ART OBJECTS AS COMMON HERITAGE OF MANKIND

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The authors have been inspired to write this article by their participation in the 1986 Jessup International Law Moot Court Competition which has raised *inter alia* the problem of restitution of art objects to their country of origin. The Belgian team, in which the authors were members, obtained the fifth rank in the International Division, and the second author was awarded the distinction of « Best Oral Advocate ».

I. — INTRODUCTION

This note deals with the claims of states on art objects that have left their territory. It looks at those claims from the point of view of the Common Heritage of Mankind. Private acquisitions of art objects as well as government acquisitions will be affected by the principles retained (1).

The number of publicized claims on art objects located abroad is on the rise (2). Claiming states either rely on the argument of « national heritage » or on a national interpretation of the « Common heritage of mankind ». In this perspective, conflicting claims of several states on the same art objects cannot be reconciled, and policies aiming at preservation and visibility are only considered secondary. A better solution can be found in a truly international interpretation of the « common heritage of mankind », consistent with the dominant interpretation of this concept outside the cultural field.

Most states have different definitions of art objects in their national legislation (3). For practical purposes, one could rely on the definition contained in the first major treaty on the subject, the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Con-

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(1) See the Nataraja statue and other examples referred to in *N.Y. Times Index* 1974, 127 and BATOR, M., *The International Trade in Art*, 1982, 5 and 7 ; a famous example can be found in the *Jeanneret v. Vichey* case, diseussed by PEARLSTEIN, W., *Northw. J. Int'l. L. Buss.*, 6, 1984, 1, 275-319.

(2) *De Standaard*, 11 March 1986.

(3) PROTT, L. V. and O'KEEFE, P. J., *Law and the Cultural Heritage*, Volume I, *Discovery and Excavation*, 181 a.f.

flict (4). The common heritage of mankind arguments do only apply to the really outstanding works of art, however. The scope of this note is therefore restricted to a small number of art objects. Some very notorious examples, such as the Elgin marbles (5), attract a lot of attention from UNESCO and public opinion. Works of living artists are excluded, in order to avoid additional problems such as recognition (6) and copyright issues.

Underlying to the conflicting claims on art objects and to the competing views of common heritage of mankind are a number of policy values, which are not always easily reconciled (7). The most important policy value is that art objects be preserved. Preservation implies good material conditions, as well as respect for the integrity of a work of art. Integrity is important for sculpture-ornamented buildings (e.g. the Parthenon), composite art objects (e.g. triptychs), religious monuments and excavation sites (e.g. Olympia). Closely linked to preservation is the value of visibility. Art objects only come alive when they are enjoyed by people. However, visibility and preservation occasionally contradict each other (8). A different value, often at odds with the visibility value, is that archeological evidence should be preserved. This value coincides with the integrity of archeological sites. A third policy value considers art objects as a national symbol referring to the past, creating a community and uniting its members. Finally, art objects can also be a means of communication between different communities. The international flow of art objects can therefore be considered as a contribution to peace and international understanding.

The most important treaty on the subject is the 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property (9). This convention did not succeed in reconciling the diametrically opposed views represented at the drafting conference. It contains a large number of sweeping but ineffective provi-

(4) Article 1(a) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14 1954, 249 U.N.T.S. 215 ; also reproduced in SABA, M. H., *La protection du patrimoine culturel mobilier, Recueil de textes législatifs*, UNESCO 1984, 336. We exclude museums and libraries ([b] and [c]), because their inclusion into the 1954 Convention is linked to the specific object (wartime protection) of this Convention.

(5) The British government considers the acquisition by Lord Elgin legal under the law of the early 19th century. This point of view is, of course, not shared by the Greek government, which is supported by UNESCO on this issue. The Assembly of the Council of Europe has, in a resolution of 3 October 1983, rebutted the Greek claim while calling the marbles « European cultural heritage belonging to all Europeans », 88 *R.G.D.I.P.*, 1984, 478 ; a recent Greek campaign, involving children sending postcards, is reported in *The Guardian*, 11 March 1986.

(6) BATOR, P. M., *o.c.*, *supra* footnote 1, 32, deals with the problem of getting one's work recognized as art.

(7) An elaboration of these remarks can be found in BATOR, P. M., *o.c.*, 19-32.

(8) In a number of cases such as the Lascaux wall-paintings, the mere exposure to light threatens the art objects ; all moveable art objects are threatened by the traffic to and from temporary exhibitions.

(9) November 14, 1970, 10 *I.L.M.*, 1970, 1289 ; also reproduced in SABA, M. H., *o.c.*, see *supra* footnote 4, 357.

sions (10) and can be interpreted in various ways. Up to now, the convention has obtained some fifty ratifications, few of which emanate from Western countries (11-12). The 1970 UNESCO Convention has not succeeded in its aim to refound the international law of art objects, which therefore remains a matter of general principles. The main principle in the field of art objects is the common heritage of mankind (13).

