

Washington International Law Journal

Volume 30 | Number 1

12-28-2020

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Recommended Citation

Hannah R. Godwin, *Legal Complications of Repatriation at the British Museum*, 30 Wash. Int'l L.J. 144 (2020).

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LEGAL COMPLICATIONS OF REPATRIATION AT THE BRITISH MUSEUM

Hannah R. Godwin[†]

Abstract: The British Museum has been the target of criticism around the world for its failure to repatriate controversial cultural property to their respective countries of origin. In 1753, a private collector left his collection to Great Britain if it agreed to build a public museum and designate a Board of Trustees whose duty was to protect the collection for the public. Statutorily incorporating the collector's intent, Parliament passed legislation binding the Board of Trustees to abide by certain principles, including preserving the collection and prohibiting disposal of objects, except in very few circumstances. As such, the Museum is administrated through trust and fiduciary duty law, legally binding the Trustees to preserve the Museum's collection. This paper argues that, despite pressing demands for the Museum to repatriate cultural property, the Board of Trustees is prohibited from repatriation.

Cite as: Hannah R. Godwin, *Legal Complications of Repatriation at the British Museum*, 30 WASH. INT'L L.J. 144 (2020).

INTRODUCTION

Founded in 1753, the British Museum is the first national public museum in the world.¹ Since 1759, the Museum has offered admission free of charge to the public, generating approximately six million visits per year.² In addition to housing collections and sponsoring research, the Museum encourages and arranges school visits, collaborative projects, and

[†] The author would like to thank several individuals for their help in putting together this Comment. First, the author would like to thank the Honorable Adam Eisenberg for guiding her to this ongoing legal issue in cultural property law. Secondly, the author would also like to thank Professor Mary Hotchkiss for serving as the author's faculty sponsor for this paper. Thirdly, the author would like to thank the following people for their thorough feedback as the paper progressed: Sydney Arizona Bay, Arianna VanMeteeren, Eric Lombardo, Casey Yamasaki, Cael Anacker, Miles Gilhuly, and Sarah Atchinson. Finally, the author thanks the entire *Washington International Law Journal* editorial staff for their engagement and support in crafting this Comment.

¹ *History*, THE BRITISH MUSEUM, <https://www.britishmuseum.org/about-us/british-museum-story/history> (last visited May 19, 2019).

² *Id.*

creative workshops in an effort to make learning accessible for all ages.³ In its mission statement, the Museum proudly states that “[t]he Museum’s aim is to hold a collection representative of world cultures and to ensure that the collection is housed in safety, conserved, curated, researched and exhibited.”⁴ It is estimated that the Museum’s collection includes eight million artifacts, making it one of the largest and most diverse institutional collections in the world.⁵ Its size is impressive compared to the State Hermitage Museum in Saint Petersburg—home to three million objects—⁶and the National Museum in Beijing, hosting nearly one million objects.⁷ However, the British Museum is nowhere near housing the largest collection; in comparison, the Smithsonian prides itself on a collection of more than 155 million objects.⁸

The Museum has been scrutinized for possessing and displaying objects, hereinafter referred to as “cultural property,” from countries and communities that have requested their return.⁹ Most notably, the Museum has been sharply criticized for its pointed refusal to return the Parthenon/Elgin Marbles to Greece.¹⁰ Rightful ownership of the Parthenon

³ See Learn, THE BRITISH MUSEUM, <https://www.britishmuseum.org/learn> (last visited March 19, 2020).

⁴ Governance, THE BRITISH MUSEUM, <https://www.britishmuseum.org/about-us/governance> (last visited Mar. 19, 2020).

⁵ 260 Years the British Museum in Numbers, THE BRITISH MUSEUM (Jan. 15, 2019), <https://blog.britishmuseum.org/260-years-the-british-museum-in-numbers/>.

⁶ Hermitage, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Hermitage-museum-Saint-Petersburg-Russia> (last visited Mar. 19, 2020).

⁷ National Museum of China, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/National-Museum-of-China> (last visited Mar. 19, 2020).

⁸ Facts About the Smithsonian Institution, SMITHSONIAN, <https://www.si.edu/newsdesk/factsheets/facts-about-smithsonian-institution-short> (last visited Mar. 19, 2020).

⁹ See generally Mark Wilding, *Museums Grapple with Rise in Pleas for Return of Foreign Treasures*, THE GUARDIAN (Feb. 18, 2019 8:02 AM), <https://www.theguardian.com/uk-news/2019/feb/18/uk-museums-face-pressure-to-repatriate-foreign-items>.

¹⁰ The Marbles are referred to by two names: the Parthenon Marbles or the Elgin Marbles. Contrary to popular belief, the Elgin/Parthenon Marbles are not marbles but instead a collection of stone sculptures taken from the Parthenon in the nineteenth century. The name “Elgin Marbles” stems from the Duke of Elgin, who sold the Marbles to Britain in 1816, who thereafter referred to the sculptures as the Elgin Marbles. The namesake “Parthenon Marbles,” emphasizes the Marbles’ history. Today, the British Museum refers to the sculptures as the Parthenon Marbles, but they are still frequently referred to as the Elgin Marbles throughout the world. See Robert Wilde, *The Elgin marbles/Parthenon Sculptures*, THOUGHTCO. (Apr. 4, 2019), <https://www.thoughtco.com/the-elgin-marbles-parthenon-sculptures-1221618>; See generally *Greece: Parthenon*, THE BRITISH MUSEUM, <https://www.britishmuseum.org/collection/galleries/greece-parthenon> (last visited Mar. 26, 2020).

Marbles has been a contentious issue.¹¹ Further, the conflict is not limited to Britain. In early 2020, the European Union declared that it would not reach a trade deal with Britain unless the Museum repatriated the Parthenon Marbles.¹² In November 2019, President Xi Jinping of China voiced support for Greece and proclaimed that the Museum should repatriate the Parthenon Marbles.¹³ A controversy broke out on a global scale when French President Emmanuel Macron commissioned a report that recommended the return of cultural artifacts to African countries obtained “without consent” during European colonialism.¹⁴ The report came after President Macron’s tour of West Africa, where he vowed that a “permanent or temporary” return of West African cultural artifacts to the region would be a “priority” during his term in office.¹⁵

In light of President Macron’s progressive attitude towards repatriation and restitution, the Museum has found itself at odds with the British people and the international community. During his campaign for Prime Minister, UK Labour Leader Jeremy Corbyn pledged to return the disputed Parthenon Marbles to Greece if elected prime minister.¹⁶ In early 2019, the Museum faced international backlash after the Museum’s director stated that the removal of the Parthenon Marbles from Greece “was a creative act,”¹⁷ claiming that the Marbles would never be returned.¹⁸ The director stood by the Museum’s lawful ownership, persisting that “[t]he objects in the collection of the British Museum are owned by the museum’s commissioners.”¹⁹ Then, in the summer of 2019, a Museum

¹¹ See Illiani Magra, *In Struggle Over Parthenon Marbles, Greece Gets Unexpected Ally: Xi Jinping*, N.Y. TIMES (Nov. 13, 2019), <https://www.nytimes.com/2019/11/13/world/europe/parthenon-marbles-xi-jinping-greece-china.html>.

¹² Adam Payne, *The EU Will Tell Britain to Give Back the Ancient Parthenon Marbles, Taken from Greece Over 200 Years Ago, If It Wants a Post-Brexit Trade Deal*, BUS. INSIDER (Feb. 20, 2020), <https://www.businessinsider.com/brexit-eu-to-ask-uk-to-return-elgin-marbles-to-greece-in-trade-talks-2020-2>.

¹³ Magra, *supra* note 11.

¹⁴ Vincent Noce, *'Give Africa Its Art Back', Macron's Report Says*, THE ART NEWSPAPER (Nov. 20, 2018), <https://www.theartnewspaper.com/news/give-africa-its-art-back-macron-s-report-says>.

¹⁵ *Id.*

¹⁶ *UK Labour Leader Jeremy Corbyn Promises to Return Parthenon Marbles to Greece if Elected PM*, FRIEZE (Jun. 5, 2018), <https://frieze.com/article/uk-labour-leader-jeremy-corbyn-promises-return-parthenon-marbles-greece-if-elected-pm>.

