister Mercouri's nor Prime Minister Papandreu's office has responded to requests for official statements of the Greek case or for comments on a draft of this article. I have had to draw the Greek side from press reports and statements by British supporters of the Greek cause. See Browning, *supra* note 9, at 41; Thompson, *supra* note 14, at 9.

The British side of the case can be drawn in part from discussions in Parliament. There are responses by the Minister for the Arts to questions about the Marbles in 58 PARL. DEB., H.C. (6th ser.) 188 (1984) (Written Answers); 54 PARL. DEB., H.C. (6th ser.) 19 (1984); 50 PARL. DEB., H.C. (6th ser.) 379 (1983) (Written Answers); 49 PARL. DEB., H.C. (6th ser.) 16 (1983); 38

nations seeking the return of cultural property, reduces to two propositions. One is that the Marbles were wrongly taken by Elgin and have never belonged, legally or morally,⁴⁵ to the British. The other is that, even if the Marbles became British property, they ought now to be returned to Greece. This seems to be an appropriate way to organize the inquiry. Accordingly, we can begin to think about the Elgin Marbles by examining the law and the ethics of the case. Was the removal illegal or immoral?

The British government bought the Marbles from Lord Elgin in 1816 after a full discussion in Parliament, in full knowledge of the facts.⁴⁶ Accordingly, it seems fair, and is consistent with the law of all civilized jurisdictions, to suppose that the right of the Crown to the Marbles was no better than Elgin's right to them. This proposition, which is preserved in the maxim *nemo plus juris ad alium transferre potest quam ipse habet*,⁴⁷ is too widely recognized to require justification. Although this rule of construction is subject to a number of exceptions and qualifications, none of them applies to a purchaser in full knowledge of the facts. If Lord Elgin owned the Marbles, he could transfer ownership to the Crown. If his title was defective, then so was the Crown's title. How good was Lord Elgin's title to the Marbles? To answer that question we have to determine (1) whether the Ottoman authorities, who at the time were the recognized government of Greece, had the authority to transfer property rights in the Marbles to Lord Elgin; (2) whether they did in fact authorize Lord Elgin to remove the Marbles and take them to England; and (3) whether Lord

PARL. DEB., H.C. (6th ser.) 558 (1983); 427 PARL. DEB., H.L. (5th ser.) 361 (1982). In 1983 a bill was introduced that would enable the Trustees of the British Museum to return the Marbles (their existing statutory authority only permitted them to dispose of duplicate materials). The bill was defeated in the House of Lords on October 27, 1983. The debate is recorded in 444 PARL. DEB., H.L. (5th ser.) 399-422 (1983).

There are journalistic presentations of the British side of the case in Brilliant, *Making the Case for Britain's Claim to the Elgin Marbles*, N.Y. Times, Apr. 9, 1984, at H33, col. 1; Scruton, *Our Concrete Case for Keeping the Marbles*, The Times (London), June 7, 1983, at 14, col. 5.

45. There are several reasons why morality enters the discussion. The Greek demand is based in part on moral grounds, and the attitude of people and governments throughout the world toward the case is based in large part on moral considerations. Further, although the international law applicable to the case is reasonably clear, international law derives much of its force from its moral authority. A legal argument that is morally offensive accordingly carries less weight in international than in municipal law. See 1 H. LAUTERPACHT, *INTERNATIONAL LAW* 46 (1970); T. NARDIN, *LAW, MORALITY, AND THE RELATIONS OF STATES* 306 (1983); 1 L. OPPENHEIM, *INTERNATIONAL LAW* 88 (H. Lauterpacht 8th ed. 1955).

46. The facts are fully set out in REPORT, *supra* note 3. Descriptions of the purchase can also be found in J. ROTHENBERG, *supra* note 3, at 357-432; W. ST. CLAIR, *supra* note 3, at 180-86, 218-29, 250-62. The parliamentary debate on the purchase of the Marbles is recorded in 34 PARL. DEB., H.C. (6th ser.) 1031 (1983).

47. BLACK'S LAW DICTIONARY 936 (5th ed. 1979).

Elgin exceeded the authority given to him. Each of these major questions raises subsidiary questions.

We begin with the situation of the Greeks in 1801, when the crucial transaction took place. All of Greece was then a part of the Ottoman Empire, ruled from Constantinople, as it had been for nearly four centuries. Athens itself was conquered by the Ottomans in 1460⁴⁸ and had been under foreign rule since 1204.⁴⁹ "For most of the period of Turkish rule Athens had been the property of one of the numerous lesser dignitaries of the Ottoman court, the Chief of the Black Eunuchs. . . ." ⁵⁰ By 1800, "normal Turkish standards of administration had been reestablished,"⁵¹ with the Grand Vizier, the head of the executive power of the Ottoman Government and second in command only to the Sultan,⁵² the internationally recognized authority governing Athens. The responsible local officials were the Voivode (the civil governor) and the Cadi (the chief judicial officer).⁵³ The Acropolis of Athens was at that time the Citadel, or military fort, under the command of the Disdar.⁵⁴ Under the international law of that time, the acts of Ottoman officials with respect to persons and property under their authority were presumptively valid. Even though their actions might seem regrettable, unsound, or unfeeling, one would not question their legality, except in the most unusual circumstances. In this instance the Ottomans had a solid claim to legal authority over the Parthenon because it was public property, which the successor nation acquires on a change of sovereignty.⁵⁵ It seems clear that under the international law of the time the Ottomans *could* give Elgin the right to remove the Marbles. Did they do so?

Elgin obtained from the Ottomans in Constantinople, where he was the British ambassador, a formal written instrument called a fir-

48. See D. DAKIN, *THE GREEK STRUGGLE FOR INDEPENDENCE: 1821-1833*, 5 (1973).

49. See A. TOYNBEE, *THE GREEKS AND THEIR HERITAGE*, 22 n.94 (1981).

50. W. ST. CLAIR, *supra* note 3, at 50. The author continues: "In 1760, however, [Athens] lost this privileged position and was henceforth auctioned by the Sultan to the highest bidder who then had the right to put the proceeds of taxation into his own pocket. Thirty-five years of unbelievable extortion . . . followed. . . ." *Id.* (footnote omitted).

51. *Id.*

52. See note 2 *supra*.

53. See S. SHAW, *supra* note 2, at 26, 50.

54. See H. INALCIK, *supra* note 2, at 120.

55. See D. O'CONNELL, *THE LAW OF STATE SUCCESSION*, 226-27 (1956).

It might be argued that the Parthenon was religious rather than state property, but the distinction seems difficult to sustain in the historical and factual context. What religious authority could have claimed ownership against the Ottoman temporal authority, if indeed any such distinction was recognized by the Ottomans at the time? The Ottoman civil and military authorities in Constantinople and in Athens certainly acted as though they had power to deal with the Parthenon, and there is no record of any religious protest.

man,⁵⁶ addressed to the local authorities in Athens. The firman responded to Elgin's written request for permission and protection "in the following objects"

(1) to enter freely within the walls of the Citadel, and to draw and model with plaster the Ancient Temples there.

(2) to erect scaffolding and to dig where they may wish to discover the ancient foundations.

(3) liberty to take away any sculptures or inscriptions which do not interfere with the works or walls of the Citadel.⁵⁷

The third of these could be interpreted as authority for what Elgin actually did, and if the firman had contained the same language, the case would be easier. We have only the Italian version of the firman. The original, in Turkish, was kept by the Ottoman officials in Athens and has been lost. The Italian version was given to Lord Elgin by the Turks and survives today. The following is a fair translation:

[I]t is incumbent on us to provide that they [i.e. Elgin's artists] meet no opposition in walking viewing or contemplating the pictures and buildings they may wish to design or copy; and in any of their works of fixing scaffolding, or using their various instruments; it is our desire that on the arrival of this letter you use your diligence to act conformably to the instances of the said Ambassador [Elgin] as long as the said five artists dwelling in that place shall be employed in going in and out of the citadel of Athens which is the place of observation; or in fixing scaffolding around the ancient Temple of the Idols, or in modelling with chalk or gypsum the said ornaments and visible figures; or in measuring the fragments and vestiges of other ruined buildings; or in excavating when they find it necessary the foundations in search of inscriptions among the rubbish; that they be not molested by the said Disdar nor by any other persons; nor even by you to whom this letter is addressed; *and that no one meddle with their scaffolding or implements nor hinder them from taking away any pieces of stone with inscriptions and figures.*⁵⁸

The language of this last clause, even when taken in context with that of the third paragraph of Elgin's request to the Sultan, is at best ambiguous. While it is possible to read the firman as a flowery concession of everything for which Elgin asked, it is more reasonable to conclude that the Ottomans had a narrower intention, and that the firman

56. A firman (firmaun, fermaun) was an edict/order/decree/permit/letter from the Ottoman Government addressed to one of its officials ordering/suggesting/requesting that a favor be conferred on a person. See 4 OXFORD ENGLISH DICTIONARY 249 (1961). Elgin described the nature of a firman as little better than authority to make the best bargain that could be made with the local authorities. REPORT, *supra* note 3, at 4.