II. — THE COMMON HERITAGE OF MANKIND AS APPLIED TO ART OBJECTS

The common heritage of mankind takes a prominent place in the law of the sea, space law and environmental law, where it forbids national claims on respective the deep seabed and its resources (14), celestial bodies (15) and wildlife (16). When applying the common heritage of mankind to outstanding art objects, some states and authors turn the concept upside down, however. Their view is called « nationalist » in this note because it puts an extreme stake on the restitution and return of art objects to their country of origin, even if their preservation and visibility do not require such return. A correct interpretation of the « common heritage of mankind » as applied to art objects is consistent with the same concept as applied outside the cultural field.

A. — *The « nationalist » view of the common cultural heritage.*

The « nationalist » view of the common cultural heritage considers the concept as derived from the more fundamental notion of national cultural heritage. In this line of thought the total of the national cultural heritages forms the cultural heritage of mankind. This implies that the international community has to assist (technically and financially) in the preservation

(10) See the introduction of BATOR, P. M., *o.c.*, footnote 1 ; Bator was the chief U.S. delegate at the drafting convention of the 1970 UNESCO convention.

(11-12) E.g. U.S.A., Italy, Greece. Other Western countries did not ratify, and Great-Britain and Switzerland were even absent at the drafting conference : BATOR, P. M., *o.c.*, see *supra*, footnote 1, 97.

(13) Reference to this principle has been made in the preamble, § 2-3 of the 1970 UNESCO convention, see *supra*, footnote 9. It was underlying to the 1972 Convention on the Protection of the World Cultural and Natural Heritage, November 16 1972, 11 *I.L.M.*, 1972, 1358.

(14) Preamble, paragraph 4 ; art. 136, 137, paragraph 2, 140 and 155, paragraph 2, official text, Final Act of the 3rd U.N. Conf. on the Law of the Sea, U.N. public., N.Y. 1984, A/CONF. 62/1237 ; ARNOLD, R. P., « The Common Heritage of Mankind as a Legal Concept », 9 *Int'l Lawyer*, 1975, 156.

(15) Preamble, articles I, par. I, V and XI of the 1967 Treaty on the Principles Governing the Activities of States Concerning the Exploitation and Utilization of Outer Space, including the Moon and the Other Celestial Bodies, U.N. DOC. RES/2222 (XXI), December 19 1966, 1-10 ; MARKOV, M. G., *Traité de Droit International Public de l'Espace*, 1973, 272-273.

(16) Convention on the Protection of the World Cultural and Natural Heritage, see *supra*, footnote 12 ; Bonn Convention on the Conservation of Wildlife Migratory Species, June 23, 1979, preambule, paragraphe 2 as quoted by KISS, « La protection internationale de la vie sauvage », 26, *A.F., D.I.*, 1980.

of the outstanding items of any national heritage (17). The 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage (18) organizes the practical system of cooperation along these lines. The Abu Simbel and Borobudur projects are well-known applications of this convention.

The « nationalist » view of the common heritage of mankind is the basic argument in favour of the restitution and return of art objects, illegally or legally acquired in the past (19). The states invoking the « nationalist » view derive it from the right to self-determination (20).

1. — Illegal acquisition.

The restitution of illegally acquired objects is a principle of law accepted by all nations (21). This principle has been applied to art objects in a number of Peace Treaties. As early as 1648 art objects acquired in war operations were restituted (22).

Even the art objects Napoleon has obtained by treaties, have not been restituted in 1815 (23).

A number of treaties concluded with former colonies provide for the restitution of illegally acquired art objects (24).

The principle of restitution stands on its own, and is accepted whatever a country's view on the common cultural heritage.

The 1970 UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property does not contain an autonomous international definition of illegal acquisition, but refers to national export and property legislations (25) in force at the time

(17). The 1954 UNESCO convention for the Protection of Cultural Property in the Event of Armed Conflict, Preamble : « The damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world ».

(18) Art. 6 of the Convention concerning the Protection of the World Cultural Heritage, November 16 1972, 11 *I.L.M.*, 1972, 1358.679.

(19) This article distinguishes between restitution and return depending on whether the acquisition of the art object was illegal or legal.

(20) Explicitly so in articles 5 to 7 and 13 to 15 of the Universal Declaration of the Rights of Peoples, Alger, July 4 1976, reproduced in *Tiers Monde en Bref, pour un droit des Peuples*, 1978.

(21) *Chorzow Factory* case, 1927, *P.C.I.J., ser. A, n°* 9, 28 ; BROWNLIE, I., *Principles of Public International Law*, 1979, 449; GUGGENHEIM, P., *Traité de droit international public*, 1954, 68.

