

**CAN INTERNATIONAL LAW PROVIDE GREECE WITH A
SUITABLE AVENUE FOR THE PARTHENON MARBLES
REPATRIATION?**

SHANIA MORGAN*

The Parthenon Marbles ('the Marbles') extraction from Greece to the United Kingdom in the nineteenth century by Thomas Bruce, 7th Lord of Elgin, where it remains today in the British Museum, has been part of controversial public debate about who possesses lawful title over the Marbles. Greece has made numerous demands for the restitution of this historically and culturally significant piece, yet the United Kingdom has denied these requests and is protected by domestic legislation from returning the Parthenon Marbles. Currently, it appears the most suitable avenue of restitution for Greece is by pursuing legal action under international law. Based on the evidence collected, Greece has a strong claim for restitution, however there are jurisdictional difficulties and the non-binding nature of advisory opinions which will need to be overcome for a successful outcome.

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* LLB Student, School of Law, University of South Australia

I INTRODUCTION

Throughout history, colonial powers have plundered cultural heritage property by forcibly stripping it from its place of origin, leaving devastation and destruction in their wake. However, a trend has emerged in modern society whereby States that are victims of cultural property theft, are insisting these artefacts be returned by contending the artefacts provide an intrinsic link to their heritage. Frequently appropriated under appalling circumstances from the nation of origin, these antiquities now permanently reside in public institutions who are preventing recovery by asserting ownership or trusteeship. Furthermore, rather than facilitating the dispute's equitable resolution, a State's domestic law may hinder repatriation claims. The United Kingdom's ('UK') *British Museum Act 1963* (UK) prohibits the de-accession of the British Museum's ('the Museum') artefacts,¹ indicating restitution claims cannot be challenged domestically unless a specific amendment permitting the official removal of these objects is made. Thus, the question to be addressed is whether the recognised sources of international law,² predominantly conventions and customary international law,³ can assist in securing the repatriation or return of wrongly expropriated cultural property. A prominent illustration on this subject is the Parthenon Marbles, which the Museum has possessed for over 200 years and refuses to return to Greece despite their numerous persistent campaigns.⁴

Before assessing how international law can fulfill Greece's demands, Part II of this paper will provide context on Lord Elgin's defective title over the Marbles which consequently shows how the Museum possesses no right to ownership. In evaluating how international law can provide recourse to Greece's request for the return of the Marbles, Part III and Part IV of this article will refer to the merits of the sources of international law in being able to assist Greece's claims. Part III will explore the two relevant treaties to Greece's claim. Closer inspection of these instruments reveal they are unable to effectuate Greece's sought-after response. Alternatively, Part IV discusses how customary international law favours the repatriation of cultural property

¹ *British Museum Act 1963* (UK) c 24, s 3(4).

² *Statute of the International Court of Justice* art 38(1).

³ *Ibid* art 38(1)(a)-(b).

⁴ Geoffrey Robertson, *Who Owns History? Elgin's Loot and the Case for Returning Plundered Treasure* (Penguin Random House Australia, 2019) 101-112; 'ICOMOS Passes Resolution to Support UNESCO Mediation for Parthenon Marbles', *British Association for Reunification of Parthenon Sculptures* (Web page, 18 November 2014) <<http://www.barps.org.uk/2014/11/icomos-passes-resolution-to-support-unesco-mediation-for-parthenon-marbles/>>; Melina Mercouri, 'Melina's Speech to the Oxford Union' (Speech, Oxford Union, June 1986).

due to its crystallisation in current State practice – supporting Greece’s claim. International law can provide some respite by supporting the Marbles restoration to Greece. However, further progress in the international arena is required to facilitate the repatriation of unique cultural property, pilfered before 1970, to their original State.

II ELGIN’S ACQUISITION OF THE MARBLES

Thomas Bruce, the 7th Lord of Elgin, has had his title over the Marbles scrutinised as its legitimacy has been widely disputed. A source of contention has surrounded the alleged firman,⁵ granted to Elgin to authorise the Marbles’ removal. In the case of the Museum, their defence partially relies on the claim that Elgin acquired legitimate and lawful ownership over the Marbles as the Ottoman government, who occupied Greece at the time, authorised their removal and exportation.

From 1801 to 1812, Elgin, who was also the British Ambassador to the Ottoman empire’s Sublime Porte, brutally extracted a substantial portion of the Marbles that remained integral to its structure,⁶ before exporting them to the UK.⁷ Initially, Elgin did not intend to physically extract the Marbles, but instead take drawings and make casts to bring back to the UK.⁸ This initial mission mirrored what French ambassador, Charles-Francois Olier, undertook in 1780, as permission to take parts of the Marbles’ structure had been denied by the Ottoman officials.⁹ From the Parthenon, Elgin’s team removed: 17 figures from the pediments, 15 metopes, 56 sculptured slabs of the friezes, one caryatid column, 13 marbles heads, and an assortment of other pieces from the structure.¹⁰ Upon their exportation from Greece, the Marbles were first housed in Elgin’s private collection,¹¹ before being purchased by the British government in 1816 as Elgin’s bankruptcy forced him to sell the Marbles and transfer ownership to the British Museum.¹² Based on the evidence obtained

⁵ A firman is a royal edict or order issued by the sovereign of an Islamic State: *Oxford English Dictionary* (online at 13 February 2022) ‘firman’.