¹⁷ Mark Brown, *British Museum Chief: Taking the Parthenon Marbles was 'Creative'*, THE GUARDIAN (Jan. 28, 2019, 2:45 PM), <https://www.theguardian.com/artanddesign/2019/jan/28/british-museum-chief-taking-the-parthenon-marbles-was-creative>.

¹⁸ *Id.*

¹⁹ *Id.*

Trustee resigned from her position.²⁰ She opined a scathing critique of the Museum's politics and unwillingness to engage in repatriation discussions: “[m]useums, state officials, journalists and public intellectuals in various countries have stepped up to the discussion . . . [t]he British Museum . . . is coming under scrutiny [and] yet it hardly speaks.”²¹ In November 2019, Geoffrey Robertson, a human rights barrister in London, published *Who Owns History?*, a title that serves as a plea to the masses that more pressure should be placed on museums to return “looted antiquities.”²²

International law does not compel the Museum to return artifacts with disputed origins. British law and common law relating to trusts and fiduciary duty control the Museum's ability to loan or dispose items in its collection.²³ The British Museum Act of 1963 dictates that Museum Trustees are legally bound by fiduciary duty to preserve the Museum's collection and dispose objects only in extremely specific and unusual circumstances.²⁴

Structurally, the Museum is organized as a corporation governed by a Board of Trustees.²⁵ While the Board of Trustees has legal ownership over the Museum collection, it is required to serve the public in the manner laid out statutorily.²⁶ A Board Trustee has “no extraordinary rights to benefit from them, only obligations towards their beneficiaries, the public.”²⁷ The Museum Board of Trustees consists of twenty-five people, with one trustee being appointed by the Crown, fifteen trustees appointed by the Prime Minister, four trustees appointed by the Secretary of State, and five trustees appointed by the Trustees themselves.²⁸ One of the

²⁰ Aimee Dawson, *In Damning Online Critique of British Museum's Ethics, Trustee Ahdaf Soueif Announces Resignation*, THE ART NEWSPAPER (Jul. 16, 2019 1:19 PM), <https://www.theartnewspaper.com/news/it-hardly-speaks-writer-ahdaf-soueif-pens-damning-critique>.

²¹ Ahdaf Soueif, *On Resigning from the British Museum's Board of Trustees*, LONDON REVIEW OF BOOKS (Jul. 15, 2019) <https://www.lrb.co.uk/blog/2019/july/on-resigning-from-the-british-museum-s-board-of-trustees>.

²² GEOFFREY ROBERTSON, WHO OWNS HISTORY? (2019); see also Geoffrey Robertson, *It's Time for Museums to Return Their Stolen Treasures*, CNN (Jun. 11, 2020), <https://www.cnn.com/style/article/return-stolen-treasures-geoffrey-robertson/index.html>.

²³ Neil MacGregor, *The Whole World in Our Hands*, THE GUARDIAN (Jul. 23, 2004, 7:27 PM), <https://www.theguardian.com/artanddesign/2004/jul/24/heritage.art> (noting that the Museum is a creation of trust and family, and that Trustee ownership “confers duties rather than rights.”).

²⁴ British Museum Act 1963, c. 24 (UK).

²⁵ Jonathan Williams, *Parliaments, Museums, Trustees and the Provision of Public Benefit in the Eighteenth-Century British Atlantic World*, 76 HUNTINGTON LIBR. Q. 195, 195 (2013).

²⁶ *Id.* at 196; see also *Attorney General v. British Museum Trustees* [2005] EWHC 1089 (Ch), [47] (Eng.).

²⁷ Williams, *supra* note 25, at 196.

²⁸ British Museum Act 1963, c. 24, § 1(a)–(d).

recognized strengths of appointment is that appointed trustees avoid political pressure from outside influences.²⁹ Comparatively, other landmark museums are not governed by a Board of Trustees. For example, the Louvre's director follows the French Government's instruction, which owns the Louvre's collections.³⁰

This article begins by providing background on the argument for repatriation by exploring definitions of cultural property and the dichotomy between the philosophies of cultural nationalism and cultural internationalism. Second, this article analyzes relevant international law relating to cultural property acquisition and repatriation, explaining why these laws cannot compel the Museum to repatriate disputed objects in its collection. Third, the article elaborates on the Museum's Board of Trustees' history and creation. This analysis also encompasses the history of applicable statutory law that binds the Trustees beyond their fiduciary duty. Fourth, this article analyzes British common law relating to fiduciary duty, ex gratia payments, and property law as it relates to the Museum's ability to repatriate cultural property. Finally, this article concludes on the premise that the Museum is unable to repatriate any cultural property unless Parliament amends the Board of Trustees' legal obligations and excuses them from their fiduciary duty *and* the Board of Trustees wishes to repatriate.

I. UNDERSTANDING THE ARGUMENT FOR REPATRIATION

Repatriation is complex. It is entangled in multiple theories of cultural property, ownership, and museum management. "Repatriation" is the process of returning cultural property to its country or people of origin.³¹ It is not an emerging concept; rather, it is an idea scholars have urged for since the sixteenth century.³² This section strives to provide context for these issues from various perspectives and how they may impact whether a museum purchases an artifact or repatriates an object from its collection.

²⁹ See Macgregor, *supra* note 23.

³⁰ See Williams, *supra* note 25, at 198.

³¹ Carol A. Roehrenbeck, *Repatriation of Cultural Property—Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments*, 38 INT'L J. LEGAL INFO. 185, 186 (2010).

³² Lyndel V. Prott, *Repatriation of Cultural Property*, 1995 U.B.C. L. Rev. 229, 229 (1995).

A. What is Cultural Property?

The definition of “cultural property” has progressively broadened over the past half-century.³³ The 1954 Hague Convention on the Protection of Cultural Property, one of the earliest international protections of cultural property, defined cultural property as property “of great importance to the cultural heritage of every people” including architecture, archaeological sites, works of art, manuscripts, books and “other objects of artistic, historical or archaeological interest.”³⁴ In 1970, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the Convention) expanded upon this definition by enumerating a new list of what could be considered “cultural property.”³⁵ Ranging from natural specimens to musical instruments, the Convention enlarged the definition in an attempt to include all possible aspects of life.³⁶

The meaning of cultural property continues to broaden today. For example, the European Union (EU) passed legislation in 2018 requiring special licenses for “cultural goods,” in an effort to prevent illegal trafficking of cultural artifacts.³⁷ Rather than define the term in connection with importance to a home country or by the category of item, the EU defined “cultural goods” as items older than 250 years old and worth at least €10,000.³⁸

1. *Cultural Internationalism v. Cultural Nationalism.* — Whether existing definitions of cultural property are sufficient will be influenced by whether a collector considers themselves to be a cultural internationalist or a cultural nationalist. Cultural nationalists argue cultural property should remain within its country of origin.³⁹ To a cultural nationalist, cultural property contributes to the fabric of national heritage and “emphasizes

³³ See Roehrenbeck, *supra* note 31, at 190.

³⁴ United Nations Educational, Scientific and Cultural Organization, Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention art. 1, May 14, 1954, 249 U.N.T.S. 358.

³⁵ United Nations Educational, Scientific and Cultural Organization, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231.

³⁶ See Roehrenbeck, *supra* note 31, at 188.

³⁷ Press Release, Council of the European Union, Preventing Illegal Import of Cultural Goods into the EU: Council Agrees its Position (Nov. 7, 2018).