57. Quoted in W. ST. CLAIR, *supra* note 3, at 88 (quotation obtained from Smith, *supra* note 3, at 190); see also J. ROTHENBERG, *supra* note 3, at 149-51; T. VRETTOS, *supra* note 3, at 65-66.

58. W. ST. CLAIR, *supra* note 3, at 90 (emphasis added) (quoting an English translation of the Italian version attributed to the Reverend D.P. Hunt, secretary to Lord Elgin). I have seen a photocopy of the Italian version and agree that the English translation here set out renders it faithfully.

provides slender authority for the massive removals from the Parthenon. The document appears to contemplate measuring, drawing, and making casts as the principal activity of Elgin's artists and workmen. The reference to "taking away any pieces of stone" seems incidental, intended to apply to objects found while excavating. That was certainly the interpretation privately placed on the firman by several of the Elgin party, including Lady Elgin.⁵⁹ Publicly, however, a different attitude was taken, and the work of dismantling the sculptures on the Parthenon and packing them for shipment to England began in earnest. In the process, Elgin's party damaged the structure, leaving the Parthenon not only denuded of its sculptures but further ruined by the process of removal.⁶⁰ It is certainly arguable that Elgin exceeded the authority granted in the firman in both respects.

Accordingly, it would seem that Elgin did not acquire property rights in the Marbles. It is the law everywhere, however, that an act in excess of the authority originally granted can be ratified, expressly or by implication from conduct indicating acquiescence.⁶¹ There is evidence that the Ottomans twice ratified what Elgin had done. For one thing, it appears that Elgin caused the Sultan to issue additional firmans addressed to the Voivode and Disdar of Athens, in which the Sultan generally sanctioned what these local officials had done for Elgin and his party.⁶² For another, a large shipment of Marbles was held up in Piraeus (the port of Athens) because the Voivode, under pressure from the French, refused to give his permission for their embarkation. Eventually the Ottoman government gave written orders to the Athenian authorities to permit the shipment, and the Marbles were allowed to leave for England.⁶³ Together these two events make a strong case for ratification of the removal, even if it exceeded the authority given in the original firman. If the removal was so ratified, then as a matter of international law the removal was legal, and Elgin was able to transfer title in the Marbles to the British Museum.

If similar events were to occur today, new principles of international law would apply.⁶⁴ As a result, the authority of the Ottoman

59. W. ST. CLAIR, *supra* note 3, at 91, 95; J. ROTHENBERG, *supra* note 3, at 153-54; *cf.* REPORT, *supra* note 3, at 56-57 (testimony of the Reverend D.P. Hunt).

60. On the damage to the Parthenon see J. ROTHENBERG, *supra* note 3, at 171-78; W. ST. CLAIR, *supra* note 3, at 102-04, 112-13, 139.

61. *See, e.g.* RESTATEMENT (SECOND) OF AGENCY § 43(1) (1958).

62. This episode is described in W. ST. CLAIR, *supra* note 3, at 113 (based on the account in Smith, *supra* note 3, at 233, 236 (quoting correspondence between Lusieri and Elgin)).

63. W. ST. CLAIR, *supra* note 3, at 159-60.

64. Until this century, a treaty imposed on the loser by an aggressor was valid under international law. *See* M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 132 (5th ed. 1984). But with adoption of the Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, T.S. No.

government to dispose of Greek cultural property under its jurisdiction would be far less clear. In international law, however, as in domestic law, the rule is that the legal effects of a transaction depend on the law in force at the time.⁶⁵ The justice, as well as the practical necessity, of such a principle is obvious. It is both fair and practically advantageous that people be able to rely on the existing law to determine the legality of their actions. The most obvious applications of this principle occur in our own constitutional prohibition against *ex post facto* laws⁶⁶ and in our legal system's bias against retroactive legislation. Thus if the removal of the Marbles was proper under the then applicable international law, as it seems to have been, then the British are legally entitled to keep them.

It is possible that the Greeks would have lost their rights even if the removal were illegal, since it all happened long ago, between 1801 (the first removals from the Parthenon) and 1815 (the final shipment to England). The passage of time inevitably has an effect, and all legal systems recognize this fact in rules of prescription. Such rules respond to the difficulty of reconstructing ancient events and to the tendency of people to rely on the *status quo*. To allow old transactions to be questioned is to invite fraud and perjury and to unsettle the affairs of the present — hence what in the common law world are called “statutes of limitation” and elsewhere are referred to as rules of “prescription.” In international law, of course, there is no statute of limitations, but the same considerations apply: witnesses die, memories fail, people rely on stable appearances, and so on. Minister Mercouri appears to have stimulated the first official request by Greece for return of the Marbles, although private approaches have undoubtedly been made over the years.⁶⁷ If we take the date of Greek independence from the Ottoman Empire to be 1828 (1821 is sometimes used, but 1828 is the more widely accepted date), then the Greeks had 155 years during which to pursue their legal remedies before they finally demanded the return of the Marbles in 1983.

Prescription statutes run against one who fails to exercise an available judicial remedy, and it might seem unfair to apply the prescrip-

796, 2 Bevens T.S. 732, by most nations, followed by U.N. CHARTER art. 2, para. 4 and the Vienna Convention on the Law of Treaties, May 23, 1969, art. 52, U.N. Doc. A/Conf.39/27, reprinted in 63 AM. J. INTL. L. 875 (1969), the rule was changed. Cf. The Hague Convention of 1954, *supra* note 17, art. 4(3) (Each party to the Convention is to “refrain from requisitioning movable cultural property” located in the territory of another party.). Under the new rule it might be argued that the Ottoman occupation of Greece and the Ottoman permission to remove Greek antiquities were illegal, thus clouding Elgin's title to the Marbles.

65. See M. AKEHURST, *supra* note 64, at 150.

66. U.S. CONST. art. I, § 9, cl. 3.

67. See note 5 *supra*.

tion principle in international law when no forum capable of definitively determining rights and providing remedies exists. In fact, however, Greece might have brought suit in an English court for return of the Marbles, on the theory that they were illegally taken by Elgin.⁶⁸ As we have already seen, the courts of most nations are open to an owner seeking the return of stolen property.⁶⁹ Greece has accordingly been in a position to sue for the Marbles since 1828 and has never done so.⁷⁰ Nor has Greece aggressively pursued its diplomatic remedies, since the 1983 request for return of the Marbles is the first such official diplomatic demand. Unless some unusual exception were made, it seems clear that the Greeks have lost any right of action they might have had for the recovery of the Marbles before an English court, where the applicable statute of limitations is six years.⁷¹

Other legal questions can be raised about Elgin's actions: to what extent were the Ottomans induced by bribery to permit and condone the removal? Elgin and his party made numerous gifts to Ottoman officials in Constantinople and Athens. While many of these were offered and received in a ceremonial context, others were given and accepted in order to receive specific favors and would, by any standard, be understood as bribes.⁷² What shall we make of Elgin's ambiguous status as British ambassador and as private acquirer of the Marbles, at a time when the Ottoman court was eager to establish friendly relations with England?

On 17 June General Hutchinson received the surrender of Cairo and the success of the Egyptian expedition [against the French] was finally assured. On 6 July, Elgin obtained the firman he had asked for. These two events were intimately connected: indeed, allowing for the time news took to travel and the ceremoniousness of all Turkish business, one fol-

68. Technically, the Marbles are the property of the Trustees of the British Museum, to whom they were transferred by act of Parliament. An Act to vest the *Elgin* Collection of Ancient Marbles and Sculpture in the Trustees of the *British Museum* for the Use of the Public, 1816, 56 Geo. 3, ch. 99. Any action for their recovery would accordingly have to be brought against the Trustees who would, of course, have no better title to the Marbles than the British Government had at the time of transfer. The Trustees' enabling statutes prohibit them from conveying any of the property they hold. A bill to give them authority to convey the Marbles was introduced in Parliament and failed in 1984. See 444 PARL. DEB., H.L. (5th ser.) 399-422 (1983). An order of the court to deliver the Marbles to Greek authorities, however, would almost certainly be obeyed.

69. See note 23 *supra*.

70. Prior to January 1, 1948, the Greek Government would have had to employ the ancient Petition of Right, which was "the process by which property of any kind . . . was recoverable from the Crown." 11 HALSBURY'S LAWS OF ENGLAND 747 (Lord Hailsham 4th ed. 1976). Enactment of the Crown Proceedings Act, 10 & 11 Geo. 6, ch. 44 (1947), altered the procedure and extended the range of government liability. Now an ordinary proceeding may be brought in the County Court.