⁶ John Merryman, ‘Thinking about the Elgin Marbles’ (1985) 83(8) *Michigan Law Review* 1881, 1884; Derek Fincham, ‘The Parthenon Sculptures and Cultural Justice’ (2013) 23(3) *Fordham Intellectual Property, Media and Entertainment Law Journal* 943, 975.

⁷ Fincham (n 6) 946, 975.

⁸ Geoffrey Robertson, Norman Palmer and Amal Clooney, *The Case for Return of the Parthenon Sculptures* (Report, 31 July 2015) 21-3; Alexandra Pistofidou, ‘Acropolis: The Repatriation of the Parthenon Sculptures and the History of their Claim’ (Master’s Thesis, University of Vienna, 2013).

⁹ Robertson, Palmer and Clooney (n 8) 21-3; Pistofidou (n 8).

¹⁰ Fincham (n 6) 976.

¹¹ *Ibid* 975.

¹² *Ibid* 978-9.

and compelling arguments raised by scholars, this extraction process, contrary to the Museum's submissions, occurred without receiving the proper authority for the Marbles' removal and therefore did not give him lawful title over the Marbles.

Under international law, 'the effects of a transaction depends upon the law in force at the time',¹³ which refers to the law that was in force at the time the theft occurred. As Greece was under Ottoman occupation between the 15th century to the 1830s, the nation was operating under Islamic law.¹⁴ This meant compliance with the 'holy law of Islam',¹⁵ the Sharia, was required to legitimise Elgin's actions.¹⁶ In accordance with Islamic law, a firman, a royal decree dispensed by the Ottoman's Sultan, must have been granted to legitimise Elgin's transaction.¹⁷ It was a firman, or more specifically, the Italian translation of such an order which Reverend Philip Hunt, Elgin's chaplain, possessed and later made an English translation of, that was alleged to have been granted by the Ottoman government to Elgin which permitted authorisation to remove the Marbles from its original structure atop the Acropolis.¹⁸ This translated firman which was kept in Hunt's possession was also accepted by and relied upon to legitimise the Marbles' removal to the Parliamentary Select Committee in 1816.¹⁹ The Select Committee was responsible for evaluating evidence surrounding Elgin's title, and upon their report guided the British government's decision to purchase the Marbles from Elgin at an undervalued price and transferred its ownership to the British Museum.²⁰ Therefore, evidently the reliability and authenticity of the firman continues to play a pivotal role to both sides of the debate surrounding the Marbles' ownership, and must be critically analysed to uncover its legitimacy.

¹³ Merryman (n 6) 1900; Michael Akehurst, *A Modern Introduction to International Law* (Allen and Unwin, 5th ed, 1984) 150; Timothy Caron, 'The Application of International Law, Morality and Public Policy to the Elgin Marbles Dispute' (2017) 3(1) *Baku State University Law Review* 1, 4.

¹⁴ Robertson, Palmer and Clooney (n 8) 20; Alison Lindsey Moore, 'Looted Art: The Case of the Parthenon Sculptures' (2007) *All Volumes* 34, 37.

¹⁵ Robertson (n 4) 63.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ David Rudenstine, 'Did Elgin Cheat at Marbles? (Lord Elgin and Parthenon Marbles)' (2000) 270(21) *The Nation* 30, 31; Dyfri Williams, 'Lord Elgin's firman' (2009) 21(1) *Journal of the History of Collections* 49, 49.

¹⁹ Rudenstine (n 18) 32.

²⁰ Fincham (n 6) 979.

Geoffrey Robertson argues the order could not be a firman for it lacked the essential features that should accompany this decree.²¹ Firstly, the firman responding to Elgin's request should have been 'signed and sealed by Sultan Selim III and copied in the Ottoman archives... [in order] to authorise the despoliation of a temple under Ottoman occupation'.²² The letter received by Elgin was signed by the Acting Grand Vizier, Sejid Abdullah, who although was a high ranking official, was not the figure whom could provide authorisation.²³ Additionally, contrary to procedural requirements, this firman was unable to be located within the Ottoman archives, and instead Elgin and Reverend Hunt could only supply an Italian translation of the wrongly identified order.²⁴ The fact that the original document was unable to be located from the Ottoman archives calls into question the authenticity and reliability of the translated document alternatively supplied considering the original order could not be verified.²⁵

Another issue which arises with the translated document is the ambiguity in its translated terms which indicates it was possible that Elgin misinterpreted what he was authorised to undertake.²⁶ Moreover, if the firman is presumed legitimate, the letter's translation indicates its terms were 'disobeyed',²⁷ as Elgin's team could draw and make mouldings, and were authorised 'to dig [in] the foundations to find inscribed blocks that may be presented in the rubbish' and could take away those stones.²⁸ Scholars have persuasively argued that this phrasing refers to the stones found in the rubble on the ground of the Parthenon and makes no reference to interfering with the stones on the building's walls,²⁹ indicating Elgin exceeded his licence terms.³⁰ In addition, the authorisation to

²¹ Robertson (n 4) 63, 66.