³⁸ *Id.*

³⁹ See Roehrenbeck, *supra* note 31, at 190.

national interests, values, and pride.”⁴⁰ Comparatively, cultural internationalists believe that cultural property should belong to the world—in other words, cultural property should be placed in institutions with the greatest resources.⁴¹ At the forefront of cultural internationalism is promoting accessibility to the public, fostering research, and preserving the cultural property in its best possible condition.⁴² Meanwhile, cultural nationalists believe that cultural property belongs to the country or people of origin, regardless of available resources.⁴³

In the mid 1980s, John Henry Merryman, a professor at Stanford Law School and an internationally recognized scholar in cultural property law, began contributing to the international discussion.⁴⁴ Merryman defined cultural property “as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction.”⁴⁵ His article, *Two Ways of Thinking About Cultural Property*, urged readers to not think too deeply about whether they are cultural nationalists or internationalists; instead, he encouraged people to think with common sense and reason, and stressed that scholars should not view the binary as so rigid:

“Thus, any cultural internationalist would oppose the removal of monumental sculptures from Mayan sites where physical damage or the loss of artistic integrity or cultural information would probably result, whether the removal was illegal or was legally, but incompetently, done. The same cultural internationalist, however, might wish that Mexico would sell or trade or lend some of its reputedly large hoard of unused Chac-Mols, pots and other objects to foreign collector and museums, and he might be impatient with the argument that museums in other nations not only should forgo building such collections but should actively assist Mexico in suppressing the “illicit” trade in those objects. In principle, any internationalist would agree that paintings should not be stolen from Italian churches for sale to foreign (or domestic) collectors or museums. But if a painting is rotting in the church from lack of resources to care for it, and the priest sells it for money to repair the roof and in the hope that the purchaser will give the painting the care it needs, then the problem begins to look different. Even the most

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INTL L. 831, 831 (1986).

⁴⁵ *Id.*

dedicated cultural nationalist will find something ludicrous in the insistence that a Matisse painting that happened to be acquired by an Italian collector had become an essential part of the Italian cultural heritage."⁴⁶

Global attitudes have quickly shifted from cultural internationalism to cultural nationalism.⁴⁷ But, while archaeological looting continues around the world, most calls for repatriation are to museums, not law enforcement or the international courts.⁴⁸ As noted by James Cuno, an art historian and curator, the debate lies not with the desire to end archaeological looting but “between museums and modern nation-states and their nationalist claims on heritage.”⁴⁹

2. *Cultural Property as Political Power.* — Some scholars claim the inherent value in cultural property is not its archaeological, historical, or scientific value but instead its political capital.⁵⁰ Power can be demonstrated by possessing cultural property from source countries or by possessing items belonging to a nation’s claimed heritage.

The power of cultural property in a national museum is not to be understated—the presence of cultural property physically ties heritage between a nation, its institutions, and its visitors, building patriotism and a sense of belonging in a nation. As stated by James Cuno, “national museums are important instruments in the formation of nationalist narratives: they are used to tell the story of a nation’s past and confirm its present importance.”⁵¹

⁴⁶ *Id.* at 852.

⁴⁷ Abby Seiff, *How Countries are Successfully Using the Law to Get Looted Cultural Treasures Back*, A.B.A. J. (July 1, 2014), https://www.abajournal.com/magazine/article/how_countries_are_successfully_using_the_law_to_get_looted_cultural_treasures (“Tess Davis, an archaeology and heritage law expert at the Scottish Centre for Crime and Justice Research at the University of Glasgow who focuses on the illicit antiquities trade in Southeast Asia, says the recent repatriations represent a changing opinion. ‘There has been a shift in the way museums treat suspect antiquities’”).

⁴⁸ See Will Brown, *Echoes of Isil as Armed Groups Loot Priceless Artefacts Across Sahel*, THE TELEGRAPH (Mar. 7, 2020), <https://www.telegraph.co.uk/news/2020/03/07/echoes-isil-armed-groups-loot-priceless-artefacts-across-sahel/> (reporting the looting of “hundreds” of archaeological sites in “one of the richest [cultural] regions in the world.”); see also Owen Jarus, *Blood Antiquities’ Looted from War-Torn Yemen Bring in \$1 Million at Auction*, LIVE SCI. (June 5, 2019), <https://www.livescience.com/65641-yemen-blood-antiquities-investigation.html> (reporting a significant amount of cultural property with little to no provenance information has been sold in the past five years).

⁴⁹ JAMES CUNO, *WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE* xviii (Princeton Univ. Press, 4th ed. 2011). Cuno currently serves as the President and CEO of the J. Paul Getty Trust. For more information, see *Mr. James Cuno*, AMER. ACAD. ARTS & SCI., <https://www.amacad.org/person/james-cuno> (last visited Sept. 1, 2020).

⁵⁰ See CUNO, *supra* note 49, at 9–15.

⁵¹ *Id.* at xix.

The mantra of “finders’ keepers” is no doubt woven within the quilt of Western civilization. Cultural internationalism presents itself in society as an expression of power. The Visigoths looted and displayed cultural goods in the third century, the Romans in the fourth century, and then the Vandals in the fifth century.⁵² Both Napoleon Bonaparte and Adolf Hitler developed intricate plans to build museums that would showcase the world’s greatest treasures.⁵³ Cuno acknowledges that “[p]ossession is power, and notions of property include notions of control.”⁵⁴

B. Ownership is Rarely Clear

Perhaps the most famous example of complex ownership rights is the Parthenon, otherwise known as Parthenon Marbles. In 1687, the Parthenon was ravaged by over seven hundred cannonballs when Venetian forces of a Christian Holy League assembled against the Ottoman Empire.⁵⁵ For over a century, the Parthenon crumbled in disrepair.⁵⁶ Thomas Bruce, the Seventh Earl of Elgin, was serving as a British Ambassador to the Ottoman Empire when he removed the surviving sculptures on the Parthenon and transported them to England.⁵⁷ Whether the Ottomans gave Bruce permission to take the amount of sculptures he did is in dispute.⁵⁸ Not all the missing Parthenon Marbles remain in England.⁵⁹ Scholars have noted Bruce had struggled with his image after his wife’s public affair and he hoped the Marbles would restore his credibility.⁶⁰ The marbles were shipped to England by the Royal Navy and government transport vessels.⁶¹ In 1816, Bruce sold the Marbles to the British Museum, where they have been displayed since.⁶² Even in 1816, the acquisition was not without outcry; Lord Byron, in the narrative poem *Childe Harold’s Pilgrimage*, “compared the imperialism of the removal of

⁵² See Roehrenbeck, *supra* note 31, at 191.

⁵³ *Id.* at 192.

⁵⁴ See CUNO, *supra* note 49, at 15.

⁵⁵ *Id.* at x.

⁵⁶ Allison C. Meier, *Wait, Why Are the Parthenon Marbles in London?*, JSTOR DAILY (Dec. 3, 2019), <https://daily.jstor.org/wait-why-are-the-parthenon-marbles-in-london/>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ The Louvre and Vatican are two institutions that have missing fragments of the Marbles. Additionally, there are reportedly missing sculpture heads in Copenhagen, and other pieces in Heidelberg, Vienna, and Palermo. See John Henry Merryman, *Thinking about the Elgin Marbles*, 83 MICH. L. REV. 1881, 1884 n.14 (1985).

⁶⁰ See Meier, *supra* note 56.

⁶¹ *Id.*

⁶² *Id.*

the marbles to the ancient Roman practice of plundering trophies.”⁶³ In the twentieth century, British art historian Kenneth Clark, a former Museum Trustee, argued for the repatriation of the Marbles as early as 1943, suggesting that the British government should build a new museum in Athens near the Parthenon, maintaining that it should be done “on sentimental grounds, as an expression of our indebtedness to Greece.”⁶⁴

After the Ottoman Empire fell, Athens was torn by international and internal conflict for decades. Today’s independent Greek government, the Third Hellenic Republic, took power in July 1974.⁶⁵ The Marbles, who shared the trauma of incessant destruction and turmoil, “became an emotional symbol of newly independent Greece.”⁶⁶ The Greek government made its first official request for their return in 1983.⁶⁷ The Museum has repeatedly denied these requests⁶⁸ Arguing the Greek’s calls for repatriation are “an instrument of national politics,” the Museum maintains that the current Greek government does not necessarily have an ownership interest: “[i]n artistic terms the sculptures are clearly part of a process that embraces Egypt and Mesopotamia, Turkey, India, Rome and the whole of Europe.”⁶⁹

The Parthenon Marbles presents a complex issue of ownership in that there are multiple factors at play: varying political jurisdiction, geography considerations, and also the attention to preserving deteriorating cultural property. It cannot be understated the high likelihood the Parthenon Marbles would have been taken by another had Bruce not shipped the Parthenon.⁷⁰ This is not necessarily justification, but an important consideration. Should an inquiry end when heritage is established? Or should factors such as resources, preservation, and political stability be considered? Furthermore, what about transactions that occurred legally, yet still resulted in a loss of heritage—should groups or

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ CUNO, *supra* note 49, at x.