71. See Limitation Act, 1939, 2 & 3 Geo. 6, ch. 21, § 2(1)(a).

72. See the events described in W. ST. CLAIR, *supra* note 3, at 93-96.

lowed at once after the other.⁷³

Elgin himself acknowledged that he was making little progress in the negotiations for a firman until the Ottomans suddenly began showering all kinds of favors on their British allies.⁷⁴

These are interesting questions, but it is difficult to turn their answer to the benefit of the Greek side in a legal dispute over the Marbles. The Ottomans who were bribed were the responsible officials. Whatever their motivation may have been, they had the legal authority to perform those actions. At a time and in a culture in which officials routinely had to be bribed to perform their legal duties (as is still true today in much of the world), the fact that bribes occurred was hardly a significant legal consideration.⁷⁵ As for the ambiguity of Elgin's position, there is a clear, if subtle, distinction between a gift of the Marbles to *Elgin* because he was a person of importance and influence in England, and a gift to *the Crown* in the person of its emissary Elgin.⁷⁶ The Select Committee inquired whether Elgin got the Marbles as British Minister or in his personal capacity and decided the latter; hence the purchase by Parliament. If Elgin had acquired the Marbles as a representative of the British Crown they would already have been Crown property, and no purchase would have been necessary.⁷⁷

In brief, on the facts available to us, it appears that the law favors the British side of the case. Although the original firman provides only slender authority for the removals, subsequent ratification of Elgin's actions by the Sultan and the passage of time since Greek independence both support the proposition that the British own the Marbles. If Greece were to sue the Trustees of the British Museum today for their return, the remedy would be denied unless a quite different version of the facts were found.⁷⁸

73. W. ST. CLAIR, *supra* note 3, at 88 (footnote omitted).

74. See REPORT, *supra* note 3, at 8.

75. The text statement of course refers to the law in force at the time. Recent legal developments would make the use of bribery a more serious issue, at least in the United States. See *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962); Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2 (1982).

76. On the international situation and how it affected Elgin's embassy and acquisition of the Marbles, see REPORT, *supra* note 3, at 2-4; J. ROTHENBERG, *supra* note 3, at 152-53; W. ST. CLAIR, *supra* note 3, at 13-22, 79-86, 92-93, 154-60; T. VRETTOS, *supra* note 3, at 58-60.

77. See REPORT, *supra* note 3, at 21.

78. It is possible that the facts are different, but none of the materials about the case that are available to the diligent researcher (in non-Greek language publications) cast serious doubt on the version used here. There may be important additional sources in the Turkish archives, but those materials are in any practical sense inaccessible to me.

THE MORALITY OF THE REMOVAL

“Had not these lovely things been preserved in England, they would have been destroyed during the Greek War of Independence!”

Now that is the very argument which has been used, and repeatedly used, whenever the British have had qualms of conscience about the Elgin Marbles. It is a rotten argument. In the first place, those statues and sculptures which escaped Lord Elgin’s depredations survived undamaged the battles of the Greek War of Independence. In the second place, if they were restored now to Greece they would certainly be as safe as in the British Museum. And in the third place, it is not for a receiver of stolen goods to claim that the goods are safer in his care than if restored to the original owners.

— Sir Harold Nicolson⁷⁹

The moral question is much harder to resolve than the legal question because moral norms are imprecise and their applicability is controversial. That is one reason for legal rules: to provide definitive and practically workable solutions to otherwise troubling and unruly questions. There is a trade-off; something is gained, but something is also lost. As a result it occasionally happens that what is legal seems morally wrong, even to those making the legal decision. The preceding discussion concludes that the removal of the Marbles was legal. The question now is whether, even if legal, it was immoral. Here again it helps to look closely at the facts.

There are two sharply contrasting historical images of Lord Elgin. One, widely popularized by Byron, depicts Elgin as a crude, exploitative, unfeeling despoiler of a helpless Greece.⁸⁰ The other portrays him as the saviour of the best of Greek art. The truth is certainly more complex than either of these stereotypes. Byron was unfair to Elgin, but his version of historical events and motivations has had enormous power in molding contemporary attitudes about the Marbles. Byron’s attack on Elgin was carried on in conversations and correspondence but took its most influential form in his poetry, particularly in *The Curse of Minerva*, composed in 1811, and in *Childe Harold’s Pilgrimage*, published in 1812. *Childe Harold*, in particular, succeeded in capturing the public imagination. It was an immediate best seller in several languages. Here are a few lines, to give the flavor.

But most the modern Pict’s ignoble boast,
To rive what Goth, and Turk, and Time hath spared:

79. Quoted in T. VRETTOS, *supra* note 3, at 11.

80. For fuller discussions of Byron’s influence see J. ROTHENBERG, *supra* note 3, at 300-04, 321-22, 334, 340; W. ST. CLAIR, *supra* note 3, at 162-65, 187-202; T. VRETTOS, *supra* note 3, at 137-49.

Cold as the crags upon his native coast,
 His mind as barren and his heart as hard,
 Is he whose head conceived, whose hand prepared,
 Aught to displace Athena's poor remains:
 Her sons, too weak the sacred shrine to guard,
 Yet felt some portion of their mother's pains,
 And never knew, till then, the weight of Despot's chains.⁸¹

(A "Pict" is of course a Scot.) The theme is pursued in *The Curse of Minerva*. The speaker is Minerva — i.e. Athena — in whose honor the Parthenon was built. She is addressing Byron.

Lo! here, despite of war and wasting fire,
 I saw successive tyrannies expire.
 'Scaped from the ravage of the Turk and Goth,
 Thy country sends a spoiler worse than both.

. . . .

Be ever hail'd with equal honour here
 The Gothic monarch and the Pictish peer:
 Arms gave the first his right, the last had none,
 But basely stole what less barbarians won.
 So when the lion quits his fell repast,
 Next prowls the wolf, the filthy jackal last:

to which Byron answers:

Frown not on England; England owns him not:
 Athena, no! thy plunderer was a Scot.

and Byron goes on to describe Scotland and the Scots:

And well I know within that bastard land
 Hath Wisdom's goddess never held command;
 A barren soil, where Nature's germs, confined
 To stern sterility, can stint the mind;

. . . .

A land of meanness, sophistry, and mist.
 Each breeze from foggy mount and marshy plain
 Dilutes with drivel every drizzly brain,⁸²

and so on.

The French, with the crucial, if unacknowledged, assistance of Byron, coined the term *Elginisme* to refer to the act of removing cultural property from its site.⁸³ For those who would like an epithet to char-

81. LORD BYRON, *Childe Harold's Pilgrimage*, Canto II, Stanza XII, reprinted in BYRON: POETICAL WORKS, *supra* note 11, at 196.

82. LORD BYRON, *The Curse of Minerva*, reprinted in BYRON: POETICAL WORKS, *supra* note 11, at 143.

83. "elginisme . . . n.m. (du n. de Thomas Bruce, comte d'Elgin (1766-1841), diplomate angl. qui constitua, par des moyens parfois douteux, d'importantes collections d'objets d'art étrangers. . . .) Forme de vandalisme consistant à arracher les oeuvres d'art de leur pays d'origine pour en constituer des collections privées ou publiques." 2 GRAND LAROUSSE DE LA LANGUE FRANÇAISE, 1528 (1972). It takes one to know one. The French, as the contents of the Louvre and the history of French military, economic, and intellectual imperialism amply illustrate, are masters of Elginisme.

acterize the sort of romantic misrepresentation and distortion of values that Byron perpetrated, perhaps *Byronism* will do. Shelley wrote that “[p]oets are the unacknowledged legislators of the world.”⁸⁴ In the field of cultural property, Byron is definitely the unacknowledged legislator. Byronism lies at the base of widely accepted attitudes toward cultural property. It supports the claims of nations of origin while it discredits those who, whether out of principle or self-interest, would advance alternative bases for the distribution of the world’s cultural property. Byronism supplies and limits the terms of discourse, preempting the argument and blocking the assertion of more appropriate criteria. It is strongly built into Western culture. Many who firmly believe that the Marbles should be returned to Greece base their positions on the Byronic version of events and motivations. History, however, provides a more complex and interesting picture.

First of all, it is important that the French were at the time aggressively acquiring great works for the Musée Napoleon (now the Louvre). Napoleon had looted Italy and other parts of Europe of much of their greatest art to fill his museum in Paris.⁸⁵ The French, rivals of the British for influence in the Ottoman Empire, sought to acquire Greek antiquities for their own museums and to prevent Elgin from acquiring them for England. If Elgin had not removed the Marbles, someone else (probably the French, but some Germans were also interested) would certainly have tried to do so.