²² Robertson (n 4) 63.

²³ Ibid 63-4; David Rudenstine, 'Lord Elgin and the Ottomans: The Question of Permission' (2002) 23 *Cardozo Law Review* 449, 469.

²⁴ Robertson (n 4) 63-4; Rudenstine, 'Did Elgin Cheat at Marbles? (Lord Elgin and Parthenon Marbles)' (n 18) 32; Rudenstine, 'Lord Elgin and the Ottomans: The Question of Permission' (n 23) 455.

²⁵ Rudenstine, 'Did Elgin Cheat at Marbles? (Lord Elgin and Parthenon Marbles)' (n 18) 32.

²⁶ Jeanette Greenfield, *The Return of Cultural Treasures* (Cambridge University Press, 2007) 56.

²⁷ Robertson (n 4) 64.

²⁸ A.H Smith, 'Lord Elgin and the Marbles' (1916) 36 *Journal of Hellenic Studies* 163, 339-41.

²⁹ Robertson (n 4) 64-5; Irini Stamatoudi, 'Legal Grounds for the Return of the Parthenon Marbles', *Helleniclink* (Web page, 1 March 2003) <<http://helleniclink.org/wp-content/docs/legal.htm>>; Greenfield (n 26) 64; Rudenstine, 'Did Elgin Cheat at Marbles? (Lord Elgin and Parthenon Marbles)' (n 18) 34-5.

³⁰ Robertson (n 4) 64-7; Greenfield (n 26) 64; Rudenstine, 'Did Elgin Cheat at Marbles? (Lord Elgin and Parthenon Marbles)' (n 18) 34-5.

permit exportation is doubtful, as it is more likely the Ottoman officials were bribed to facilitate the shipment.³¹

Ultimately, the evidence suggests Elgin never obtained a firman and the Italian translated instrument merely purported to be the Ottoman firman; or if Elgin had obtained a firman, he exceeded his licence terms. Consequently, this suggests that his acquisition amounts to theft by contravening the Islamic law in force at the time. Moreover, it appears that the Select Committee which Parliament convened in 1816 wrongly considered the Italian translation to be an accurate representation linked to the original Ottoman firman and should not have accepted the documentation as legitimate.³² The British Crown, who vested the Marbles' ownership in the Museum's trustees, has subsequently received an illegitimate title as Elgin's unlawful actions meant he obtained a defective title, which does not entitle the Museum to ownership, as a legitimate title was unable to be transferred.³³ Nevertheless, despite Elgin's defective title, unless the *British Museum Act 1963* (UK) prohibiting de-accession of artefacts held in its care is repealed, then relief must be pursued on an international basis by turning to the sources of international law, for there is no domestic avenue available within UK law.

III INTERNATIONAL CONVENTIONS

The two conventions which respond to the global despoilation of cultural property are ineffective for Greece's repatriation of the Marbles return due to their limited applicability and will be discussed in further detail below. The first convention is the *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* ('1970 UNESCO Convention'),³⁴ while the second convention which also fails to assist Greece's case is the *1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects* ('1995 UNIDROIT Convention').³⁵ Together, these treaties strengthen the prevention of illicit trade of moveable cultural heritage property occurring across future

³¹ Robertson (n 4) 71; Greenfield (n 26) 64; Rudenstine, 'Did Elgin Cheat at Marbles? (Lord Elgin and Parthenon Marbles)' (n 18) 36-7; Rudenstine, 'Lord Elgin and the Ottomans: The Question of Permission' (n 23) 453.

³² Rudenstine, 'Did Elgin Cheat at Marbles? (Lord Elgin and Parthenon Marbles)' (n 18) 33.

³³ Nadia Banteka, 'The Parthenon Marbles Revisited: A New Strategy for Greece' (2016) 37(4) *University of Pennsylvania Journal of International Law* 1231, 1239.

³⁴ Opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) art 1 ('1970 UNESCO Convention').

³⁵ Opened for signature 24 June 1995, 34 ILM 1322 (entered into force 1 July 1998) ('1995 UNIDROIT Convention').

generations at an international level and introduce a basic international regime to protect the cultural heritage property of nations globally.³⁶

A 1970 UNESCO Convention

The 1970 UNESCO Convention was dedicated to and established a co-operative framework at an international level for tackling the universal issue of cultural heritage property which has been illicitly trafficked and preventing further illegal exportations and theft of these artefacts from taking place. The 1970 UNESCO Convention broadly defines 'cultural property' as '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'.³⁷ Evidently, the Marbles constitute 'cultural property', for they could be viewed as 'an extension of [Greece's] nationhood',³⁸ considering its 'rank above the highest achievements of mankind ... not only for their aesthetic qualities ... but also for their central place in the cultural history of ancient nations'.³⁹ Moreover, Article 7 held that ratifying States must be dedicated to ensuring cultural property that has been illicitly exported since 1970, is prohibited from being acquired but also returned to the State of origin.⁴⁰ Article 7 prescribes measures must be taken to ensure museums and other institutions are prevented from possessing artefacts that have been illicitly acquired. It also provides for the recovery or restitution of artefacts when the State of origin requests their return. However, this Convention does not operate retrospectively, and thus, only legally effects transactions made after its adoption in 1970.⁴¹ Subsequently, Greece may not rely on the 1970 UNESCO Convention for the Marbles' recovery.⁴² Furthermore, this Convention leaves it to the individual States' discretion to designate 'specific items from the various categories as cultural property',⁴³ along with allowing signatories to cherry-pick portions of the agreement to implement, as the instrument is not self-executing.⁴⁴ In other words, it requires signatories to implement the

³⁶ Craig Forrest, 'Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage' (2003) 4(2) *Melbourne Journal of International Law* 592.