⁶⁷ See Merryman, *supra* note 59; See also *Greece to Ask Britain for the Elgin Marbles*, N.Y. TIMES (May 15, 1983), <https://www.nytimes.com/1983/05/15/world/greece-to-ask-britain-for-the-elgin-marbles.html> (reporting that Greek Government will officially ask for the Parthenon Marbles to be returned).

⁶⁸ See Macgregor, *supra* note 23.

⁶⁹ *Id.*

⁷⁰ See Meier, *supra* note 56 (noting the Parthenon had suffered from looting for over a century); see also CUNO, *supra* note 49, at x (detailing the civil unrest, vandalism, and destruction happening at the Parthenon during the reign of the Ottoman Empire).

nations be able to revoke prior transactions if they can establish a similar origin? These are not simple questions. While international law has sought to alleviate the lack of consent surrounding cultural property acquisition, it has achieved little in inspiring institutions to halt acquisitions or repatriate cultural property.

II. INTERNATIONAL LAW DOES NOT COMPEL BRITAIN TO RETURN DISPUTED CULTURAL PROPERTY.

There are two prominent international conventions that guide the discussion of repatriation and ownership: The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 UNESCO Convention),⁷¹ and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the UNIDROIT Convention).⁷²

A. 1970 UNESCO Convention

The UNESCO Convention applies only to cultural goods illicitly acquired three months after a State has become a party to the treaty.⁷³ The UNESCO Convention was groundbreaking at the time of its 1970 inception. Subtly echoing a cultural nationalist philosophy, the Convention acknowledged that the “export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin.”⁷⁴ The purpose of the UNESCO Convention was to develop a cooperative legal framework that would serve to prohibit and apply international pressure preventing the illicit exportation of cultural property.⁷⁵ The UNESCO Convention labeled any cultural property imported, exported, or transferred contrary to the conditions set forth in the Convention as “illicit.”⁷⁶ Illicit is given broad latitude—it is defined as any trade in cultural property that is “effected contrary to the provisions adopted under this Convention by the States

⁷¹ United Nations Educational, Scientific and Cultural Organization, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 2, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

⁷² Int'l Institute for the Unification of Private Law [UNIDROIT], *Convention on Stolen or Illegally Exported Cultural Objects*, Jun. 24, 1995, 2421 U.N.T.S. 457.

⁷³ *Id.* art 21.

⁷⁴ *Id.* art 2.

⁷⁵ *Id.*

⁷⁶ *Id.* art. 3.

Parties thereto.”⁷⁷ As noted by Merryman, this means that the definition of “illicit” expands and narrows by the laws of the participating states.⁷⁸ For this reason, critics of UNESCO have labeled it “a blank check.”⁷⁹ Thus, it is the participating countries that define illicit, rather than a definition achieved through the engagement of scholars, museum curators, dealers, or other experts.⁸⁰ James Cuno criticizes this policy for its lack of engagement and its consequences: “[i]t leaves States free to make their own self-interested decisions about whether or not to grant or deny export permission in specific cases . . . the Convention condones and supports the widespread practice of over-retention . . . hoarding of cultural property.”⁸¹

Moreover, the UNESCO Convention requires signing countries to “take necessary measures . . . to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State which has been illegally exported after entry into force of this convention, in the States concerned.”⁸² The United Kingdom accepted the UNESCO Convention on January 8, 2002.⁸³ While the UNESCO Convention provides a framework for illicitly traded goods after 1970, it provides no legal recourse for countries seeking the return of long-lost, long-disputed cultural goods. Consequently, while the United Kingdom may be a signed party to the UNESCO Convention, the Museum is under no binding obligation to repatriate the most controversial cultural property on display, as they were acquired prior to 1970 (the Rosetta Stone was acquired in 1801 by British soldiers after defeating Napoleon in Egypt,⁸⁴ the Parthenon Sculptures were purchased in 1816,⁸⁵ and another

⁷⁷ *Id.*

⁷⁸ See Merryman, *supra* note 44, at 844 (“[I]f Guatemala were to adopt legislation and administrative practices that, in effect, prohibited the export of all pre-Columbian artifacts, as it has done, then the export of *any* pre-Columbian object from Guatemala would be “illicit” under UNESCO 1970.”).

⁷⁹ *Id.*

⁸⁰ *Id.* at 845.

⁸¹ CUNO, *supra* note 49, at 15.

⁸² United Nations Educational, Scientific and Cultural Organization, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 7, Nov. 14, 1970, 823 U.N.T.S. 231

⁸³ States Parties List in Alphabetical Order, UNESCO, <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha> (last visited Sep. 8, 2020).

⁸⁴ See *Egyptian Museum Calls for Rosetta Stone to be Returned from UK after 200 Years*, THE TELEGRAPH (Nov. 6, 2018, 6:33 PM), <https://www.telegraph.co.uk/news/2018/11/06/egyptian-museum-calls-rosetta-stone-returned-uk-200-years>.

⁸⁵ See Meier, *supra* note 56.

beloved cultural artifact, Easter Island's Hoa Hakananai'a,⁸⁶ was acquired in 1869).

Despite the UNESCO's Conventions best efforts, the Convention failed to provide any consequences should a group or country violate its terms.⁸⁷ However, the UNESCO Convention provided an example for countries to design their own laws and address the illegal acquisition of cultural property.⁸⁸ Because these agreements have failed to halt the possession of illicitly traded cultural property, the argument for repatriation has strengthened across the globe.⁸⁹ Global leaders met again in 1995 to discuss a supplemental treaty for illicit exportation that could result in enforceable legal actions.⁹⁰

B. The UNIDROIT Convention

In 1995, the UNIDROIT Convention was enacted to supplement the UNESCO Convention, as the UNESCO Convention lacked the ability to apply legal consequences on those who violated its pact.⁹¹ The UNIDROIT Convention states that "[t]he possessor of a cultural object which has been stolen shall return it."⁹² While the UNIDROIT Convention considers the scenario where a collector may come unknowingly come into possession of stolen cultural property, the UNIDROIT Convention still demands repatriation and restitution: "[t]he possessor of a stolen cultural object required to . . . payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object."⁹³

The UNIDROIT Convention also establishes a statute of limitations for three years from when a claimant gained knowledge of the cultural property being possessed by an unlawful possessor.⁹⁴ However, a contracting state "may declare that a claim is subject to a time limitation

⁸⁶ Hoa Hakananai'a, THE BRITISH MUSEUM, https://research.britishmuseum.org/research/collection_online/collection_object_details.aspx?objectId=512302&partId=1 (last visited Dec. 20, 2020).

⁸⁷ See Roehrenbeck, *supra* note 31, at 196.

⁸⁸ See Seiff, *supra* note 47.

⁸⁹ See Merryman, *supra* note 44, at 845.

⁹⁰ See Roehrenbeck, *supra* note 31, at 196.

⁹¹ Int'l Institute for the Unification of Private Law [UNIDROIT], *Convention on Stolen or Illegally Exported Cultural Objects*, Jun. 24, 1995, 2421 U.N.T.S. 457.

⁹² *Id.* art. 3.

⁹³ *Id.* art. 4.