(22) Westphalien Peace Treaties and later examples dealt with in ENGSTLER, L., *Die Territoriale Bindung Von Kulturgutern im Rahmen Des Volkerrechts*, 1964, 87-89.

(23) ENGSTLER, L., *o.c., supra*, footnote 22, 91-119, especially 111.

(24) France-Laos (Febr. 6, 1950) ; Algeria-France (July 11, 1968) ; Italy-Ethiopia ; Belgium-Zaire ; The Netherlands-Indonesia (1976) ; sometimes, there is restitution or return without a treaty ; the Lombok treasure was e.g. returned to Indonesia in 1977 by the Netherlands.

(25) Article 3 : « The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit » ; this Convention is extremely broad in enumerating the kinds of provisions states can adopt, November 14, 1970, 10 *I.L.M.*, 1970, 1289 ; also reproduced in SABA, M. H., *o.c.*, see *supra*, footnote 3, 357.

of the acquisition (26). Therefore, one has to refer to the generally accepted rules of conflict law (27) demarcating the scope of national export and property legislations. As to *ownership* vesting legislation, the generally accepted rule of conflict law is the *lex situs* (28). It implies that every state may declare itself owner of all art objects found within its territory (29). According to the traditional interpretation of the *lex situs* rule, other states are not obliged to take these ownership declarations into account, once the objects have left the country of origin. As to *export prohibitions*, they are traditionally considered public laws not to be enforced by foreign jurisdictions (30).

The traditional point of view is strongly rebutted by the proponents of the « nationalist » view on common cultural heritage. In this view, the strict territoriality principle has to be forsaken whenever paramount inte-

(26) *Isle of Palmas* case, 1928, 2 *R. Int'l Arbitr. Aw.* 845 ; *German interests in Upper Silesia* (judgment) *P.C.I.J.*, Ser. A, N° 7, 1926, 41 ; *U.S. Nationals in Morocco* (judgment) *I.C.J. Rep.*, 1952, 183 a.f. and 188 a.f. ; *Ambatielos* (jurisdiction) *I.C.J. Rep.*, 1952, 40.

(27) JESSUP, Ph., « Separate Opinion », *Barcelona Traction* (judgment) 1070, *I.C.J. Rep.*, 33 and 37 ; *Serbian Loans* (judgment) *P.C.I.J.*, Ser. A, N° 20, 1929, 19 and 41 ; *Brazilian Loans* (judgment) 1929, *ibid.* ; BROWNLIE, I, *Principles of Public International Law*, 1966, 41-43.

(28) *Winkworth v. Christie*, 1979, 1 CH., 1980, 496 ; *Sensor*, 22 *I.L.M.*, 1983, 66, 77 *A.J.I.L.*, 1983, 636 ; *Van der Heydt and Burth v. Robert Peel, Dalloz Period.*, 1902, 361 II ; *Papadopoulos v. Kon. Nederlandsche Stoombootmaatschappij, Nederlandse Juris prudentie*, 1925, 347 ; *Wisconsin v. Pelican Insurance Co.*, 127 *U.S.* 265, 92 ; *Duc de Frias v. baron Pichon*, 13 *Clunet*, 1886, 593 ; Article 5 of the Hague Convention on the Transfer of Ownership in International Sales of Corporal Movable Property, 15 April 1958, *Recueil des Conventions Conférences de La Haye de Droit International Privé* 1951-1980, 1981 ; RIGAUX, F., « Le conflit mobile en droit international privé », 117 *Hague Recueil*, 1966, 396-387 ; CASTEL, J. G., *Canadian Conflict of Laws*, 1977, II, 379-380 ; VALLADAO, H., *Direito Internacional Privado*, 1977, II, 161 ; MAKAROV, A. N., *Grundriss des Internationalen Privatrechts*, 1970, 131 ; LEFLAR, R. A., *The Conflict of Laws*, 1980, 555.

(29) This has happened in Australia, Belize, Brunei, Bulgaria, China, Costa Rica, Cyprus, the Dominican Republic, Ecuador, Greece, Gibraltar, Guam, Haiti, Hawaii, Hong Kong, Hungary, Iceland, Iraq, Italy, Kenya, Kuwait, Libya, Malaysia, New Zealand, Poland, Romania, Sri Lanka, Sudan, Taiwan, Tanzania, Tunisia, Turkey, Venezuela and North Yemen, according to PROTT, L. V. and O'KEEFE, P. J., *o.c.*, *supra* footnote 2, 190-191.