³⁷ 1970 UNESCO Convention (n 34) art 1.

³⁸ Banteka (n 33) 1235.

³⁹ B F Cook, *The Elgin Marbles* (British Museum Press, 2nd ed, 1997) 5.

⁴⁰ 1970 UNESCO Convention (n 34) art 7.

⁴¹ Ibid; Kelly Culbertson, 'Contemporary Customary International Law in the Case of Nefertiti' (2012) 17(1) *Art, Antiquity & Law* 27, 35; Merryman (n 6) 1893.

⁴² Stamatoudi (n 29); Robertson (n 4) 142-3; Culbertson (n 41) 35.

⁴³ Roger Mastalir, 'A Proposal for Protecting the Cultural and Property Aspects of Cultural Property' (1992) 16(4) *Fordham International Law Journal* 1033, 1040.

⁴⁴ Leila Amineddoleh, 'Protecting Cultural Heritage by Strictly Scrutinising Museum Acquisitions' (2014) 24 *Fordham Intellectual Property, Media & Entertainment Law Journal* 729, 740; Ioanna Georgiou, 'The role of UNESCO in cases of return of cultural property to

necessary legislation into their domestic law in order to have any legal effects on parties to the agreement. An additional limitation of the *1970 UNESCO Convention* is the request of restitution may only be claimed by States and not by individual parties.⁴⁵ Nevertheless, this limitation does not affect Greece's case, as they are a State party claiming restitution, yet it should be noted this provision hinders any claims for property that was previously owned by individuals.

B *1995 UNIDROIT Convention*

The *1995 UNIDROIT Convention* sought to facilitate the return of cultural property that had been illegally exported by formulating agreed procedures to effectuate the surrender and repatriation of stolen artefacts.⁴⁶ Under the *1995 UNIDROIT Convention*, recourse may be sought where a claim is brought by a country requesting the return of property in another country's court. Notably, the Convention affirms it 'in no way confers any approval or legitimacy upon illegal transactions ... which may have taken place before the entry into force of the Convention'.⁴⁷ Ultimately, this affirmation contrasts with the *1970 UNESCO Convention* in that it allows for retrospective application in returning art that has been stolen.⁴⁸ Despite this affirmation, Article 10 states that the provisions only apply to stolen cultural property once the treaty enters into force and the particular State has ratified it and agreed to be bound by the agreement.⁴⁹ In other words, the provisions dedicated to preventing illicit transaction of cultural heritage artefacts under the convention does not apply in situations where the cultural property has been stolen before the convention entered into force in the country where the claim is being brought as well as the claimant nation. However, only 47 States have ratified the treaty and the UK is not a party to this instrument.⁵⁰

Thus, the *1970 UNESCO Convention* and the *1995 UNIDROIT Convention* will not aid in Greece's quest to repatriate the Marbles. However, these treaties are 'important stages in the ripening process of a wider *erga omnes* rule of customary international law covering important cultural property whenever it

their countries of origin. The work of the UNESCO "Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation"' (MA Thesis, International Hellenic University, 2016).

⁴⁵ Georgiou (n 44).

⁴⁶ *1995 UNIDROIT Convention* (n 35).

⁴⁷ Ibid.

⁴⁸ Robertson (n 4) 143.

⁴⁹ *1995 UNIDROIT Convention* (n 35) art 10.

⁵⁰ 'UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (Rome, 1995) - Status', *UNIDROIT* (Web page, 2 December 2019) <<https://www.unidroit.org/status-cp>>.

has been wrongly taken from its own place of creation'.⁵¹ This idea is explored further in Part IV.

IV CUSTOMARY INTERNATIONAL LAW

A *State Practice and Universally Recognised Principles*

In customary international law, the developing trend indicates a consistent practice followed by States to repatriate cultural property to the original State. Consequently, this practice may assist Greece to substantiate their claim for the Marbles' return. Under customary law there are two central tenets to drawing a conclusion about whether a rule of custom exists.

First, State practice must indicate there is a general practice towards this custom,⁵² which may be evidenced by sustained and consistent conduct of States. The second requirement is there is a general acceptance of the customary rule within the international community, referred to as *opinio juris sive necessitatis* ('*opinio juris*').⁵³

The United Nations General Assembly's position has been confirmed by 27 resolutions urging the repatriation of cultural property.⁵⁴ In 2018, the General Assembly unanimously adopted Resolution 73/130, with 105 member States supporting a resolution put forth by Greece to address the issue of returning cultural heritage property to its country of origin.⁵⁵ This position has garnered support from numerous States including the US, Italy, Egypt, Germany, Switzerland, and Turkey. However, while the UK and Russia have expressed their reservations to recognise restitution claims, France's President, Emmanuel Macron, has publicly declared in favour of reinstating looted artefacts back to Africa that were stolen during the colonial era.⁵⁶ The French President pledged that art and artefacts which were part of Africa's heritage should not be held in private collections and museums across Europe and

⁵¹ Robertson (n 4) 144.