⁹⁴ *Id.* art. 3.

of 75 years or such longer period as is provided in its law.”⁹⁵ Furthermore, claims for “cultural object[s] displaced from a monument, archaeological site or public collection in a Contracting State making such a declaration shall also be subject to [75 years or more].”⁹⁶

While the UNIDROIT Convention provides a substantial legal framework for repatriation and restitution claims, it faces the same challenges as the UNESCO Convention: its provisions apply to cultural goods stolen or trafficked *after* the treaty’s ratification.⁹⁷ Only 22 nations have signed the UNIDROIT Convention.⁹⁸ Critically, the United Kingdom has not signed the treaty.⁹⁹ Consequently, the Museum is not bound by the UNIDROIT Convention to return cultural property.¹⁰⁰

III. THE BRITISH MUSEUM’S INTERNAL STRUCTURE PREVENTS REPATRIATION

The Museum is a unique legal creature, being the first museum opened for the public and the first to be governed by a Board of Trustees.¹⁰¹ As noted eloquently by Museum Director Neil MacGregor, “[p]arliament hit upon a solution of extraordinary ingenuity and brilliance. They borrowed from private family law the notion of the trust.”¹⁰² More formerly known as “fiduciary duty law,” a “fiduciary” is “Someone who is required to act for the benefit of another person on all matters within the scope of their relationship.”¹⁰³ A *trustee* is “Someone who stands in a fiduciary or confidential relation to another; esp., one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary.”¹⁰⁴ Put simply, fiduciary law governs the roles and obligations a trustee must follow in preserving property for a beneficiary. “The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* art.10.

⁹⁸ *Id.*

⁹⁹ Alphabetical List of Parties to the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, UNIDROIT, <https://www.unidroit.org/status-cp> (last updated Dec. 2, 2019).

¹⁰⁰ *Id.*

¹⁰¹ See Williams, *supra* note 25, at 198 (noting that other museums and collections are “constituted differently because common law is not recognized in the Roman law tradition.”).

¹⁰² See MacGregor, *supra* note 23.

¹⁰³ *Fiduciary*, Black’s Law Dictionary (11th. ed. 2019).

¹⁰⁴ *Trustee*, Black’s Law Dictionary (11th. ed. 2019).

to the property or affairs of another, B.”¹⁰⁵ In the case of the Museum, the Board of Trustees are appointed to manage the collection, which is held in trust for the benefit of the general public, who are beneficiaries.¹⁰⁶

A. Creation of the British Museum

The British Museum owes its existence to the Last Will and Testament of a wealthy physician, Sir Hans Sloane, who built his private collection with the intent of forming the foundation for a future museum.¹⁰⁷ Upon his death in 1753, he had curated an immense collection: nearly 50,000 volumes of manuscripts and books of prints; 32,000 medals and coins; 12,506 “vegetable substances”; 5,843 shells; and 756 “humana.”¹⁰⁸ His carefully drafted Last Will and Testament offered the collection to Parliament in exchange for 20,000 pounds, conditioned on the establishment of a Board of Trustees to oversee the collection that follows his testamentary intent.¹⁰⁹ Describing the effort in cultivating his collection and desire to keep it together, Sir Sloane writes:

“. . . and having through the cour[s]e of many years with great labour and expence, gathered together whatever could be procured either in our own or foreign countries that was rare and curious; and being fully convinced that nothing tends to more to rai[s]e our ideas of power, wi[s]dom, goodne[s]s, providence I do Will and de[s]ire that for the promoting of the[s]e noble ends . . . my collection in all its branches may be, if po[ss]ible, kept and pre[s]erved together whole and [e]ntire”¹¹⁰

Uniquely, Sir Sloane’s Last Will and Testament set out a requirement that a Board of Trustees be appointed to protect his testamentary intent. In his own words, he writes “[a]nd I do hereby further reque[s]t and desire, that the tru[s]tees hereby appointed . . . will concur, as far in them

¹⁰⁵ *The Significance of Being identified as Fiduciary*, UK PALMERS COMPANY LAW § 5A.277 quoting *White v Jones* [1995] A.C. 207 at 271.

¹⁰⁶ See MacGregor, *supra* note 23 (“The rest of the world has rights to use and study the collection on the same footing as British citizens.”).

¹⁰⁷ Sarah Zhang, *The Museum of Colonialism*, THE ATLANTIC (Sept. 16, 2017), <https://www.theatlantic.com/science/archive/2017/09/hans-sloane-british-museum/539763/>.

¹⁰⁸ *Id.*

¹⁰⁹ Sir Hans Sloane, *Authentic Copies of the Codicils Belonging to the Last Will and Testament of Sir Hans Sloane, Bart. Deceased, Which Relate to His Collection of Books and Curiosities 12* (published by order of executors) (1753) (online through the British Museum) <https://archive.org/details/authentic-copieso00sloa/page/11/mode/2up>. Author’s note: there have been changes to spelling to modify the ease of reading for a modern English reader.

¹¹⁰ *Id.* at 3–4.

re[s]pectively lies, in promoting this my i[n]tention] . . . with their best endeavours”¹¹¹ Sir Sloane was also immensely concerned with accessibility to the public and sought to restrict control by the British Government. Sir Sloane envisioned a society where the average person could gain an education about the world for free in their own community.¹¹² He writes “[the collection may be] . . . vi[s]ited and [s]een by all persons”¹¹³

Shortly thereafter, Parliament accepted the offer presented in Sir Sloane’s Last Testament and passed the British Museum Act of 1753, which founded the Museum and recognized it as a corporation managed by a Board of Trustees.¹¹⁴ Despite being named “the British Museum,” it was done so not to establish heritage ties to Britain, but instead to connect it with the British people and to avoid connotations of glamour and royalty.¹¹⁵ The British Museum Act of 1753 codified Sir Sloane’s testamentary intentions into binding British law. Consequently, the Board of Trustees became legally bound to protect the collection not only by common-law fiduciary duty principles, but also by British law.

As noted by the Museum’s Deputy Director Jonathan Williams, the Board’s first course of action was to project a mission statement upon its formation.¹¹⁶ While it seriously considered “*Bono communi*” (for the common good), the Board chose “*Bonarum artium cultoribus*,” (for the devotees of humane pursuits).¹¹⁷ The Museum’s mission statement would become symbolic of its cultural internationalist philosophy that would guide the Museum in its acquisitions.

B. Collection Growth and Rise to International Prominence

Over time, changes were made to the British Museum Act to account for administration issues as the Museum expanded well beyond Sir Sloane’s collection.¹¹⁸ The British Museum Act of 1963—which remains in effect to this day—replaced the British Museum Act of 1902 and all its

¹¹¹ *Id.* at 16.

¹¹² *Id.* at 19.

¹¹³ *Id.*

¹¹⁴ See Williams, *supra* note 25, at 195.

¹¹⁵ See MacGregor, *supra* note 23 (“Unlike those princely royal collections across Europe, where the subjects were from time to time graciously admitted at the will of the sovereign (as was still the case with the royal pictures here in Britain), the new museum in London was to be the collection of all citizens, where they could come free of charge and as of right.”).

¹¹⁶ See Williams, *supra* note 25, at 195 n.1, 214.

¹¹⁷ *Id.*

¹¹⁸ See British Museum Act 1902, 1 Edw. 7 c. 12; see also British Museum Act 1963, c. 24 (UK).

prior amendments.¹¹⁹ In the early 1960s, the British Museum Act of 1963 created the Natural History Museum, with its own Board of Trustees, separate from the Museum.¹²⁰

Today, the Museum is led by a Director and a Board of Trustees.¹²¹ The British Museum Act of 1963 provides for the composition of the Trustees and their powers.¹²² Trustees are appointed to serve a four-year term, which may be renewed with the Prime Minister's permission.¹²³ A Trustee's term is prohibited from exceeding ten years.¹²⁴ Today, a quick look of the Museum's Board of Trustees sets forth an image of an incredibly accomplished and privileged panel—CEOs, investment bankers, former solicitors, award-winning artists, and executive directors compose the Board.¹²⁵ Most important, Trustees are given the “duty” to “keep the objects comprised in the collections of the Museum . . . except in so far as they may consider it expedient to remove them temporarily for any purpose connected with the administration of Museum and the care of its collections.”¹²⁶ Furthermore, “[o]bjects vested in the Trustees as part of the collections of the Museum shall not be disposed of by them otherwise than under section 5 or 9 of this Act [or section 6 of the Museums and Galleries Act 1992].”¹²⁷

1. Disposing Cultural Property from the Museum's Collection. — Under Section 5 of the 1963 British Museum Act, Trustees are enabled to dispose of an object under three circumstances: one, if there is a duplicate; two, if it appears to have been produced *after* 1850 of “printed matter” to which the Trustees have a copy of; or three, if the object is “unfit” and is a “detriment to the interests of students.”¹²⁸

2. Loan of Cultural Property to Other Museums. — Trustees are permitted to loan cultural property to other museums.¹²⁹ Trustees are required to consider the following factors: (1) the interests of students and

¹¹⁹ See *Attorney General v. British Museum Trustees* [2005] EWHC 1089 (Ch), [3] (Eng.).