With so many eyes all fixed on the same goal and a few pieces already in the hands of the French, it would not be long before some one would succeed in acquiring the Parthenon sculptures. If we add to the competitive inclinations of the French and English Hellenists in Athens at the time, the political instability, confusion, and opportunity for plunder precipitated by the Napoleonic Wars, we have all the ingredients necessary for a successful antiquarian attack on the temple. The question of who first had the thought, or who made the first move toward divesting the structure of its sculptural treasure, is academic. The fact is that by the opening of the 19th century the “rape of the Parthenon” had become an historical inevitability.⁸⁶

This is at best a morally ambiguous argument; there is something troubling about the suggestion that *A* may perform a wrongful act because *B* would otherwise do so. Still, the fact that the French and others were in hot pursuit of the Marbles suggests something about the morality prevailing in that time and place, which is the morality applicable to a judgment about Elgin’s actions. It is also reasonable to ask

84. P.B. SHELLEY, A DEFENCE OF POETRY 90 (1904).

85. See the materials collected in J. MERRYMAN & A. ELSÉN, *supra* note 3, at 1-28 to 1-42.

86. J. ROTHENBERG, *supra* note 3, at 143-44.

whether moral culpability should attach to a historically inevitable act. If Rothenberg is right, and the removal of the Marbles was bound to occur, is it right to assign moral blame to one who merely did the inevitable? Finally, if one treats the removal as the joint responsibility of the British, the French, and other Europeans who made the removal inevitable, perhaps the moral blame should be distributed among them, rather than assigned solely to Elgin.

It is remotely possible that the Marbles would not have been taken by some other collector if they had been left in place by Elgin, but that would have left them exposed to a variety of more serious hazards. The Ottomans were insensitive to the beauty and the artistic and cultural importance of the Marbles.⁸⁷ It has also been suggested that the Greeks themselves lacked interest in or respect for their own antiquities.⁸⁸ There is no reason to suppose that they would have received better protection or care from the Ottomans during the few remaining years of Ottoman dominance than in the previous four centuries. On the contrary, as the cause of Greek independence gathered force, the temptation to do damage to Greek monuments and the possibility that such monuments would be unintentional victims of military action greatly increased. Ottoman soldiers who had used the Acropolis as their Citadel for centuries, and who had used both the Propylea and the Parthenon as powder magazines, would have had another decade and a half to expose the Marbles to the kind of danger that had already led to ruinous explosions in both of those structures. The Propylea was shattered when explosives stored in it by the Ottomans were struck by lightning. The Ottomans then moved their powder magazine to the Parthenon and it exploded when hit by a Venetian cannon ball. The little temple of Athena Nike was deliberately razed

87. See REPORT, *supra* note 3, at 7. St. Clair describes the attitude of the Ottomans toward Greek antiquities and the record of damage to works on the Acropolis under their rule in W. ST. CLAIR, *supra* note 3, at 55-57. Most Ottomans, including those of the military establishment who were quartered on the Acropolis, had only contempt for the works of the Greeks.

At another likely site on the Acropolis a house stood in the way and the owner was unwilling to sell. Some months later permission was obtained from Constantinople to buy it compulsorily and pull it down. But the excavations — which went down to the rock — yielded nothing. The Turk whose house it was declared laughingly that he had used the marble from the statues found on the spot to make the mortar for his house.

Id. at 99 (footnote omitted). For the contrasting "Tale of the Disdar's Tear" see T. VRETTOS, *supra* note 3, at 79; W. ST. CLAIR at 102-03.

88. The evidence on this point is unclear. See REPORT, *supra* note 3, at 5; W. ST. CLAIR, *supra* note 3, at 211-14; T. VRETTOS, *supra* note 3, at 104-06. One witness hostile to Elgin was asked at the hearings of the Select Committee: "Do you think the Greeks were anxious that those Marbles should not be removed from Athens?" He answered: "They were decidedly and strongly desirous that they should not be removed." But the Reverend Philip Hunt, Elgin's chaplain and secretary in Turkey and Greece, when asked, "Was any opposition shown by any class of the natives?" replied, "None." REPORT at 43, 144.

by the Ottomans to make way for an artillery installation. Individual Ottoman soldiers could have continued to break up marble objects to build walls or to burn for lime.⁸⁹ The growing trade in antiquities, fed by Greeks as well as by Ottomans, would have dispersed many of the Marbles to individual collections of uncertain fate (many individual works in effect disappeared in this way, taken by some traveler to Europe and eventually lost or discarded or rendered anonymous).⁹⁰ Elgin's removal had the added merit of keeping works of major importance together in a way that ensured full knowledge of their origins.⁹¹

Finally, we know what has happened to the few works that were left on the Parthenon. Those that were not removed have deteriorated terribly in the intervening 175 years. Those taken to England and installed in the British Museum (as well as those smaller portions removed to France, Germany, and elsewhere) have on the contrary been much better preserved.

Any estimate of the morality of Elgin's actions has to take account both of his motives and of the results of what he did. His motives, though certainly mixed,⁹² included a large element of reverence for the Marbles and the intention of removing them to a safer place. He also wished to bring the Marbles to the attention of the world and to see them used to advance the arts.⁹³ The passion for Greek antiquities was still in its early infancy even in England and France, where the works of the Romans were more highly valued. Elgin's removals fo-

89. See W. ST. CLAIR, *supra* note 3, at 55.

90. A statement by Payne Knight, a detractor of the Marbles and an opponent of Elgin, before the Select Committee is significant: "I think, my Lord Elgin, in bringing them away, is entitled to the gratitude of the Country; because, otherwise, they would have been all broken by the Turks, or carried away by individuals, and dispersed in piece-meal." REPORT, *supra* note 3, at 103; see also W. ST. CLAIR, *supra* note 3, at 56-57.

91. As he had intended from the beginning, Elgin had his artists draw, model, and describe the Greek antiquities, thus providing a historical record of the condition and the context of works that were not taken, as well as of those that were. These are listed in REPORT, *supra* note 3, app. 11.

92. There is a story that at one time Elgin planned to use the Marbles to decorate a new home he intended to build in Scotland. See W. ST. CLAIR, *supra* note 3, at 180-81. Rothenberg, however, disputes this account, stating that Elgin's intention was to use only architectural fragments, not sculptures from the Parthenon, in the Scottish home. J. ROTHENBERG, *supra* note 3, at 157-61.

93. While still in England planning his embassy in Constantinople, Elgin resolved to take artists and craftsmen with him to make drawings and casts of Greek antiquities to advance the fine and applied arts in Britain. See REPORT, *supra* note 2. When his Government refused to support this scheme, he undertook the expense himself. He tried to engage British artists (including J.M.W. Turner, then 24 years old) but they rejected his terms. On his way to Constantinople he engaged the Italian painter Lusieri and another painter, two architectural draftmen, and two moulders. See *id.* at 3-4, 17-18; J. ROTHENBERG, *supra* note 3, at 145-47; W. ST. CLAIR, *supra* note 3, at 7-9, 28-31; T. VRETTOS, *supra* note 3, at 20-22, 28-29, 31-35. On the eventual impact of the Marbles on the fine and applied arts in Britain see W. ST. CLAIR at 263-67.

cused Europe's attention on the magnificence of the Marbles and other works of Greek art of that period. One result was that Greek superseded Roman art as the ideal, both in high and in popular culture. Elgin was convinced of the superiority of Greek over Roman art, and through his actions and the resulting acquisition of the Marbles by the British Museum, the rest of the world came to share his opinion.

When the marbles had finally been purchased and installed in the British Museum and the noise of the battle had subsided, the concrete and lasting changes they had wrought became clearer. They had radically transformed the understanding of Greek Classical style. They had clarified the difference between original Greek sculpture and later Roman copies. . . . They had virtually dethroned the Hellenistic and Greco-Roman idols of sculptural excellence in the Belvedere Court of the Vatican and replaced them by Periclean ones. . . . They had permanently altered the attitude toward the restoration of antiquities. They had changed the social function of rare antiques from decorative to educational, and from private to public purposes.⁹⁴

Elgin was also motivated by nationalism: he wanted the Marbles for England and feared that they would otherwise go to the French.⁹⁵ It is clear that Elgin hoped to advance his own career and may at times have thought that the Marbles would help.⁹⁶ In that hope he was disappointed, in part, because of Byron's influence.⁹⁷ Financially, there is no evidence that Elgin ever expected the Marbles to be profitable, although he probably hoped to recover his expenses.⁹⁸ In any event, the Marbles were his financial ruin. He went deeply into debt, often at high interest, to finance the work of his artists and the removal and shipment of the Marbles.⁹⁹ The £ 35,000 that Parliament

94. J. ROTHENBERG, *supra* note 3, at 6-7 (footnote omitted). The reference to the restoration of antiquities is to an episode in which Elgin, and all of us, benefitted from the sensitivity and greatness of spirit of the famous Italian sculptor Canova. As had been the common practice with ancient sculptures in damaged condition, Elgin intended to have the Marbles "restored" and offered the project to Canova, who refused, stating that it would be "sacrilege in him or any man to presume to touch them with a chisel." W. ST. CLAIR, *supra* note 3, at 152 (quoting LORD ELGIN, MEMORANDUM ON THE SUBJECT OF THE EARL OF ELGIN'S PURSUITS IN GREECE 39 (1815)). Other sculptors were impressed by this example, and the disastrous practice of "restoration" rapidly declined. See J. ROTHENBERG, *supra* note 3, at 163-69, 185-89.