⁵² *Statute of the International Court of Justice* art 38(1)(b); Farhad Talaie, 'The importance of custom and the process of its formation in modern international law' (1998) 5 *James Cook University Law Review* 27, 30.

⁵³ *Statute of the International Court of Justice* art 38(1)(b); Talaie (n 52) 31.

⁵⁴ 'Resolutions adopted by the United Nations General Assembly about Return and Restitution of Cultural Property', *UNESCO* (Web page, 2017) <<http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/resolutions-adopted-by-the-united-nations-general-assembly-about-return-and-restitution-of-cultural-property/>>.

⁵⁵ *Return or Restitution of Cultural Property to the Countries of Origin*, GA Res 73/130, UN Doc A/Res/73/130 (13 December 2018); Robertson (n 4) 145.

⁵⁶ Farah Nayeri, 'Return of African Artifacts Sets a Tricky Precedent for Europe's Museums', *The New York Times* (online, 27 November 2018) <<https://www.nytimes.com/2018/11/27/arts/design/macron-report-restitution-precedent.html>>.

should be returned.⁵⁷ This position could potentially pave a global movement for other institutions and nations across Europe, and even around the world, to begin the repatriation of stolen heritage back to their country of origin. Macron's pledge began to take shape in 2021 when France engaged in a transaction in which ownership of 26 pieces of Benin art was transferred back to Africa.⁵⁸ Unlike Macron's and France's acknowledgement that artefacts which had been acquired during the colonial era should be returned, the UK have expressed the opposite sentiment and have remained with their longstanding position that the Marbles had been acquired lawfully.⁵⁹ Furthermore, by having 140 signatories to the 1970 *UNESCO Convention*, this supports a practice that spans across various nations favouring restitution 'not only as a rule of law but as a rule of moral conduct that should prompt the return of cultural property wrongfully taken and acquired before 1970'.⁶⁰

The repatriation of cultural property has received acceptance in State practice, where notable antiquities returned included: the Lydian Hoard,⁶¹ a gold coffin,⁶² (both received by Turkey) antiquities seized from Easter Island,⁶³ and the Venus of Cyrene.⁶⁴ A focal point in their restitution was the non-execution of due diligence expected by museums when acquiring artefacts to ensure antiquities were not illegally exported.⁶⁵ This places an obligation on museums to thoroughly investigate the antiquities provenance, ensuring they possess

⁵⁷ Naomi Rea, 'France's President has promised to return Africa's heritage- Now Macron's pledge is being put to the test', *Artnet News* (online, 8 March 2018) <<https://news.artnet.com/art-world/macron-repatriate-african-heritage-1238219>>.

⁵⁸ Henrique Valadares, 'As Paris museum returns looted African treasures, will others follow France's lead?', *France 24* (online, 10 November 2021) <<https://www.france24.com/en/africa/20211110-as-paris-museum-returns-looted-african-treasures-will-others-follow-france-s-lead>>.

⁵⁹ *Ibid.*

⁶⁰ Robertson (n 4) 145.

⁶¹ *Republic of Turkey v Metropolitan Museum of Art*, 762 F Supp 44 (SDNY, 1990) ('*Republic of Turkey*').

⁶² Victoria Stapley-Brown and Nancy Kenney, 'Met hands over an Egyptian coffin that it says was looted', *The Art Newspaper* (online, 15 February 2019) <<https://www.theartnewspaper.com/news/met-hands-over-an-egyptian-coffin-that-it-says-was-looted>>.

⁶³ Agence Presse, 'Norway's Kon-Tiki Museum to return thousands of Easter Island artefacts', *The Guardian* (online, 29 March 2019) <<https://www.theguardian.com/world/2019/mar/29/norways-kon-tiki-museum-to-return-thousands-of-easter-island-artefacts>>.

⁶⁴ Alessandro Chechi, Anne Laure Bandle and Marc-André Renold, 'Case Venus of Cyrene- Italy and Libya', *ArThemis Art-Law Centre, University of Geneva* (Web page, January 2012) <<https://plone.unige.ch/art-adr/cases-affaires/venus-of-cyrene-2013-italy-and-libya/case-note-2013-venus-of-cyrene-2013-italy-and-libya>>.