¹²⁰ British Museum Act 1963, c. 24, § 1(1).

¹²¹ *Governance*, BRITISH MUSEUM, https://www.britishmuseum.org/about_us/management.aspx (last visited Dec. 20, 2020).

¹²² British Museum Act 1963, c. 24, § 1(1).

¹²³ See *Governance*, *supra* note 121.

¹²⁴ British Museum Act 1963, c. 24, § 1, 8, sch. 1.

¹²⁵ See *Governance*, *supra* note 121.

¹²⁶ British Museum Act 1963, c. 24, § 3(1).

¹²⁷ *Id.* § 3(4).

¹²⁸ *Id.* § 5(1)(b)–5(1)(c).

¹²⁹ *Id.* § 4.

other persons visiting the Museum; (2) the physical condition and degree of rarity of the object in question; and (3) any risks the property may be exposed to.¹³⁰ Loaning may not be a means for disposal; the Trustees must predetermine the time period property can be lent and under what conditions.¹³¹

The Museum claims Greece has not inquired into a loan of the Parthenon Marbles but that the Museum would be amenable to such an agreement.¹³² The Museum regularly participates in loaning of objects to museums around the world.¹³³

IV. OPPORTUNITIES FOR REPATRIATION ARE LIMITED

Unlike most museums around the world, whether the Board of Trustees may repatriate a cultural object from its collection also depends on British charitable trust law.¹³⁴ Accordingly, common law surrounding trusts and estates and ex-gratia payments come into play.

A. The Law of Ex Gratia Payments in Britain

In the United Kingdom, an “*ex gratia* payment”—latin for “by favor,”¹³⁵—is an ambiguous term applied to payments made by a charity that feels morally compelled to give but does not necessarily want to admit wrongdoing, acknowledge legitimacy, or take responsibility.¹³⁶ A common example may be a Trustee including a recently-born grandchild into the will of a recently deceased testator.¹³⁷ By including an *ex gratia* payment to the child, the Trustee does not acknowledge the will as incorrect but instead makes a modification to relieve moral obligations.¹³⁸ Another example may be a testator who promises property to a beneficiary but dies

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *The Parthenon Sculptures: The Trustees’ Statement*, THE BRITISH MUSEUM, <https://www.britishmuseum.org/parthenon-sculptures-trustees-statement> (last visited Dec. 20, 2020).

¹³³ *How to Borrow British Museum Objects*, THE BRITISH MUSEUM, <https://www.britishmuseum.org/our-work/how-borrow-british-museum-objects> (last visited Dec. 20, 2020). See also Martin Bailey, *Lack of Space at the British Museum Sees Major Loan of Assyrian Collection to Getty*, THE ART NEWSPAPER (Sept. 10, 2019 11:50 BST), <https://www.theartnewspaper.com/news/no-room-at-the-british-museum>.

¹³⁴ See generally Williams, *supra* note 25; Macgregor, *supra* note 23.

¹³⁵ The Charity Commission, *Ex Gratia Payments by Charities*, GOV.UK (May 1, 2014), <https://www.gov.uk/government/publications/ex-gratia-payments-by-charities-cc7/ex-gratia-payments-by-charities-cc7>.

¹³⁶ *Id.*

¹³⁷ The Charity Commission, *Guidance*, GOV.UK (May 1, 2014), <https://www.gov.uk/government/publications/ex-gratia-payments-by-charities-cc7>.

¹³⁸ *Id.*

before she is able to record that intent in her will.¹³⁹ Again, the Trustee does not want to invalidate the will but seeks to make a modification that does what is just while preserving the rest.¹⁴⁰

While the law of *ex gratia* payments may seem limited to trusts and estates surrounding wills, the concept of *ex gratia* payments has been referenced as the legal argument for repatriation claims, too. *In re Snowden* was a landmark 1970 case that analyzed the purpose and limitations of *ex gratia* payments. In the case *Attorney General v. British Museum Trustees*,¹⁴¹ counsel for the Museum's Board of Trustees argued that *Snowden's* precedent enabled the Museum to repatriate looted artwork to Jewish families. *Attorney General v. British Museum Trustees* serves as the exclusive, primary caselaw on the Museum's ability to repatriate cultural property. The case is critical to understanding this aspect of the law because it ultimately informs the moral obligation side of the argument that serves as the core of all cultural property repatriation claims.

1. *In re Snowden*. — *Snowden* was a landmark case in British charitable trust law in that provided charitable trustees with the ability to seriously consider “moral claims” against them.¹⁴² Prior to 1969, charity trustees had no choice but to strictly follow their charity's objectives, regardless of the moral consequence.¹⁴³ However, the court in *Snowden* held that a court or the Attorney General may authorize a charitable trustee to make an *ex gratia* payment in the specific circumstance where “if the charity were an individual it would be morally wrong of him to refuse to make the payment.”¹⁴⁴ In Mr. Snowden's will, he specified he left all shares held at death to three named beneficiaries in specific proportions.¹⁴⁵ He also left behind pecuniary legacies and the net residue of the estate to several charities.¹⁴⁶ However, prior to his death, Mr. Snowden sold the company shares.¹⁴⁷ This left the initial three named beneficiaries—family

¹³⁹ The Charity Commission, EX GRATIA PAYMENTS BY CHARITIES – CASE STUDIES [#] (2013) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/396698/Ex_gratia_payments_by_charities___case_studies.pdf.

¹⁴⁰ *Id.*

¹⁴¹ *Attorney General v. British Museum Trustees* [2005] EWHC 1089 (Ch), [34]–[37] (Eng.).

¹⁴² See Jonathan Burchfield, *Ex Gratia Payments by Charities from Estates*, 6 PRIVATE CLIENT BUS. 416, 416–20 (1994).

¹⁴³ *Id.* at 416.

¹⁴⁴ *Id.*; See also *Snowden, Re* [1970] EWHC (Ch) 700.

¹⁴⁵ Jonathan Burchfield, *Ex Gratia Payments by Charities from Estates*, 6 PRIVATE CLIENT BUS. 416, 417 (1994).

¹⁴⁶ *Snowden, Re* [1970] EWHC (Ch) 700.

¹⁴⁷ *Id.*

members of Mr. Snowden—omitted entirely from his will.¹⁴⁸ In response, the included charities offered to give up proportions of their shares to benefit these omitted beneficiaries. The Court explored whether the Attorney General had authorization to allow the charities to complete the transaction and ultimately decided that it was able to do so.¹⁴⁹

The *Snowden* case was powerful in that it was the first to recognize a trustee performing beyond the scope of its fiduciary duty in the name of ethics. Given that charities exist to serve the public, the court recognized the counter-intuitiveness of prohibiting charities from following their moral compass.¹⁵⁰ However, this exception is “slender.”¹⁵¹ The provision was intended to help in circumstances where a beneficiary may have been unintendedly omitted from a will, such as from a “legal or technical oversight,” which was the case in *Snowden*.¹⁵² It was not meant to include new beneficiaries that the testator never intended.¹⁵³

2. *Charities Act of 1993*. — Nearly twenty-three years after *Snowden*, Parliament enacted The Charities Act of 1993, which provided charities with the power to make *ex gratia* payments in response to a moral obligation.¹⁵⁴ It recognized the event in which charity trustees may have no legal power to take a certain action, but may feel a moral obligation to do so.¹⁵⁵ In these situations, the law permits charity trustees to contact the Attorney General and ask for permission to deviate from their fiduciary duty.¹⁵⁶ In 2011, the Attorney General’s power was expanded and may now be exercised by the The Charity Commission for England and Wales.¹⁵⁷ This Commission serves a multitude of roles in governing charities.¹⁵⁸ It governs on behalf of the crown and serves to foster the public’s confidence in charities by ensuring charities are complying with administrative standards.¹⁵⁹ However, the Commission is encouraged and in some cases, required to refer the application to the Attorney General.¹⁶⁰ However, the

¹⁴⁸ *Id.*

¹⁴⁹ See Burchfield, *supra* note 145, at 417.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See The Charity Commission, *supra* note 139.