(30) *McClain* case, 545 F 2d 996 (5th Cir. 1977) ; *Moens v. Ahlers North German Lloyd*, 30 *Rechtskundig Weekblad*, 1966, 360 ; *American President Lines v. China Mutual Trading Co.*, *A.M.C.*, 1953, 1526 (Hong Kong Sup. Ct.) as quoted in 21 *I.L.M.*, 1982, 1894 ; *King of Italy v. De Medici, T.L.R.*, 1918, 623 Ch. ; VAN HECKE, G., « Principes et méthodes de droit international privé », 126 *Hague Recueil*, 1969, 496 ; MORRIS, J. H. C., *Dicey and Morris on the Conflict of Laws*, 555, 90 and 94 ; BASSIOUNI, M. C., « Reflexions on Criminal Jurisdiction in the International Protection of Cultural Property », 10 *Syr. J. Int'l L. Com.*, 1983, 312-313. This view has recently been confirmed in the British case *Attorney General v. Ortiz*, 1983, 2 *All. E.R.*, 1984, 93, 1 A.C., and been invoked by the E.E.C. in the dispute over the Siberian pipeline, 21 *I.L.M.*, 1982, 894 ; ERGEÇ, R., *La compétence extra-territoriale à la lumière du contentieux sur le gazoduc sibérien*, 1984, 113.

See, however, the International Council of Museums Report to the International Commission for Intellectual Cooperation (1933), quoted in FOUNDOUKIDIS, E., *Art et Archéologie*, 1939, 1, 58, where a project of an international convention already asked states not to recognize the validity of sales of art objects exported against the will of foreign governments ; the project never became a convention, partly due to the Second World War.

rests of another state are involved (31). This is the more forcefully argued when the interests involved are shared by the international community as a whole, as is the case with art objects that are common heritage of mankind. Advocates of the « nationalist » view point out that present international law recognizes the right of every state to its historical and cultural wealth (32). It is by the development of national cultures that the states enrich the culture of mankind (33). States can therefore no longer ignore each other's export prohibitions (34). The German Bundesgerichtshof upheld a Nigerian export prohibition by refusing to enforce an insurance contract covering the transportation of illegally exported art objects (35). As to the validity of sales of art objects outside the territory of origin, the « nationalist » view makes a distinction (36). *Export prohibitions* on the one hand are typically enforced by means of fines and other criminal sanctions. They have no effect outside their jurisdiction. *Ownership* vesting legislation, on the other hand, intended to have direct private law effects in other jurisdictions, is therefore to be taken into account by those other jurisdictions (37).

In the « nationalist » view the 1970 UNESCO Convention confirms the rules just mentioned (38) and is therefore a turning point. All recent exportations (39) of art objects in breach of ownership vesting regulations are in this view illegal under international law, and these objects have to be

(31) *Alnati* case, Hoge Raad (the Netherlands), 13 May, 1966, *Nederlandse Jurisprudentie*, 1967, 16 ; compare with article 7 of the 19 June 1980 E.E.C. Convention concerning the Law applicable to Contractual Obligations, *P.B.L.* (1980), 226/1, discussed by VAN HECKE, G., « *Jus cogens* and international trade », in *Essays on the law of Int'l Trade*, Asser Institute, 1976, 3 at 9-10.

(32) Article 27 of the Universal Declaration of Human Rights, 10 December 1948, *U.N. Doc. A*/Res. 217 (III) ; see also Article 14 fo the Universal Declaration of the Rights of Peoples, Alger, 4 July 1976, reproduced in *Tiers Monde en Bref, pour un droit des Peuples*, 1978.

(33) Article 1 of the Declaration of Principles on International Cultural Cooperation, 4 November 1966, General Conference UNESCO ; Preamble of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 *U.N.T.S.* 215 ; ENGSTLER, L., *Die Territoriale Bindung Von Kulturgutern im Rahmen Des Volkerrechts*, 1964, 197.

(34) Article 30 of the Recommendation on International Principles applicable to Archeological Excavations (5 December 1956), SABA, M. H., 1984, *o.c.*, see *supra*, footnote 3, 375 ; article 4 of the Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property (20 October 1964) : « No import of cultural property should be authorized until such property has been cleared from any restrictions on the part of the competent authorities in the exporting state », article 6 of the European Convention on the Protection of the Archeological Heritage (6 May 1969), reproduced in SABA, M. H., 1984, *o.c.*, *supra*, footnote 3, 365.

(35) 22 June 1972, *Entscheidungen des Bundesgerichts in Zivilsachen*, 1973, 82-87.

(36) This part is based on the analysis of the present Dutch view by POSTMA, G. J. S. in « Blocking measures in other European countries », *International Financial Law Review*, July 1983, 13-14.

(37) The U.S. National Stolen Property Act has introduced this rule into federal (criminal) law ; this act has been discussed by UPTON, R., « Art Theft : National Stolen Property Act Applied to Nationalized 'Mexican' Pre-Columbian Artifacts », 10 *N.Y.U.J.I.L. POL.* 3, 1978, 569-611.