95. While passing through France on his journey back to England from his embassy, Elgin was detained and held prisoner by the French for three years. He later stated that he could have been freed at any time and might have named any price he wanted if he would sell the Marbles to Napoleon. See J. ROTHENBERG, *supra* note 3, at 189-93; W. ST. CLAIR, *supra* note 3, at 121-35; T. VRETTOS, *supra* note 3, at 115-65. At a later time Prince Ludwig of Bavaria offered to buy them. See W. ST. CLAIR at 228.

96. See W. St. Clair, *supra* note 3, at 85-86, 185, 223, 261, 270.

97. See *id.* at 165, 187-202.

98. On Elgin's consistent lack of monetary motive throughout the episode see J. ROTHENBERG, *supra* note 3, at 156-57.

99. In addition to the expense of maintaining his artists and moulders and financing their work in Athens, and maintaining a steady flow of gifts to local officials, Elgin employed 300-400 laborers at a time in removing and transporting the Marbles. See REPORT, *supra* note 3, at 8.

eventually paid for the Marbles were far less than the costs Elgin incurred.¹⁰⁰ Indeed, it is possible to make of Elgin a nobly tragic figure: a man so dedicated to the cause of classic Greek art and to the acquisition and preservation of the Marbles that he sacrificed his career and his fortune for them.¹⁰¹ That picture is an exaggerated one, just as Byron's picture was exaggerated in a quite different way. If we try to eliminate the exaggerations, what remains is a morally complex picture, with some pluses and some minuses. It would not be at all unreasonable to come down on Elgin's side as rescuer of the Marbles. In judging the morality of his actions, that is a very weighty and perhaps determinative consideration. "Nous n'avons qu'à regretter que la noble idée qu'a eu Mylord Elgin de les soustraire aux ravages journaliers d'une nation barbare ne soit venue un siècle et demi plus tôt à quelque riche et puissant amateur."¹⁰² One who, at great personal cost, is responsible for the preservation of a great cultural treasure has performed a great moral act.

Conversely, one who damages a great cultural treasure is open to moral censure, and it is undeniable that Elgin's removals caused serious harm to the structure of the Parthenon. We must somehow deal with the fact that Elgin did both good and evil. How does one balance his merit in preserving the Marbles against his moral responsibility for damage to the Parthenon? The problem is complicated, as we have seen, by uncertainty about what would have happened to the Marbles (and to the Parthenon) had Elgin not taken the Marbles; by the apparent unselfishness of Elgin's motivation and his conviction of the superiority of classical Greek sculpture; and by the impact of the episode on the history of art and of taste. It seems significant that Elgin impoverished, rather than enriched, himself in acquiring the Marbles. Finally, recall that the applicable moral considerations are those of that time and place. It would be unreasonable to suggest that Elgin was entirely blameless in taking the Marbles and damaging the Parthenon, but it would be equally unreasonable, in view of all of the facts, to

100. Elgin calculated his total expenditure on the Marbles to be £ 74,240. See W. ST. CLAIR, *supra* note 3, at 252.

101. Elgin left England and died in reduced circumstances in France. All of the £ 35,000 had been taken by his creditors. See W. ST. CLAIR, *supra* note 32, at 261. Vrettos states that Elgin was in "a[b]ject poverty when he died in Paris" on November 4, 1841 and that "[h]is enormous debts were not fully paid off by his family until 1875." T. VRETTOS, *supra* note 3, at 223 n.†.

102. E.Q. Visconti (reading a letter from the Chevalier Antonio Canova and two memoirs to the Royal Institute of France "on the Sculptures in the Collection of the Earl of Elgin") ("We can only regret that Lord Elgin's noble intention to remove them from the daily ravages of a barbarous nation did not occur a century and a half earlier to some wealthy and powerful amateur."), quoted in J. ROTHENBERG, *supra* note 3, at 10 n.15.

conclude that the removal was morally wrong. In fact, there is no persuasively incisive answer to the moral question; the opposing considerations are too much in balance.

I conclude that the legality of the removal of the Marbles is clearly established and that its immorality has not been demonstrated. The Greeks do not have a strong legal or moral case against Elgin. Minister Mercouri's and Byron's eloquence and art to the contrary notwithstanding, the British own the Marbles and, on balance, did not wrongly acquire ownership. For those who agree, that settles the legal and moral questions about the removal. There remains, however, the most difficult and interesting question of all: Should the British now return the Marbles to Greece? Independent of questions about the legality and morality of the removal is the argument that the Marbles should, on other grounds, be returned. Adequate analysis of this aspect of the case brings a new set of considerations into play, requiring us to consider the relative merits of nationalism and internationalism as guiding principles in the allocation of cultural property.

THE ALLOCATION OF CULTURAL PROPERTY

The British say they have saved the Marbles. Well, thank you very much. Now give them back.

*Melina Mercouri*¹⁰³

The discussion up to this point has been retrospective. We have looked at the historical record in order to assess the legality and morality of the British acquisition of the Marbles. What happened in the past strongly affects the present and future, so that one who properly acquired something normally has the legal right to keep and enjoy it and, if he wishes, to dispose of it. Thus if the Trustees of the British Museum became the owners of the Marbles in 1816, they own them today. Still, in no legal system is the right of property absolute; it is possible to establish new rules of property or modify old ones, and although the right of property is respected, it is subject to regulation and even, in extreme cases, to expropriation. Even if Britain properly acquired the Marbles, it is still possible to argue for their return to Greece.

The hypothetical question we now face can be put in different ways. For one, suppose that the legal and moral arguments about the British acquisition of the Marbles were treated as evenly balanced, so that they favored neither Britain nor Greece. Or suppose that ade-

103. *Quoted in Sunday Times (London), May 22, 1983, at 15, col. 1.*

quate funds were available to compensate Britain if it were decided that the Marbles should be expropriated in order to return them to Greece. Aside from the historical question whether the acquisition was proper, what other kinds of arguments are relevant to a principled decision about the proper location of the Marbles in the future?

One reasonable starting point is the general principle of repose: an existing situation should continue unless some reason is given for changing it. That principle is consistent with the human tendency to rely on appearances and to assume that the present state of affairs will persist. Most frequently it justifies the retention of cultural property by nations of origin. For example, independently of rights based on sovereignty and claims based on cultural nationalism, it seems right that Mayan artifacts remain in Mexico unless some good reason to remove them is shown. In this case the principle works the other way. Britain has the Marbles. Accordingly, it is up to the proponents of change, those who wish the Marbles returned to Greece, to justify their proposal.

To whom should such arguments be addressed? We have shown that the Greeks could sue for the return of the Marbles in a British court. Even if they should do so, however, the range of argument that the British court could properly hear and decide is quite narrow, limited to determining the legality of the removal. The kind of question we here wish to pursue is different, and there is at present no tribunal competent to consider it. We must therefore supply our own hypothetical supranational tribunal, one charged with making informed, principled decisions concerning the proper allocation of disputed cultural property. Assuming that such a tribunal existed and that the Greek claim to the Marbles was properly submitted to it, how should it decide?

Cultural Nationalism

The most obvious argument is that the Marbles belong in Greece because they are Greek.¹⁰⁴ They were created in Greece by Greek artists for the civic and religious purposes of the Athens of that time. The appealing implication is that, being in this sense Greek, they belong among Greeks, in the place (the Acropolis of Athens) for which they were made.¹⁰⁵ This argument, which I will call the argument

104. For discussions of specific cultural value and cultural nationalism as they relate to controls over the export and import of cultural property see P. BATOR, *supra* note 21, at 26-30; Merryman & Elsen, *supra* note 21, at 8.