¹⁵³ See Burchfield, *supra* note 145, at 417–18.

¹⁵⁴ Charities Act 1993, c. 10 (UK).

¹⁵⁵ *Id.* § 27(1).

¹⁵⁶ *Id.* § 27(2).

¹⁵⁷ Charities Act 2011, c. 25, § 106 (UK).

¹⁵⁸ *Id.* §§ 13–15.

¹⁵⁹ *Id.* § 15(2).

¹⁶⁰ *Id.* § 106.

loophole for charities to engage outside the scope of their duty to take care of a moral interest is still present within the law.¹⁶¹

3. *Attorney General v. British Museum Trustees*. — The 2005 cultural property law case *Her Majesty's Attorney General v. British Museum Trustees*,¹⁶² serves as the singular authority guiding the British Museum's ability to repatriate cultural property. In *British Museum Trustees*, the High Court of Justice Chancery Division struck down the Board of Trustees' decision to repatriate looted artifacts from Jewish families during the Nazi regime.¹⁶³

In 2002, the Museum's Board of Trustees was informed by the Commission for Looted Art in Europe (CLAE) that the Museum possessed artwork belonging to a Jewish family in Czechoslovakia, who suffered looting at the hands of the Gestapo in 1939.¹⁶⁴ The Trustees purchased these paintings in 1946.¹⁶⁵ Compelled by CLAE's plea, the Trustees agreed, in writing, to return the artwork if it were deemed permissible by law.¹⁶⁶ The Trustees proceeded by contacting the Attorney General, asking whether a return was possible.¹⁶⁷ Writing to the Attorney General, the Trustees and Museum Director Neil MacGregor "recogni[z]ed the scale of destruction and looting of historical monuments and private and national collections fell into a category which by the standards of the time was exceptional and required urgent mitigation during extensive redress."¹⁶⁸ Pursuant to the Charities Act of 1993, the Trustees wrote to the Attorney General seeking permission to dispose of the paintings. The Trustees urged the Attorney General to follow the analysis in *Snowden*:

"... if the Attorney-General were to take a positive view of his powers to sanction Snowden-type action in relation to objects now comprised in a national collection and subject to an acknowledged holocaust restitution claim, he would offer a straightforward solution to the debate in the present case, in respect of which equity requires a swift solution."¹⁶⁹

¹⁶¹ *Id.*

¹⁶² *Attorney General v. British Museum Trustees* [2005] EWHC 1089 (Ch), (Eng.).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at [2]–[6].

¹⁶⁵ *Id.* at [2].

¹⁶⁶ *Id.* at [7].

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at [14].

¹⁶⁹ *Id.* at [7].

A question split amongst property law, fiduciary duty law, and ethics, the Attorney General sought an answer from the High Court of Justice Chancery Division.¹⁷⁰

Sir Andrew Morrit, adjudicating the case as Vice Chancellor,¹⁷¹ conducted his legal analysis on the presumption that the heirs of the paintings had no rightful claim, “either in law or in equity,” to the paintings.¹⁷² Consequently the legal analysis that followed did so on the assumption that the paintings were “. . . vested in the Trustees as part of the collections of the Museum.”¹⁷³ Not all legal scholars have agreed with Vice Chancellor’s decision to assume this fact.¹⁷⁴ The Vice Chancellor also acknowledged the existence of the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, a 1943 declaration by the United Kingdom to take a stand against looted artifacts that occur in enemy-controlled territories, in addition to noting the variety of steps British actors took to reduce the harm caused by looted artwork.¹⁷⁵

Yet, despite the Board of Trustee’s commitment to right a moral wrong and notwithstanding the United Kingdom’s commitments to prevent dispossession of looted cultural property as a result of Nazi Germany, the Court found that the Museum Trustees lacked the ability to return the artwork and remained bound to its fiduciary duty—preserving the artwork in its collection for the benefit of the public.¹⁷⁶ The Vice Chancellor

¹⁷⁰ *Id.* at [8].

¹⁷¹ In 2005, The Court of Chancery was adjudicated by the Vice Chancellor. The position is now referred to as the Chancellor of the High Court. The Chancery Division focuses on property disputes and holds an “ex ficio” title at the Court of Appeal. For more information, see *Chancellor of the High Court*, JUDICIARY.UK, <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/profile-chancellor-hc/> (last visited Mar. 25, 2020).

¹⁷² *Attorney General v. British Museum Trustees* [2005] EWHC 1089 (Ch), [9] (Eng.).

¹⁷³ *Id.*

¹⁷⁴ Norman Palmer, a London barrister who specialized in repatriation law, has taken up the consideration that the British Museum never truly owned the holocaust artwork, and thus there is the distinct possibility that no relevant statutory law actually prohibits the transfer. Palmer was incredibly influential in persuading United Kingdom authorities to agree to the 1970 UNESCO Convention in 2002. Pointing to the Limiting Act, he writes, “The 1939 [Limiting] Act extinguishes the title of the person from whom the object was unlawfully taken, but it does not explicitly create a new ownership in anyone else.” Palmer argues that the British Museum maintained only a possessory title, rather than ownership truly being *vested* in accordance with Section 3(4) of the British Museum Act. For more information, see Norman Palmer, *Responding to Conscience: The Holocaust (Return of Cultural Objects) Act of 2009*, 15 ART ANTIQUITY & L. 87 (2010).

¹⁷⁵ See *Attorney General v. British Museum Trustees* [2005] EWHC 1089 (Ch), [10]–[14] (Eng.) (noting the efforts the British government has made to prevent the acquisition of dispossessed property).

¹⁷⁶ *Id.* at [47].

enumerated the opportunities for when a Trustee may dispose of an object: (1) if it is a duplicate; (2) unfit to be retained; or (3) if it is useless.¹⁷⁷ Unsurprisingly, the Vice Chancellor stated the paintings at issue failed to fit into any of these categories.¹⁷⁸ The Court then proceeded to consider common law cases involving *ex gratia* payments, where trustees have been authorized to exercise beyond their duty.¹⁷⁹ However, the Vice Chancellor distinguishes these cases from the case at hand, noting that in none of those cases was there a statutory prohibition at play.¹⁸⁰ In simple terms, those cases involved only a Trustee going beyond what was expected—there was no statute expressly saying that the Trustee could not act in such a manner.¹⁸¹ Here, the British Museum Act of 1963 stated plainly and clearly that under no circumstances—except those enumerated as exceptions—may a Trustee dispose of an object in its collections.¹⁸²

As a result, the Court held the Museum's Trustees were bound to preserve the collection: "I reject the argument . . . moral considerations may be relevant to an exercise of the power to compromise they may alone justify the non-observance of § 3(4)¹⁸³ in relation to objects which are part of the collections. They are, alone, incapable of disapplying § 3(4) or justifying a failure to observe its terms."¹⁸⁴ Despite the persuasiveness of the Charities Act of 1992 and *Snowden*, no legal authority could override the testamentary intent codified in the British Museum Act of 1963 and the fiduciary duty law embedded within it.

B. Britan May Amend a Moral Wrong Through Legislation

Notably, four years later in 2009, the Holocaust (Return of Cultural Objects) Act of 2009 was passed, giving British museums a way to repatriate and not violate the British Museum Act of 1963.¹⁸⁵ The Act empowered the Board of Trustees, along with other museums, the temporary power to "return certain cultural objects on grounds relating to

¹⁷⁷ *Id.* at [23].

¹⁷⁸ *Id.* at [29], [38]–[49].

¹⁷⁹ *Id.* at [29].

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at [44]–[45].

¹⁸³ The Vice Chancellor is referring to § 3(4) of The British Museum Act 1963, stating objects may not be disposed of unless otherwise permitted by statute.

¹⁸⁴ *British Museum Trustees*, [2005] EWHC 1089 (Ch) at [47].