(38) Articles 3, 15 : As stated *infra* in the text accompanying footnote 57, this article is too vague to imply a legal obligation.

(39) « Recent » meaning : « after 1970 ».

restituted (40). For earlier exportations (41) and for mere violations of export regulations, the « nationalist » view accepts that international law does not offer the remedy of restitution.

2. — Legal acquisition.

Gradually, the return of legally acquired art objects to their country of origin is being claimed and sometimes accepted. This evolution, if successful, could diminish the importance of the distinction between legal and illegal acquisition.

States sometimes perceive a moral or a practical need to return legally acquired art objects to the country of origin. Some treaties concluded with former colonies provide for the return of legally acquired art objects (42). Political beside moral, aesthetical and practical considerations play an important role in this behaviour (43). The question must now be addressed whether there is a legal obligation to return legally acquired art objects.

Three principles are put forward as a possible basis for the return of legally acquired art objects. First, the link between works of art and a nation. Secondly, the link between works of art and a territory. And, finally, the integrity of works of art. These three principles are widely invoked in resolutions, declarations and treaties.

(1) The link of art with a nation lies in their national cultural heritage (44). This idea has been expressed in U.N. General Assembly resolutions (45) ; in the 1956 UNESCO Recommandation on International Principles Applicable to Archeological Excavations (46) ; the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (47) ; the 1970 San

(40) The protection of *bona fide* purchasers is solely a matter of municipal law ; see BATOR, P. M., *o.c.*, *supra*, footnote 1.

(41) Number 18 of the Report on the Preparation of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing ..., published as an Annex to the Convention, 9 *I.L.M.*, 1970, 1040 excludes retroactivity for the restitution clauses.

(42) See *supra*, footnote 24.

(43) Compare, in the field of restitution, the U.S.-Mexican cooperation in the field of illegally exported art objects (asked for by Mexico) and of stolen trucks (asked for by the U.S.) ; this political deal is referred to in ABRAMSON, R. D. and HUTTLER, S. B., « The legal response to the illicit movement of cultural property », 5 *Law Pol. Int'l Bus.*, 1973, 943 ; see also *supra*, footnote 37.

(44) The Afo-a-Kom statue was returned because it embodied « the spiritual, political and religious essence of the people of Kom » ; see BATOR, M., *o.c.*, footnote 1 and the press articles quoted therein.

(45) 3391 (XXX) Restitution of Works of Art to Countries Victims of Expropriation ; 34/64 Return or Restitution of Cultural Property to Countries of Origin 29 nov. 1979 Preambule ; 36/64 Return or Restitution of Cultural Property to Countries of Origin 27 Nov. 1981 Preamble.

(46) Reproduced in SABA, M. H., *o.c.*, see *supra*, footnote 4, 375.

(47) Preamble, paragraph 4, see *supra*, footnote 25.

Salvador Convention on the Protection of the Archeological, Historical and Artistic Heritage of the American Nations (48) : the 1976 Alger Universal Declaration of the Rights of Peoples (49), and the 1978 UNESCO Recommandation for the Protection of Movable Cultural Property (49). As time goes on, however, and civilizations influence each other, it can become difficult to link an art object to a specifie nation (50), let alone to a specific state. As only the latter enjoy international legal personality (51) prolonged legal battles cannot be avoided (52).

(2) The link of art with its territory of origin is highlighted by the 1956 UNESCO Recommandation on International Principles Applicable to Archeological Excavations (53) : the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (54), and the 1976 San Salvador Convention on the Protection of the Archeological Historical and Artistic Heritage of the American Nations (55). UNESCO has promoted the return of art objects to the people and territory of origin (56). This advice has been followed not only in ex-colonial relationships. Australia has e.g. returned art objects to Vanuatu (57). Both UNESCO and the International Council of Museums give wide publicity to these examples and hope that public opinion will put pressure on Western governments to follow this

(48) Preamble, paragraph 2, see SABA, M. H., *o.c.*, see *supra*, footnote 4, 370.

(49) Art. 13-15, *o.c.*, see *supra*, footnote 32.

(50) Recommandation number 3, reproduced in SABA, M. H., *o.c.*, see *supra*, footnote 4, 386.