105. Historically it might be more accurate to describe the Parthenon as a symbol of Athenian dominance over other Greek cities, rather than as a monument to or celebration of Greekness. This point is more than a quibble. Some argue that: (1) the very idea of a Greek nation is a

from cultural nationalism, requires careful examination, since it is basic to the Greek position and because arguments like it are frequently made by other governments calling for the return of cultural property (and is strongly implied in their use of the term "repatriation"). Public attitudes toward the campaign for restitution of cultural property are based to a large extent on uncritical acceptance of the cultural nationalism argument. Its validity is assumed in much of the dialogue in the United Nations, UNESCO, and the Council of Europe, as well as in the process of policy formation within a number of nations. It is a basic assumption of Byronism, and its continuing power to dominate the discussion of cultural property questions is a measure of the control the poet still exerts over our attitudes toward cultural objects.

Although the cultural nationalism argument, by definition, emphasizes national interests and values, it is here addressed to a hypothetical supranational tribunal deciding an international controversy. In that context the cultural nationalism argument will be judged by international standards. Further, it will be only one of a variety of considerations that ought to be taken into account in reaching a principled decision about the proper allocation of the Marbles. The others will be examined below; for the moment we will focus on the nature of cultural nationalism and on the weight it should be given in an international dispute about cultural property.

In bare form, the argument from cultural nationalism is more an assertion than a reason. It is not self-evident that something made in a place belongs there, or that something produced by artists of an earlier time ought to remain in or be returned to the territory occupied by their cultural descendants, or that the present government¹⁰⁶ of a nation should have power over artifacts historically associated with its people or territory. Our first task is to discover whether there is more to the cultural nationalism argument than a mere self-serving assertion.

In its truest and best sense, cultural nationalism is based on the relation between cultural property and cultural definition. For a full life and a secure identity, people need exposure to their history, much

modern creation for which there is little historical basis before the nineteenth century; (2) the Parthenon only became a symbol of Greek nationality in the 1820s; and (3) the assertion by modern Greeks of their identity with ancient Greeks is in this sense a national myth of the modern Greek state. See, e.g., St. Clair, *The Marbles: How Greek?*, Financial Times, Jan. 21, 1984, at 25, col. 5.

106. One of the difficulties with cultural nationalism as a basis for the allocation of cultural property is that it is inseparable from politics. Some who now advocate the return of the Marbles would have opposed their return when the Colonels were in power in Greece. When the United States recently returned the Crown of St. Stephen to Hungary there were objections on political grounds. See N.Y. Times, Dec. 27, 1977, at 3, col. 3; N.Y. Times, Nov. 5, 1977, at 3, col. 1.

of which is represented or illustrated by objects. Such artifacts are important to cultural definition and expression, to shared identity and community. They tell people who they are and where they come from. In helping to preserve the identity of specific cultures, they help the world preserve texture and diversity. Works of art civilize and enrich life. They generate art (it is a truism among art historians that art comes from art) and nourish artists. Cultural property stimulates learning and scholarship. A people deprived of its artifacts is culturally impoverished.

The difficulty comes in relating the notion of cultural deprivation to the physical location of the Marbles. If the British had attempted to appropriate the identity of the Marbles, disguising or misrepresenting their origin, then the Greeks, and all the rest of us, would rightly object to such falsification of the culture. If such misrepresentation were encouraged or justified by their location in England, then one could see the basis for an argument that the Marbles should be returned to Greece. But in fact the British have from the beginning presented the Marbles openly and candidly as the work of Greek artists of extraordinary genius and refinement. Presented as they are, spectacularly mounted in their own fine rooms in one of the world's great museums, the Marbles honor Greece and Greeks. No visitor to the British Museum could come away with any other impression. By their removal to London and exposure in the British Museum, they have brought admiration and respect for the Greek achievement. As we have seen, that was one of Lord Elgin's intentions. In the most important sense the Greek cultural heritage has been preserved, arguably enhanced, by the British acquisition and display of the Marbles.

It is not clear that enjoyment of *cultural* value (as distinguished from economic and political value, which are discussed below) requires possession of the Marbles. Greeks need access to their cultural heritage, and access would be easiest and most direct if the Marbles were in Athens, but writings about the Marbles are widely published and well illustrated, and excellent reproductions exist. In that sense the Marbles are, or could easily be made to be, as accessible to the Greeks through reproductions as through the originals. There must be some cultural magic inherent in the authentic object, and not in an accurate reproduction, that speaks only to Greeks, or the argument fails.¹⁰⁷

107. Authentic objects have many times the market value of even the most convincing reproductions (if they are known to be copies rather than originals). That fact shows that the original Marbles would, if placed on the market, command a much higher price than reproductions. The relevant empirical question, however, is whether, if offered for sale, they would bring a higher price from Greeks than from non-Greeks. There is no easy answer to that hypothetical question.

Still, the argument for possession as an aspect of cultural nationalism has an instinctive appeal. We see that appeal in its most compelling form in cases like that of the Afo-A-Kom, whose possession was said to be essential for the Kom. The words of the First Secretary of the Cameroon Embassy in Washington, D.C., at the time of the case are eloquent:

It is beyond money, beyond value. It is the heart of the Kom, what unifies the tribe, the spirit of the nation, what holds us together.¹⁰⁸

In this case (and in that of Tlaloc, a Mayan deity whose removal from its site in a rural village to the then-new National Museum of Anthropology in Mexico City was, for a time, a Mexican *cause celebre*¹⁰⁹) a superstition was at work.¹¹⁰ Physical removal of the artifact threatened the welfare of the tribe or village. Disaster would befall. Return of the object was essential to the well-being of the group, perhaps even to its survival. There is an analogous mystical element in the attitude of some Greeks toward the Marbles: something essential is missing; there is a cultural wound. In earlier times conquerors took the cultural property of the losers, in the belief that the *mana*, or cultural identity and strength of the conquered, was embodied in those objects. Such Greeks want their *mana* back. We can respect such beliefs, and recognize their self-fulfilling tendencies, without accepting them as a basis for the international allocation of cultural property.

The cultural nationalist argument is distinct from, but related to, two other arguments, one economic and one political. Economically, whoever has the Marbles has something of value: they would command an enormous price if offered for sale, and their presence in a public collection nourishes the tourist industry. Possession is obviously necessary in order to enjoy the economic value, and Britain has the Marbles. We have already seen, however, that the law seems to support the British acquisition and thus to sanction British enjoyment of the economic value. Indeed, providing the basis for allocating things of value is one of the important functions of law, and it is one of

If the availability of wealth and the opportunity cost of spending it to acquire the Marbles were evenly distributed among potential Greek and non-Greek purchasers, and if the Greeks then bid more for the Marbles than other bidders, we would have persuasive evidence that the possession of the Marbles has special value for Greeks. And that might translate into a significant component of extra cultural value to Greeks. The conditions necessary for such an empirical experiment are unlikely ever to exist.

108. Quoted in J. MERRYMAN & A. ELSEN, *supra* note 3, at 2-2. For a discussion of the Afo-A-Kom case see *id.* at 2-27 to 2-29.

109. The author learned of the Tlaloc controversy from discussions with Mexicans during a trip to Mexico.

110. Compare the removal of an ancient statue of Demeter from Eleusis, over the protests of the natives, by the Rev. Edward Daniel Clarke, an Englishman who was a rival and detractor of Elgin. The episode is described in W. ST. CLAIR, *supra* note 3, at 105-07.

the things law seems to do particularly well. If the Greeks were to base their argument on the economic value of the Marbles, they would merely be rearguing a question of property law, claiming that they own the Marbles. As we have already seen, they would probably lose that argument.¹¹¹ The applicable law is clear and, on the facts as we have interpreted them, favors the British.

The final component of the nationalism argument is political: the belief that the presence of the Marbles in England, or in any place other than Greece, is an offense to Greeks and to the Greek nation. Here the demand for the return of the Marbles is based on national pride. That sort of sentiment is close to cultural deprivation of the sort just discussed, but it is worlds away from it in a very important sense.

Nationalism in its broader meaning refers to the attitude which ascribes to national individuality a high place in the hierarchy of values. In this sense it is a natural and indispensable condition and accompanying phenomenon of all national movements. . . . On the other hand, the term nationalism also connotes a tendency to place a particularly excessive, exaggerated and exclusive emphasis on the value of the nation at the expense of other values, which leads to a vain and importunate overestimation of one's own nation and thus to a detraction of others.¹¹²

The weight one gives to this kind of argument for the return of the Marbles depends to a large extent on one's attitude toward political nationalism itself. No candid observer can deny its power in world affairs. But if one sees it as at best a dubious good, with large elements of superstition and prejudice, with an unsavory record as the religion of the state, and as a source of international economic, social, political, and armed conflict, then the nationalist argument becomes an uncomfortable one to sustain. In short, political nationalism is a questionable value, and its assertion before our supranational tribunal does not argue clearly, or perhaps at all, for the return of the Marbles to Greece.