¹⁸⁵ Holocaust (Return of Cultural Objects) Act 2009, c.16 (UK).

events occurring during the Nazi era” for a period of ten years.¹⁸⁶ While the process required extensive preparation and advisory opinions, the Act permitted repatriation if the cultural property was lost due to the evils that occurred during the Holocaust.¹⁸⁷

The Holocaust Act of 2009’s passage is evidence that Parliament holds the capacity to relax the statutory requirements that bind the Museum’s Trustees to their fiduciary duty. The possibility exists that someday, with the assistance of Parliament, the Trustees could repatriate controversial cultural property, such as the Parthenon Marbles or the Rosetta Stone.

However, such an event assumes two critical propositions: first, that Parliament would enact such legislation; and two, that the Museum’s Board of Trustees would be willing to part with such cultural property. It cannot be assumed that either party would be willing to part with cultural property in response to disputed ownership rights. Even though the Vice Chancellor presumed the Museum had rightful ownership over the paintings in *British Museum Trustees*, there was little disagreement whether the Museum had actual ownership—the Trustees were eager to return the artwork to correct a moral wrong.¹⁸⁸

The request to repatriate Gestapo-looted artwork to Jewish families differs from current repatriation requests. Looting during the Holocaust was committed by a common enemy: Nazi Germany.¹⁸⁹ Contemporary calls for repatriation differ in that much of the cultural property was previously taken by Britain’s modern allies, if not taken by Britain itself.¹⁹⁰ As noted previously, cultural property has political power.¹⁹¹ Such a profoundly disputed object such as the Parthenon Marbles would arguably have more of a political impact than a cultural one. With the EU demanding the Parthenon Marbles’ return in exchange for a trade agreement,¹⁹² and multiple world leaders demanding its return,¹⁹³ whether Parliament chooses to lend the opportunity to the Trustees will depend on how willing the United Kingdom is to exchange that political power. Should the United

¹⁸⁶ *Id.* § 3.

¹⁸⁷ *See id.*

¹⁸⁸ *British Museum Trustees*, [2005] EWHC 1089 (Ch) at [14].

¹⁸⁹ Holocaust (Return of Cultural Objects) Act 2009, § 3 (UK).

¹⁹⁰ *See, e.g.*, CUNO, *supra* note 49, at xii (noting the French initially took the Rosetta Stone).

¹⁹¹ *See* CUNO, *supra* note 49, at 9–15.

¹⁹² *See* Payne, *supra* note 12.

¹⁹³ *Id.*; *See also* Magra, *supra* note 11.

Kingdom decide to repatriate the Parthenon Marbles or any other disputed cultural property, the general public may infer that it is doing so out of committing a wrong.

And of course, beyond Parliament is the Board of Trustees. They must agree to the repatriation of any property.¹⁹⁴ Given the nature of the position, it is nearly certain that all members of the Board are cultural internationalists, guarding the collection for the preservation and education of the general public. Richard Lambert, Chair of the British Museum Trustees, opined in a letter to the British public in 2018, stressing the Trustees are in the best position to care for the Parthenon Marbles, as they are focused on research, preservation, and accessibility as opposed to seeing the Parthenon Marbles “as negotiating chips in a political debate.”¹⁹⁵

Furthermore, the Museum Trustees have been transparent in their positions regarding repatriation, especially regarding the Parthenon Marbles. They assert the Marbles are not stolen and the Museum retains rightful ownership.¹⁹⁶ Further, the Trustees claim the Greek government has never requested a loan; they state they will consider a loan if the Greek government inquires.¹⁹⁷ Ultimately, they reason the Marbles must stay in their collection for the worldwide public benefit.¹⁹⁸ At the end of their statement, the Trustees write, “. . . [t]he British Museum isn’t a government body. The Trustees have a legal and moral responsibility to preserve and maintain all the collections in their care and to make them accessible to world audiences.”¹⁹⁹

Yet, repatriation is not impossible. The Holocaust Act of 2009 is precedent that Parliament has the power to provide a temporary relief and broaden the Trustees’ ability to dispose of objects in its collection.²⁰⁰ The Holocaust Act provides crucial insight into what Parliament can do. Barristers, museum curators, lobbyists, politicians, and activists should pay attention to the Holocaust Act’s characteristics as it provides guidance

¹⁹⁴ As Trustees, they have ultimate legal ownership rights over the collection. *See Williams, supra* note 25, at 196.

¹⁹⁵ Richard Lambert, *Trust Us to Look After the Parthenon Marbles*, THE GUARDIAN (Sept. 26, 2018), <https://www.theguardian.com/artanddesign/2018/sep/26/trust-us-to-look-after-the-parthenon-marbles>.

¹⁹⁶ *See THE BRITISH MUSEUM, supra* note 135.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *See* Holocaust (Return of Cultural Objects) Act 2009, c.16 (UK).

for creating successful legislation. First, any proposed legislation should be in response to an urgent request. Government is reactive, not proactive.²⁰¹ The Holocaust Act of 2009 was passed in response to the *British Museum Trustees* holding, four years after its decision.²⁰² Second, the proposed legislation would need to be narrow in scope. The Holocaust Act relaxed the laws pertaining to disposal of property “on grounds relating to events occurring during the Nazi era,” only.²⁰³ Legislation that would enable the Board to flexibly respond to all repatriation requests would not be realistic. Furthermore, legislation that is not limited to a specific event in history is likely to be considered too broad. Finally, it can be assumed that the legislation must be in response to an object that is not of a significant value to the Museum. The paintings at issue in *British Museum Trustees* were three Old World paintings purchased for nine guineas in 1946.²⁰⁴ While the scope of the British Museum Act may be relaxed by Parliament, the Board of Trustees remain bound by their fundamental duty to preserve the collection to the best of their abilities.²⁰⁵

CONCLUSION

It is the legal instrument of the trust that enabled Sir Hans Sloane to preserve his intent against the test of time. While fiduciary duty on its own merit is powerful, the fiduciary duty relationship governing the Museum’s Board of Trustees is twofold. Their duty to the British public has two layers of protection: the common law of fiduciary duty and the statutory incorporation of Sir Sloane’s Last Will and Testament in the Museum Act of 1963. It is these layers of protection that prevent the Board from repatriating cultural property.

Repatriation is an orchestra of complexity. It is entangled in battles for political standing, legitimacy, heritage, and justice. These conversations are difficult for any institution. The British Museum, as an organization governed by a Board of Trustees bound both at common law and statute, faces a unique dilemma. At law, the Trustees are compelled to

²⁰¹ DEVELOPMENTS IN BRITISH POLITICS NINE 190 (Richard Heffernan, et. al., eds., Palgrave Macmillan, 9th ed. 2011).

²⁰² See *Attorney General v. British Museum Trustees* [2005] EWHC 1089 (Ch), (Eng.); see also Holocaust (Return of Cultural Objects) Act 2009, c.16 (UK).

²⁰³ Holocaust (Return of Cultural Objects) Act 2009, c.16 (UK).

²⁰⁴ *British Museum Trustees*, [2005] EWHC 1089 (Ch) at [2].

²⁰⁵ See Holocaust (Return of Cultural Objects) Act 2009, § 2(6) (UK) (requiring that conditions must be met and approved by an Advisory board, and that “[t]he power conferred by subsection (1) does not affect any trust or condition subject to which any object is held.”).

serve the public and preserve the Museum at all costs, unless excused by Parliament. To make a difference, one must be informed about what the Board is capable of.

When he wrote his Last Testament and Will, Sir Sloane pictured what he believed to be a great world—a world that he knew he would not see, but one he sought to create for others. And yet, as profound as Sir Sloane's story may be, there are thousands of other stories, just as important and profound. They, too, must be included in the conversation. It cannot be ignored that cultural property has been stolen, looted, and wrongfully taken from oppressed peoples throughout human history. While Sir Sloane sought for the Museum collection to be accessible to all, that can never be the case. By the essence of being a physical object, a cultural artifact can be only in one place at once. As the international community continues to urge repatriation, the question remains whether Sir Sloane's testamentary intent can stand the test of time, or if Parliament will envision a different path for its future. Only time will tell.