(51) BRICHET, drafter of the 1970 UNESCO convention, quoted in SIEROSZEWSKI, « Les origines et les principes de la convention de 1970 sur les mesures à prendre pour empêcher l'exportation, l'importation et le transfert illicites des biens culturels », 44 *Annuaire de l'A.A.A.*, 1974, 67 ; FOUNDOUKIDIS, E., see *supra*, footnote 27, 9 ; NAFZIGER, J., « An Anthro-Apology for managing the international flow of cultural property », 4 *Hous. J. Int'l L.*, 1982, 199 ; NAHLIK, S. E., « Biens culturels et conflit armé », 120 *Hague Recueil*, 1967, 96, 157. KOUASSI, « Le concept du patrimoine commun de l'humanité et l'évolution du droit international public », 39 *Revue Jurid. Pol. Indépendance et Coopération*, 1985, 950.

(52) We do not specifically refer to « nations struggling for their independence », as meant in FELDMAN, D., « International Personality », 191 *Hague Recueil*, 1985, II, 343, at 360.

(53) For the battle between Greece and Britain over the Elgin Marbles, with UNESCO and the Council of Europe each supporting one side, see *supra*, footnote 4.

(54) Recommandation number 8, reproduced in SABA, M. H., *o.c.*, see *supra*, footnote 3, 375.

(55) Art. 4b, see *supra*, footnote 25.

(56) Art. 5, see *supra*, footnote 3.

(57) Art. 15 of the 1970 UNESCO convention recommends the states to conclude special agreements on restitution : « Nothing in this Convention shall prevent States Parties thereto from concluding special agreements among themselves or from continuing to implement agreements already concluded regarding the restitution of cultural property removed, whatever the reason, from its territory of origin, before the entry into force of this Convention for the States concerned ».

In 1978 UNESCO created an Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation, to encourage such arrangements. See « Return and Restitution of Cultural Property », 31 *Museum*, 1979, 1.

(58) 23 *Museum*, UNESCO 3, 1981, 196.

tendency. The same public opinion can lead private persons to return legally acquired art objects to the territory and people of origin (59).

(3) The integrity of complex works of art has been taken into account in the Versailles Treaty of 1919. This Treaty contains the return of a few art objects the legal acquisition of which had never been disputed, Article 247 obliged Germany to return *as war reparation* two panels of Van Eyck's « Mystic Lamb » and two of Bouts' « Last Supper » to Belgium. At the occasion, Belgium again recognized the legality of the former acquisition by the German museums (60). The main motive for these returns was the reunification of two great works of art (61). Closely linked to this motive is the integrity of art *collections* (« the interest of mankind in big collections »), which was the underlying motive for a few treaties concluded at about the same time between the successor states of the Habsburg monarchy (62). Since then, the integrity of works of art has developed into an internationally recognized principle. The integrity of the Parthenon temple is a major argument for the Greek government in its quest for the Elgin marbles (63). Reference to this integrity has been made in the 1978 UNESCO Recommendation for the Protection of Movable Cultural Property (64).

When assessing the legal value of these three emerging principles one can find a conclusive counterargument in article 15 of the 1970 UNESCO convention (65). By encouraging states to conclude special agreements on the return of legally acquired art objects, the convention implicitly recognizes that there is no legal obligation to do so.

(59) See e.g. the *Afo a Kom* case dealt with in BATOR, M., *o.c.*, see *supra*, footnote 1 and the press articles quoted therein.

(60) DE VISSCHER, Ch., « La protection internationale des objets d'art et des monuments historiques », *Revue de droit international et de législation comparée*, 16, 1935, 71 a.f. ; ENGSTLER, L., *o.c.*, *supra*, footnote 33, 1964, 129 ; see also VAN DEN GHEYN, M., for a detailed account : « Les tribulations de l'Agneau Mystique », 15 *Revue belge d'archéologie et d'histoire de l'art*, 1945, 31, 35 and 37 ; HOLLANDER, B., *The International Law of Art*, 1959, 54.

(61) « Afin de reconstituer deux grandes œuvres d'art » as quoted by VAN DEN GHEYN, M., *l.c.*, *supra*, footnote 60, 37.

(62) Special Convention to solve Controversies on the Historical and Artistic Patrimony of the ancient Austro-Hungarian Monarchy, Vienna, May 4th 1920,, art. 1, 3 XIX *Nouveau Recueil G. Martens*, 682 ; Agreement on the Museum and Libraries, November 27th, 1932, 162 *Recueil des Traités Société des Nations*, 395 ; TIETZE, H., « L'accord austro-hongrois sur la répartition des collections de la maison de Habsbourg », 23-4 *Mouseion*, 1933, 94 ; NAHLIK, S. E., « La protection internationale des biens culturels en cas de conflit armé », 120 *Hague Recueil*, 1967, 101 ; ENGSTLER, L., *o.c.*, *supra*, footnote 33, 251 and 261 ; see also the 1921 Riga Peace Treaty between Poland and the Soviet Union, where the Soviet Union is allowed to keep « scientifically elaborated and complete systematic collections, as the basis of collections with a universal scientific importance », X., « Le Traité de Riga de 1921 et le patrimoine artistique de la Pologne », 17-18 *Mouseion*, 1932, 206.