Even if the tribunal were to accept the claim that works of importance to a culture belong at that culture's site, it does not necessarily follow that the Marbles should return to Athens. It is true that they are Greek in origin, but they have been in England for more than a century and a half and in that time have become part of the British cultural heritage. The Elgin Marbles and other works in the British Museum have entered British culture, help define the British to themselves, inspire British arts, give Britons identity and community, civilize and enrich British life, and stimulate British scholarship. While

111. See notes 43-78 *supra* and accompanying text.

112. Boehm, *Nationalism*, in 11 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 231, 231 (1933).

one may argue that in these terms the Greek claim is more (or less) powerful than that of the British, it is not unreasonable to perceive the two positions as roughly equivalent, so that on this point there is a stand-off.

I conclude that the argument from cultural nationalism fails to make the case for the return of the Marbles. It fails because it expresses values not clearly entitled to respect (political nationalism), because it is founded on sentiment and mysticism rather than reason, and because it is a two-edged argument that is equally available to the British. One can admire the Greekness of the Marbles and respect their specific cultural importance to Greeks without concluding that they belong in Greece.

Cultural Internationalism

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, states in its preamble that "cultural property belonging to any people whatsoever" is "the cultural heritage of all mankind."¹¹³ These words, appearing for the first time in any major piece of international legislation, announce the important principle that everyone has an interest in the preservation and enjoyment of all cultural property, wherever it is situated, from whatever cultural or geographic source.¹¹⁴ There is still, regrettably, an exception for military necessity,¹¹⁵ and nations sometimes do violate their legal obligations toward cultural property, but the principle is clearly accepted. All of us, from every country, have an interest in the preservation and disposition of the Marbles; the matter does not touch only on Greek and English interests. The Marbles are "the cultural heritage of all mankind."¹¹⁶

It is early in the development of cultural internationalism to suggest that it applies to all cultural property in all circumstances or that, in a conflict between a sovereign nation's preference and the international interest, the latter will prevail. For present purposes a more modest approach will serve: if the legal and moral arguments are treated as evenly balanced, and if the argument from nationalism is also inconclusive, are there considerations from the point of view of

113. The Hague Convention of 1954, *supra* note 17, preamble.

114. This development is described in J. MERRYMAN & A. ELSEN, *supra* note 3, at 1-16 to 1-98.

115. The Hague Convention of 1954, *supra* note 17, art. 4, para. 2, states that the obligation toward cultural property "may be waived . . . in cases where military necessity imperatively requires such a waiver."

116. The Hague Convention of 1954, *supra* note 17, preamble.

cultural internationalism (which the Hague Convention language expresses) that indicate the proper way to allocate the Marbles? There are three such considerations: preservation, integrity, and distribution.

Preservation takes priority for obvious reasons. If the Marbles are destroyed, people of all cultures will be deprived of an important part of their cultural heritage, and the problem of allocation disappears. Damage short of destruction — whether through inadequate care, the action of the elements, or the hazards of war, terrorism, or vandalism — threatens the same value.

It is essential that the Elgin Marbles be protected from damage or destruction, but it can hardly be argued that they are exposed to such danger in London. On the contrary, they are well mounted, maintained, and guarded.¹¹⁷ There is no reason to suppose that they would be safer in Athens. Indeed, if one compares the record of care for works on the Acropolis and in the British Museum since 1816, it is clear where the greater danger has lain. The sculptural reliefs remaining on the Parthenon and the Caryatids on the Erechtheion have all been badly eroded by exposure to a variety of hazards, including the smog of Athens. The Marbles in the British Museum have fared much better. If one had to make a decision based solely on concern for the physical preservation of the Marbles, it would be difficult to justify moving them to Athens. Even if, as is probable, they would be placed in a museum there, rather than reinstalled on the Parthenon, what reason would there be to expose them to the danger involved in removal and transport? What reason would there be to expect that they would be safer in Athens, over the next 170 years, than they have been in London, over the past 170 years? If the time should come when they would be safer in Greece, then the preservation interest would argue for their return. Under present conditions, the preservation concern favors leaving the Marbles in the British Museum.

We must also consider the concern for the preservation of the records of a civilization. It is important to our understanding and appreciation of the artifact that we properly associate it with the time, place, and manner of its origin and with its functions and significance within the culture. But such understanding and appreciation are not necessarily advanced by returning articles to their original sites. It is

117. The British record in caring for the Marbles is quite good but not perfect. In an unfortunate episode in the 1930s, Museum personnel scrubbed many allegedly "dirty" marbles, thus removing traces of the original paint and, at least equally important, some of the marble patina. See *Marbles Damaged?*, ART DIGEST, July 1, 1939, at 20; *Die Reinigung der Elgin Marbles*, 24 PANTHEON 244 (1939); The Times (London), May 18, 1939, at 16, col. 7. Full details of this destructive action have yet to be published by the Museum's trustees.

true that the removal of an artifact from its site can destroy vital information. A current example is the looting of Mayan sites in Mexico and Central America.¹¹⁸ The best remaining record of the Mayan civilization (whose writing is still not deciphered) is an integral part of the monumental architecture and sculpture of these sites. It derives its significance and reveals its information to scholars only while it remains in place. When a mural or a stele is removed from such a site, even if it is removed without damage to what remains, it and the site both can lose significance. The mere fact of removal of a part takes it out of context and reduces its meaning. Unless the removal is thoroughly and carefully documented, the object's value as a cultural record is irretrievably lost, made anonymous by the lack of documentation of its origin.

In the case of the Elgin Marbles, the removal was accompanied by thorough documentation. Elgin employed six artists, led by the Italian Lusieri, to make measurements, drawings, and casts of the antiquities of Athens and, in particular, of the works on the Acropolis. Even before Elgin came, other travellers had done drawings and water colors of the Parthenon. The Marbles present nothing like the Mayan problem. It is true that even the best and most thoroughly documented removal may subsequently prove to have been in some sense inadequate, so that a part of the human record is irretrievably lost. But that is primarily an argument against removal, not for the return of something that has already been taken away.

The second international concern is for the integrity of the work of art — for restoration of the parts of “dismembered masterpieces.”¹¹⁹ If we think of the intact Parthenon as an integrated work of art, so that the parts together have more beauty and significance than the sum of the dismembered pieces, then it makes sense to argue that the sculptures should be reinstalled on the temple. That object could of course be achieved by removing the remains of the Parthenon to London and there reuniting it with the sculptures. Indeed, the atmospheric conditions that have made it necessary to take the Caryatids indoors are also eating away at the marble fabric of the Parthenon itself and will, in time, destroy it. Still, the Acropolis is a part of our cultural heritage, with its own integrity, and who can imagine the Acropolis without the Parthenon? It seems unlikely that anyone would seriously suggest moving the entire Acropolis of Athens to London; proposals to protect the Acropolis by enclosing it in a plastic

118. For a thorough discussion see K. MEYER, *supra* note 19, at 12-41.

119. See Failing, *The Case of the Dismembered Masterpieces*, ARTNEWS, Sept. 1980, at 68 (a useful discussion of the integrity problem and of some important examples).

bubble seem, in comparison, far more practical. Under present circumstances we need only consider the more modest suggestion that the Marbles be returned to Athens and there replaced on the Parthenon. Accordingly, the integrity argument favors the Greek position.

There is, however, a serious objection: the Marbles cannot be reinstalled on the Parthenon without exposing them to almost certain damage from the elements and the smog of Athens. The preservation and integrity interests are in direct conflict, and in that case the preservation interest should prevail. The masterpiece is better dismembered than destroyed or seriously damaged. At a time when the caryatids of the Erechtheion have had to be taken indoors by the Greek authorities to preserve them from further damage, it cannot seriously be argued that the Marbles should be restored to their places on the temple. In fact, the Greek proposal is not to restore the Marbles to the Parthenon but to transfer them from a museum in London to a museum in Athens. Their site in Athens would be near the Parthenon (within 200 yards, according to Minister Mercouri), but that small distance is critical. The argument for return is an argument for restoration of the integrity of the Parthenon, and that is not (at present) possible without exposing the Marbles to unacceptable hazards. Accordingly, although the "integrity of the work of art" or "rememberment" argument is persuasive, present conditions make it inapplicable. Should it become possible to reinstall the Marbles safely on the Parthenon, then the integrity argument would favor their return.