⁶⁵ *Republic of Turkey* (n 61); Stapley-Brown and Kenney (n 62).

good title as a *bona fide* purchaser for value without notice. Additionally, this principle has found expression in the 1995 *UNIDROIT Convention*,⁶⁶ whilst also expressly provided for in the International Council of Museums ('ICOM') ethical codes.⁶⁷

The concept of due diligence, which has found its way into case law, treaties and ICOM's ethical codes, places a clear set of ethical obligations and standards that museums and other institutions are expected to adhere to. The British Parliament, or more specifically the Select Committee, did not execute proper due diligence in their purchase.⁶⁸ Instead they should have conducted a more thorough inquiry as 'the weakness in Elgin's title was clear',⁶⁹ considering the only proof Elgin proffered was the Italian translation of a wrongly identified firman.⁷⁰ Notably, under international law whilst there is no time bar to bring a claim,⁷¹ questions of estoppel or waiver if unreasonable delay arose which has prejudiced the possessor, can be raised.⁷² For the Marbles, evidence of Greece's 'perennial'⁷³ campaigns indicates there was no unreasonable delay in their demands.⁷⁴ Furthermore, the Venus of Cyrene's return to Libya, and the Italian *Consiglio di Stato* ruling in 2008 provided a vital customary international rule supporting the restitution of cultural property.⁷⁵ The court ruled for the statue's restitution 'on the basis [of] a rule of customary international law that obliged states to return treasures taken as a result of colonial domination or armed conflict'.⁷⁶ One further example exemplifying State practice for returning artefacts is the restoration of Norse manuscripts to Iceland.⁷⁷ This case highlighted two principles that need

⁶⁶ 1995 *UNIDROIT Convention* (n 35) art 4.

⁶⁷ 'Code of Ethics for Museums', *International Council of Museums* (Code of Ethics Document, 2017) <<https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf>>.

⁶⁸ Rudenstine, 'Did Elgin Cheat at Marbles? (Lord Elgin and Parthenon Sculptures)' (n 18) 33.

⁶⁹ Robertson (n 4) 89.

⁷⁰ *Ibid.*

⁷¹ *Certain Phosphate Lands in Nauru (Nauru v Australia) (Judgment)* [1992] ICJ Rep 240, 253-4.

⁷² Robertson (n 4) 128; *Republic of Turkey* (n 61).

⁷³ Robertson (n 4) 128.

⁷⁴ *Ibid.*

⁷⁵ Robertson (n 4) 146-7; Chechi, Bandle and Renold (n 64); *Consiglio di Stato*, 23 June 2008, No. 3154, *Associazione Nazionale Italia Nostra Onlus c Ministero per i beni e le attività culturali et al* ('*Consiglio di Stato*').

⁷⁶ Robertson (n 4) 146; *Consiglio di Stato* (n 75).

⁷⁷ Erland Nielsen, 'Denmark to Iceland: A Case without Precedence: Delivering Back the Islandic Manuscripts 1971-1997' (Conference Paper, 68th IFLA Council and General Conference, 18 August 2002).

balancing in these disputes: the first being the petition by a previously subjugated State ‘for possession of a key to its history’,⁷⁸ while the second is, the possessor claims the artefacts are properly cared for in its existing location and ‘would be better studied where they were’.⁷⁹

The Museum attempted to justify Elgin’s actions by claiming he protected the Marbles from ruin,⁸⁰ and presently the Museum is in the best position for their care.⁸¹ This argument has been used to rationalise Elgin’s intervention since 1816, when in his witness statement to the Parliamentary Select Committee, Reverend Hunt contended that without Elgin’s intervention the Turkish would have destroyed the Parthenon.⁸² However, the Parthenon withstood the conflict for 2,300 years before Elgin’s intervention.⁸³ Some of the conflicts the Parthenon endured and remained largely intact included Sparta’s civil wars, Alexander the Great’s military campaigns and even religious changes and the rise of Christianity.⁸⁴ Under Ottoman occupation the only significant damage which the Parthenon sustained prior to Elgin’s presence occurred in a conflict between the Turkish and the Venetians in 1687.⁸⁵ During this conflict, a military cannonball hit the gunpowder the Turkish forces had stored within the building and caused an explosion.⁸⁶ Nevertheless, the Parthenon Marbles’ structure remained largely intact.⁸⁷ An additional consideration is that Elgin did not necessarily rescue them, considering the Ottomans were obligated to protect the temple.⁸⁸ According to international law throughout the Ottoman occupation period, it was prescribed that any powers that occupied other nations were required to respect places of worship or those of have a particular historical or cultural significance to the occupied nations.⁸⁹ Therefore, the

⁷⁸ Robertson (n 4) 147.

⁷⁹ Ibid.

⁸⁰ Ibid 74-7; William St Clair, *Lord Elgin and the Marbles* (Oxford University Press, 4th ed, 1998) 247.

⁸¹ Robertson (n 4) 132-3; Amineddoleh (n 44).

⁸² Robertson, Palmer and Clooney (n 8) 20.

⁸³ Robertson (n 4) 53-4, 81-2; Robertson, Palmer and Clooney (n 8) 16; Fincham (n 6) 969.

⁸⁴ Robertson, Palmer and Clooney (n 8) 16; Moore (n 14) 36; John Boardman, ‘The Elgin Marbles: Matters of Fact and Opinion’ (2000) 9(2) *International Journal of Cultural Property* 233, 234-7.

⁸⁵ Robertson, Palmer and Clooney (n 8) 16; Fincham (n 6) 969; Moore (n 14) 37.

⁸⁶ Robertson, Palmer and Clooney (n 8) 16; Fincham (n 6) 969; Moore (n 14) 37.

⁸⁷ Fincham (n 6) 969.