(63) DE LA SIZERANNE, R., « Doit-on rendre les marbres d'Elgin au Parthénon? », *Revue des Deux Mondes*, 1931, 832.

(64) Number 15, see *supra*, footnote 50.

(65) See *supra*, footnote 57.

B. — *A definition of the common cultural heritage challenging the « nationalist » view.*

The Abu Simbel and Borobudur projects (66) can illustrate a different and more autonomous view of the cultural heritage of mankind. State sovereignty over outstanding works of art is limited by the interest of the international community (67). In this way the cultural heritage of mankind is qualitatively different from the mere sum of national heritages, and is more consistent with common heritage of mankind as applied to the deep seabed, the celestial bodies and the environment (68). The cultural heritage of mankind imposes two obligations on its owner. First, absolute priority should be given to the preservation of the art objects so that future generations and civilizations can communicate with their past. Secondly, the cultural heritage of mankind must be used to the benefit of all mankind : for art objects this implies exhibition and accessibility to researchers and to the public at large (69). In this alternative view, the common heritage of mankind does not provide for a proper ownership regime (as mankind has no legal personality). It does, however, limit national ownership claims on the environment and on the outstanding art objects as well as forbidding claims on celestial bodies and the deep seabed (70). Therefore, states come close to being mere trustees of mankind for the art objects situated on their territory. That art objects are situated on a territory is inescapable, and constitutes the main difference between outstanding works of art on the one hand and seabed resources and celestial bodies on the other hand. The two obligations of preservation and accessibility do invariably apply, however, to all items that are common heritage of mankind.

(66) See *supra* text accompaning footnote 16.

(67) Borgesse, « Expanding the Common Heritage of Mankind — The Krill of the Southern Ocean is the Common Heritage of Mankind », in *Global Planning and Resource Management*, 1980, 186 ; the same view also to be found in Preamble, paragraph 2 and 3, and article 3 of the Convention on the Protection of Cultural Goods in the Event of Armed Conflict, see *supra*, footnote 3 ; Attitude of i.a. the Soviet delegate, reported in Nahlik, S.E., see *supra*, footnote 51, 128-129 ; Nafziger, J., see *supra*, footnote 51, 195 ; Williams, S.A., *The International and National Protection of Movable Cultural Property*, 1978, 54 ; Preambule, paragraph 1 of the European Convention on the Protection of the Archeological Heritage, May 6, 1969, *E.T.S.*, 8 *I.L.M.*, 1969, 736 ; preamble, paragraphs 2 and 3 of the 1970 UNESCOC onvention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, see *supra*, footnote 25 ; preambule, paragraphs 2, 4, 5 and 6, and art. 6, 8 and 15 of the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, November 16, 1972, 11 *I.L.M.*, 1972, 1358 ; collective state practice : article 17 of the Declaration of Principles on International Cultural Cooperation, November 4, 1966, General Conference, UNESCO ; individual state practice : Todman, T. A., Ass't Secret. for Inter-American Affairs, Dep't of State, letter to the Chairman of the Permanent Council of the Organisation of American States, August 26, 1977, OEA/Sec. G., CP/INF. 1173/77, reprinted in *Digest U.S. Practice Int'l L.*, 880-881 (Boyd, J., ed. 1979).

(68) See *supra*, footnotes 14 to 16.

(69) Nafziger, J., see *supra*, footnote 51, 194-30 ; Bator, P. M., see *supra*, footnote 1, 23 ; Gordon, « The Third World and the Protection of National Patrimony : Oil, Art and Orchids », 2 *Hast. Int'l. Comp. L. Rev.*, 1979-1980, 287.

(70) Borgese, see *supra*, footnote 67.

The alternative view of the common heritage was supported by the Council of Europe, which labelled the Elgin marbles « Common European Heritage » (71). It implies that there exists no obligation to return legally acquired art objects, as long as the new owner complies with the obligations of preservation and accessibility. The obligation to restitute illegally acquired art objects is accepted, although one will rarely be able to invoke it in practice. For, proof of illegal acquisition in the remote past is difficult, and the owner can often invoke prescription (72).

There is no rule in international law that excludes cultural objects in general from acquisitive prescription. Authors defending the opposing view (73) do not give a definition of cultural objects precise enough to demarcate the application of the sweeping exception they invoke. In all specific cases where restitution is at stake, the main topic for discussion is not the principle of prescription but the protest necessary to interrupt it. During the last two centuries, the way of expressing valid protest has changed considerably. As long as a territory was under colonial domination, no legal value was attached to verbal or even physical opposition on the part of local people. The only relevant protest was that emanating from the sovereign colonial power (74). After the emergence of international organizations (League of Nations, U.N.) and international tribunals (P.C.I.J., I.C.J.), diplomatic protest was supplemented by these means. Mere diplomatic protest was not sufficient any more to initiate or maintain an effective protest (75). In view of these strict conditions for permanently effective protest, most cultural objects claimed by dispossessed states as their national cultural heritage have been legally acquired by their new owner. The acceptance of prescription considerably reduces the practical importance of defining cultural objects as opposed to ordinary movable property (76).