The other international interest is distributional; a concern for an appropriate international distribution of the common cultural heritage, so that all of mankind has a reasonable opportunity for access to its own and other people's cultural achievements. There is a tendency for works of art to flow from the poor to the wealthy nations, and one can imagine the unpleasant extreme of a Third World denuded of cultural property in order to stock the museums and the private collections of a few wealthy nations.¹²⁰ The motivating force for the movement of art is today primarily economic.¹²¹ Dealers, collectors,

120. At an earlier time the French seem to have assumed that it was the proper fate of major works of art to find their way to France (where, incidentally, the Louvre contains some Parthenon Marbles that the French have not offered to return to Athens). The systematic looting of Europe's art carried on by Napoleon was justified by the French in these terms. For a discussion see J. MERRYMAN & A. ELSÉN, *supra* note 3, at 1-28 to 1-42.

121. As recently as World War II, however, one saw a massive effort by the Germans to loot occupied Europe of art for German museums and for the private collections of Nazi leaders. The motivation was partly greed, but there were other reasons: racism (used to justify the confiscation of works held by Jews) and the deliberate cultural impoverishment and humiliation of defeated nations. See discussions of the Nazi *Einsatzstab Rosenberg* in J. MERRYMAN & A. ELSÉN, *supra* note 3, at 1-43 to 1-56.

and museums in wealthy countries are prepared to pay well for artworks, and it is not unreasonable for art-rich but otherwise poor countries to express concern about the flow.¹²² The prospect of a world in which all major artworks are concentrated in a few nations, with the rest culturally impoverished as a result, is unpleasant to contemplate.¹²³

How should this distribution/access consideration affect the allocation of the Marbles? It is true that Greek antiquities can be found in major museums and private collections throughout the world and that some of the greatest Greek antiquities are found abroad. But it is difficult to argue that Greece itself is in this sense impoverished. One of the reasons people go to Greece is to enjoy its wealth of antiquities. One of the informed and concerned traveller's preoccupations is with the future of the many works that remain in Greece; like most art-rich nations, Greece faces enormous problems of expense and cultural organization in order to protect, conserve, and display what it has.

The distribution interest actually has another and quite different aspect. There is an international interest in the accessibility of cultural property to all people. That policy is advanced by distribution, rather than retention in one place, of the works of a culture.¹²⁴ If all the works of the great artists of classical Athens were returned to and kept

122. Resolution 808 (1983) of the Parliamentary Assembly of the Council of Europe, *supra* note 40, refers to "the imbalance that exists at world level in the distribution of cultural property, a disproportionate amount of which is concentrated in major collections in Europe and North America" and to "the lack of representative national collections in certain countries." Similar concerns have been expressed in the United Nations, particularly and appropriately in UNESCO, and in 1978 an Intergovernmental Committee was established to carry out UNESCO and United Nations' policy supporting the return of cultural property to nations of origin. See note 39 *supra* and accompanying text.

123. There is a dark side of the distribution consideration. Some nations currently have policies that, in an indirect but fatally effective way, assure the destruction of important cultural property. They do this by hoarding works that they do not protect, study, or display, but merely retain. Languishing in unexploited and unprotected sites, inadequately housed in leaky warehouses or seedy museums, crumbling through improper treatment and lack of conservation, unavailable for study or enjoyment, much of the world's cultural heritage is lost each year through the consequences of this kind of "covetous neglect." See P. BATOR, *supra* note 21, at 21-22; Merryman & Elsen, *supra* note 21, at 10; Schumacher, *supra* note 20; Stewart, *Two Cheers for the Tombaroli*, NEW REPUBLIC, Apr. 28, 1973, at 21-22. Much of that heritage would have been preserved had it been distributed — made available by sale or trade or gift or long-term loan to museums in other parts of the world, where it would be properly conserved and displayed. The nation that forbids the export of cultural property and fails to provide adequately for its preservation and display at home is a major threat to the cultural heritage of all mankind. It is common knowledge that this is precisely the situation in some art-rich Third World nations. Ironically, some of those nations play on heightened international concern for cultural preservation in order to reinforce their own antidistributional, access-frustrating, culturally destructive retentive policies. (Greece, incidentally, is not such a nation. The recent Greek record in coping with its enormous supply of antiquities is a relatively good one.)

124. The art critic John Canaday, writing in the N.Y. Times, Dec. 2, 1973, at D25, col. 1, argued that American art should be "spread around," not kept at home. The idea of "missionary art" that makes a culture vivid and comprehensible abroad is appealing and is consistent with

there, the rest of the world would be culturally impoverished. That is not specifically an argument for retention of the Marbles by the British; it is a refutation of the notion that all of the works of a culture belong at that culture's situs.

Criteria for an appropriate international distribution of the artifacts of a culture do not yet exist; the dialogue until now has been dominated by demands for repatriation and by deference to cultural nationalism. But as a general matter, it seems difficult to argue convincingly for the return of the Marbles to Athens on distributional grounds. If we focus instead on the question of access, there seems little reason to suppose that the Marbles would be more accessible to the world's peoples in Athens than they are in London.

Reviewing the arguments made to our hypothetical supranational tribunal, we find the following: cultural nationalism is a dubious argument at best, entitled to little weight. In any event, it supports both the Greek and the British cases and is inconclusive. Economic nationalism merely reargues the question of who has the legal property in the Marbles, and the British seem to win that one. Political nationalism is difficult to employ in a convincingly principled way, since it seems to urge values that are of dubious desirability. The values of cultural internationalism — preservation, integrity, and distribution/access — lead in different directions. The most powerful of them, preservation, does not under present circumstances advance the Greek cause, since there is no basis for arguing that the Marbles would be safer in Athens. The integrity argument favors reuniting the Marbles with the Parthenon, but at present that is not possible without exposing them to unacceptable hazards. There are no developed criteria for applying the distribution/access concern, but it does not appear that the present distribution of Greek antiquities argues strongly for returning the Marbles to Athens.

Accordingly, under present circumstances, the tribunal should leave the Marbles where they are.

CONCLUSION

There is something dispiriting about a reasoned conclusion that conflicts with a congenial sentiment. Life seems brighter when feelings and thoughts lead in the same direction. As a practicing, credentialed Hellenophile who once subscribed fully to the usual attitude toward the Marbles, I have watched with growing dismay as the ac-

generally approved goals of international understanding and mutual cultural respect. See P. BATOR, *supra* note 21, at 30-31.

cepted version showed itself to misrepresent history and to indulge nationalist sentiment. It is perfectly rational for Greeks to want the Marbles. They are incredibly valuable. They would greatly enrich the collections of Greek museums. Their repossession would support the Greek national myth and feed the national ego. A Greek politician who could claim credit for their return would be an instant and enduring national hero. But the argument that they were illegally or immorally taken does not survive careful examination, and the argument that they ought, on principled grounds, to be in Greece rather than London is unpersuasive. Indeed, the principles that would seem most properly to apply to the case argue for leaving the Marbles in London unless critically important conditions — chiefly the safety of the Marbles in London and the advisability of their exposure to the atmosphere of Athens — change. Even then the concern for distribution and access might argue for a location other than Greece.

The exercise of thinking critically about commonly accepted notions — perhaps prejudices is a better term — concerning the Elgin Marbles suggests a broader inquiry. Greece is not the only nation that makes strong claims for the restitution (and, even more forcefully, the retention) of cultural property. How solidly based are the similar claims of other nations? Is it possible that some of them, perhaps many of them, will on examination turn out to express prejudice and sentiment at the expense of reason and principle? Do some of them justify policies that endanger, rather than protect, our cultural heritage? Do such claims promote or frustrate an appropriate distribution of and reasonable accessibility to the cultural heritage? In the international political climate since World War II such questions have been avoided. In the United Nations, at UNESCO, and in the Council of Europe, the justice of the claim of the nation of origin for retention or repatriation is accepted without question. In such an atmosphere the cultural heritage of mankind is in greater danger than from the combined efforts of all the *tombaroli* and *huaqueros*¹²⁵ and their local equivalents in art-rich nations. Byron has much to answer for.

Perhaps in the eighties the dialogue about cultural property can move to a higher level. If we can think about the Elgin Marbles, then perhaps we can think about other pieces of the culture. The process is painful and sometimes leads to unwelcome conclusions, as this article demonstrates. Still, the stakes are high. The world is full of undiscovered, unexplored sites. Uncounted millions of artifacts await discov-

125. *Tombaroli* (Italian) and *Huaqueros* (Spanish) are people who make an illegal living discovering, removing, and selling objects from tombs and sites in, respectively, Italy and Mexico/Central America.

ery. Other millions, already discovered, lead a precarious existence while they wait to be properly preserved, studied, and displayed. We need them to tell us who we are and where we came from, to nourish creativity and enrich our lives, to discredit myths of racial and national superiority in cultural achievement, to demonstrate our common humanity. That, in the end, is what the law and politics of cultural property are about: the cultural heritage of *all* mankind.