⁸⁸ Robertson (n 4) 56, 58; Irini Stamatoudi, ‘The Law and Ethics Deriving from the Parthenon Marbles Case’ (1997) 2 *Web Journal of Current Legal Issues* 3:12-15.

⁸⁹ Robertson, Palmer and Clooney (n 8) 20.

claim put forth by the British Museum that without Elgin there would be no Marbles can be disputed. It is also relevant that today the Acropolis Museum is in the best position to care for the Marbles now as they can be viewed ‘in proximity to the monument they were built to embellish ... in a state-of-the-art museum’.⁹⁰ Ultimately, the restitution principle has received general acceptance by States who evidently do not condone unlawful acts of forces such as Elgin and subsequently generated a universal practice of returning misappropriated cultural property.

B Case Law

Customary international law provides further indication towards favouring this restitution principle through judgments handed down by courts. These judgments demonstrate both the requisite practice and *opinio juris*.⁹¹ Under the principle of *opinio juris* it should be noted that it is hard to discern the mind of a State in whether they believe a legal obligation exists.⁹² As discerning *opinio juris* can be difficult, there are a variety of sources which can assist with identifying the existence of an accepted practice which include diplomatic correspondence, press releases, legislation, treaties, General Assembly resolutions and declarations and judicial decisions.⁹³

Notably, the International Court of Justice (‘ICJ’) has never considered whether international law places an obligation on States to repatriate cultural antiquities.⁹⁴ However, this position should shift so clear enunciation of the international law stance is attained. The ICJ in the *Temple of Preah Vihear* case endorsed that States retained sovereignty over artefacts and items integral to the heritage of the nation of origin’s people,⁹⁵ and thus emerges an enforceable right enabling repatriation, which was implicit and consequential to the nation’s sovereignty.⁹⁶ This suggests that States are authorised to act on behalf of their people to request the restitution of their cultural property seized by foreign powers when they were not independent or geographically was not

⁹⁰ Banteka (n 33) 1240-1.

⁹¹ Talaie (n 52) 31; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14.

⁹² Moisés Montiel, ‘Fantastical Opinio Juris and How to Find it’, *Opinio Juris* (Web page, 23 June 2021) <<http://opiniojuris.org/2021/06/23/fantastical-opinio-juris-and-how-to-find-it/>>.

⁹³ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226; *North Sea Continental Shelf (Judgment)* [1969] ICJ Rep 3; *Report of the International Law Commission on the work of its seventieth session*, GA Res 73/10, 73rd sess, Supp No 10, UN Doc A/RES/73/10 (30 April-1 June and 2 July-10 August 2018).

⁹⁴ Robertson (n 4) 150.

⁹⁵ *Ibid* 13.

⁹⁶ *Temple of Preah Vihear (Cambodia v Thailand) (Judgment)* [1962] ICJ Rep 6, 36.

considered a country,⁹⁷ for any title to these historic artefacts belongs to the ‘public ownership of the state as part of its national sovereignty’.⁹⁸ Therefore, a State which has had its antiquities looted from their territory possesses a legitimate right to pursue a claim against the possessor.

This approach was adopted in *Webb v Ireland*,⁹⁹ where Finlay CJ overruled the ‘finders-keepers’ principle, emphasising ‘that one of the most important national assets belonging to the people is their heritage and knowledge of its true origins and the buildings and objects which constitute keys to their ancient history’.¹⁰⁰ Moreover, a ‘necessary ingredient of sovereignty’,¹⁰¹ is allowing the State of origin to retain ownership over antiquities which are of an inherent significance to the nation.¹⁰² For it would be inconsistent with societal standards that those who find such important objects, in particular by chance, become their exclusive property.¹⁰³ Finlay CJ’s judgment has been applied in a myriad of common law courts such as England and Indiana and may be considered evidence of State practice and its acceptance by other judicial systems.¹⁰⁴ Those courts stated that all nations ‘must be accorded a sovereign right to possess the keys to its history, and that such possession should ... be restored to it by other states in which the property happened now to repose’.¹⁰⁵ Furthermore, Indiana’s Supreme Court in *Autocephalous Greek-Orthodox Church of Cyprus v Goldberg*,¹⁰⁶ ascertained the disputed mosaics were unique pieces of a historic artistic period and should be restored to the State of origin.¹⁰⁷ The Court held returning the mosaics served as a ‘reminder that greed and callous disregard for the property, history, and culture of others cannot be countenanced by the world community or by this court ... we should not sanction illegal traffic in stolen cultural property’.¹⁰⁸ Moreover, if the property

⁹⁷ Robertson (n 4) 151.

⁹⁸ Ibid.

⁹⁹ [1988] IR 353, 383.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ *Iran v Barakat Galleries Ltd* [2009] QB 22; *Autocephalous Greek Orthodox Church of Cyprus v Goldberg and Feldman Fine Arts Inc*, 917 F.2d 278, 1990, U.S App. Decision (*Autocephalous Greek Orthodox Church of Cyprus v Goldberg*).

¹⁰⁵ Robertson (n 4) 13.

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

¹⁰⁷ *Autocephalous Greek Orthodox Church of Cyprus v Goldberg* (n 104) 297.