The « trusteeship » view of common heritage of mankind is recognized in the 1970 UNESCO convention. where state-parties undertake to promote the development of scientific and technical institutions specialized in the preservation and presentation of cultural property (77). The practical imple-

(71) See *supra*, footnote 5.

(72) VERYKIOS, P. A. *La prescription en Droit International Public*, 1934, 81, 47, 51, 55 ; FOUNDOUKIDIS, E., « L'organisation des Relations Internationales en matière d'Art et d'Archéologie », in 9 *Art et Archéologie. Recueil de Législation Comparée et de Droit International*, ICOM, 1939, 89.

(73) NAHLIK, S. E., « Biens culturels et conflit armé », 120 *Hague Recueil*, 1967, 96, 100 ; KONING, S. C. H., « Application de la Convention de l'UNESCO sur les biens culturels », in COUNCIL OF EUROPE, *La protection juridique internationale des biens culturels*, 1983, 133 at 134.

(74) VERYKIOS, P. A., *o.c.*, *supra*, footnote 72, 82.

(75) JOHNSON, D. H. N., « Acquisitive prescription in international law », 27 *Brit. Yearb. I.L.*, 1950, 342 and 346 ; PINTO, R., « La prescription en droit international », 87 *Hague Recueil*, 1955, 398.

(76) This is the reason we have not involved ourselves in the Byzantine discussion ; see *supra*, footnote 3.

(77) Article 5 (e) ; see *supra*, footnote 25.

mentation and international control of the preservation and accessibility obligations mainly lie with public opinion and specialized non-governmental organizations (78).

III. — CONCLUSION

In 1970, the International Council of Museums (ICOM) has issued a code of ethical rules governing museum acquisitions (79). Similarly, the Association of Art Museum Directors (AAMD) has called upon its members to comply with the acquisition standards contained in the 1970 UNESCO Convention (80), which itself refers to ethical principles (81). By enhancing the concerns of public opinion about acquisition practices, these organizations help to shift the focus of attention from national pride to the interests of the art objects and of the international community.

The fact that the « nationalist » view of common heritage of mankind is still dominant explains the bitter quarrels over a small number of art objects, e.g. the Elgin marbles (82). Art-possessing states refuse to return any single art object to the country of origin for fear of establishing a precedent for a general obligation of return. Such obligation would ruin most museums in the world.

In the view of common heritage of mankind defended in this article, a *return* obligation is out of question and *restitution* is only required in cases of blatantly illegal acquisition. All attention can therefore be directed towards the well-being of the outstanding works of art (83). States can afford selective generosity, and exchange, loan and deposit agreements (84) can be concluded. The Museum Exchange Program set up by ICOM (85) will in this way receive the attention it deserves.

(78) A parallel can be drawn with human rights, where public opinion and private organizations are the most effective enforcement agents.

(79) De Varine-Bohan, H., 23 *Icom Newsletter*, June 1970, number 2, 10 ; Clear and correct documentation on the origin of the object is required (conclusion n° 3) ; acquisition through intermadiaries in strict respect of the laws and interests of the country of provenance or origin (conclusion n° 12) ; acquisition in good faith, not only for museum directors but also for private collectors (conclusion n° 14).

(80) Woods, W. F., « A museum directors view on regulation and deregulation », in Duboff, L. D., *Art Law*, 1975, 328 ; see also Bator, M., o.c. ; see *supra*, footnote 1, 85, footnote 83.

(81) Article 5 (e) ; see *supra*, footnote 25.

(82) See *supra*, footnote 5.

(83) The Common Heritage of Mankind, when correctly interpreted, creates obligations to be fulfilled towards art objects, which are no subjects of international law, or, in another construction, towards mankind, including future generations. As in the development of international standards for the treatment of alien human beings, traditional frontiers are being transgressed. See also *supra*, footnote 78.

(84) See e.g. the agreement between French museums and the museum of Tahiti at Papeete concerning loan and deposit of Pacific region objects, announced in 33 *Museum*, UNESCO, 2, 1981, 118 ; an older example of exchange, between India and Europe, is treated in 22 *Museum*, UNESCO, 3-4, 1969, 239.

(85) See its review 32 *Museum*, 3, 1980, 162, « L'UNESCO et ICOM : trente-quatre ans de coopération », 162.