¹⁰⁸ Ibid.

is fundamental to a State's heritage by virtue of its 'distinctive characteristics, comparative rarity, or its contribution to the knowledge of the origins, development, or history of that people',¹⁰⁹ and its position in a Museum has encumbered this attachment, it should be returned.¹¹⁰ Therefore, a discernible *opinio juris* of returning cultural property has crystallised in customary international law and would be the most suitable avenue for Marbles' restitution.

C Seeking an Advisory Opinion from the International Court of Justice

To attain a clear enunciation of the obligation to yield important cultural property to the State of origin in customary international law, it is essential that an Advisory Opinion be sought from the ICJ. In accordance with Article 96 of the *Charter of the United Nations* the ICJ is authorised to hand down an advisory opinion on 'any legal question',¹¹¹ arising by request of the General Assembly or Security Council.¹¹² Additionally, under Article 96 any other UN organs or specialised agencies can seek advisory opinions from the court surrounding the 'legal questions arising within the scope of their activities'.¹¹³ If the ICJ hands down an advisory opinion on repatriation of artefacts, then this rationale can provide guidance on the legality of the UK's actions and potentially recommend the return of cultural property once specific criteria is established.

Notably, the UK will only accept the ICJ's jurisdiction with 'disputes arising after 1 January 1984, with regard to situations or facts subsequent to the same date'.¹¹⁴ Considering the dispute first arose when objections to the Marbles removal were circulated in 1801 and 1833, this indicates the UK is not subject to the ICJ's jurisdiction.¹¹⁵ To circumvent this jurisdictional issue, it is advised that the General Assembly, or another UN organ such as UNESCO or specialised agency request an advisory opinion from the court.¹¹⁶

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ *Charter of the United Nations* art 96(a).

¹¹² Ibid; Michael Scharf, 'Talking Foreign Policy: Art, Diplomacy, and Accountability' (2017) 49(1-2) *Case Western Reserve Journal of International Law* 251.

¹¹³ *Charter of the United Nations* art 96(b).

¹¹⁴ 'United Kingdom of Great Britain and Northern Ireland Declaration Recognising the Jurisdiction of the Court as Compulsory', *International Court of Justice* (Web page, 22 February 2017) <<https://www.icj-cij.org/en/declarations/gb>>.

¹¹⁵ *Certain Property (Liechtenstein v Germany) (Judgment)* [2005] ICJ Rep 6.

¹¹⁶ *Charter of the United Nations* art 96.

Although the decision handed down from the ICJ will be non-binding, the UK has demonstrated a predisposition to conform with these rulings.¹¹⁷ However, while the UK has been previously inclined to follow the ICJ's rulings, this does not guarantee that should an advisory opinion be sought, that the UK will act in accordance with the opinion if Greece does obtain a favourable outcome. On the other hand, it could be argued that if the opinion does favour Greece's position for the Marbles return, then the UK government would receive both domestic and international pressure to comply with the decision. Thus, it would become a matter of honour, upholding their reputation, and maintaining international relations with other nations which may force compliance from the UK to return the Marbles. Evidently, should UNESCO or another UN authorised body seek an advisory opinion from the ICJ, the judgment will have far-reaching implications for not only the disputing parties but also the evolution of customary international law on returning cultural artefacts.

V CONCLUSION

Throughout history, colonial authorities have participated in the mass plundering of cultural property belonging to subjugated peoples, and presently disputes have arisen around who is entitled to the property's ownership: the original State, or the current possessor. While claimants demand repatriation by asserting the antiquity supplies a continuing link to their heritage, the current possessor claims legal ownership or trusteeship. Greece's frequent requests for the Marbles' repatriation is a widely recognised dispute on this matter. While Greece's claims have been hindered by British legislation prohibiting de-accession,¹¹⁸ alternative reliance on international law may secure the repatriation of the misappropriated property.¹¹⁹

Firstly, despite the Museum's contentions, Elgin did not obtain clear title over the Marbles as he unlawfully acquired them and consequently the Museum has not been transferred a legitimate title. Under international law, the first potential mechanism at Greece's disposal is Conventions, more precisely the *1970 UNESCO Convention* and *1995 UNIDROIT Convention*, which prescribes rules concerning the illegal acquisition of cultural property. However, Greece cannot depend on these instruments as they lack retrospective operation and signatories. Hence, a new convention should be generated to facilitate the return of cultural property which operates to cover events prior to 1970.

¹¹⁷ Robertson (n 4) 164.

¹¹⁸ *British Museum Act 1963* (UK) c 24, s 3(4).

¹¹⁹ *Statute of the International Court of Justice* art 38(1).

A second mechanism which Greece could rely upon is customary international law, for universal principles recognising a State's right to recover their cultural property has manifested through State practice and *opinio juris*. To receive a clear enunciation of this principle in customary international law, an advisory opinion should be sought from the ICJ by one of the authorised UN organs. For Greece, one issue which may prevent the Marbles' return is that any advisory opinions handed down by the ICJ will be non-binding, which means the UK will not be forced to comply with the decision. However domestic and international pressure may force compliance from the UK, to maintain their honour within their own nation but also abroad in the international community. Therefore, while customary international law does support the Marbles' return to Greece, additional international developments are required to create a concrete regime which will assist in reuniting cultural property with its homeland State.