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ARTICLE

INTERNATIONAL LEGAL ISSUES ON CHINA'S RECOURSE FOR CULTURAL RELICS PILLAGED OVERSEAS: DILEMMA AND WAY OUT — TAKE THE LITIGATION ON THE AUCTION OF RAT HEAD AND RABBIT HEAD BRONZE STATUES FOR EXAMPLE

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Facing the dilemma on the recourse for Chinese cultural relics pillaged overseas, China shall get a clear understanding of the international legal situation, strengthen international communication and promote international compromise. Based on this foundation, China shall take rational, beneficial, and moderate legal actions to uphold and protect national rights. The recourse on the ground of international custom has been deemed as a failure by the view of the majority; the recourse in a foreign court will almost certainly encounter numerous obstacles in law that are very difficult to deal with, and the recourse in a national court will not only achieve the expected goals but also raise considerable disadvantages. If China hopes to retrieve the pillaged cultural relics by means of international treaty, it is necessary for China to conclude special agreements with relative states. The latter shall exercise best efforts to recover the cultural relics and return them to China at the expense of Chinese tax payers.

On the other hand, there are two choices available if China hopes to settle the problem through general principles of law: One is to make an agreement with relative states, and the other is to authorize certain international tribunals to adjudicate the case according to the general principles of law. If the International Court of Justice ("ICJ") is chosen, then the relative states can authorize the court to decide the case according to the principle of ex aequo et bono; however, the best way is to conclude an international arbitration agreement and renounce the application of certain general principles of law which might hinder the dispute resolutions. The other choice is to make unilateral legal activities

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with each other according to relative general principles of law, on condition that certain tacit agreement or understanding had been achieved between relative states. However, whether the above international legal methods can be used for the settlement of the problem, it depends on sufficient negotiation and mutual compromise between China and other relative states; the relative national authorities shall pay more attention to such aspects instead on unilateral declarations or sanctions.

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INTRODUCTION

In October 2008, Christie's — the world's leading art auction business in France — announced that the Rat Head and Rabbit Head Bronze Statues from China's Yuanmingyuan would be publicly auctioned in Paris. This announcement aroused strong protest from Chinese society. In January 2009, eighty-six lawyers from China organized the Chinese Bar Fellowship of the Recourse and Rescue of Cultural Relics, attempting to prevent the auction and recover the pillaged Chinese treasures through transnational civil litigation. That is the first time for a national bar fellowship commencing a lawsuit to recover Chinese cultural relics pillaged overseas.[1]

[1] Here the Chinese cultural relics pillaged overseas mainly point to the cultural relics lost because of larceny, robbery, smuggling and other illegal activities, excluding those transferred overseas through lawful ways.

The Bar Association produced a statement to Christie's and other parties, pointing out that these two bronze statues belong to China and the Chinese people will take the necessary steps to retrieve them, and requiring that the auction be cancelled. However, Christie's responded that the owner of these bronze statues had acquired the ownership lawfully, the statues had been transferred many times and accompanied with clear history of ownership and sufficient legal certifications, and that the auction shall continue.

On 19 February 2009, the Bar Fellowship invited the Association for the Protection of the Art of China in Europe ("APACE") to apply for an injunction to the Tribunal de Grande Instance in Paris and required ceasing the auction. On 24 February 2009, the tribunal held an emergency hearing and held that APACE cannot represent China or Chinese public interest in this case, and thereupon rejected the application. On 26 February 2009, Christie's held a special auction in the Grand Palais, each of the bronze statues was sold at the price of EURO 14,000,000.[2] On the same day, the Chinese State Administration of Cultural Heritage published a notice, pointing out that the recent auctions of Christie's on Chinese cultural relics pillaged overseas were very frequent, which violated the principles of relative international treaties and harmed the rights and feelings of Chinese people and it required local administrations to examine on the entry and exit of relics that related to Christie's.

It is praiseworthy for the Bar Fellowship to insist on the commencement of transnational litigation process; in any case, they had pointed out the fact that these pillaged relics[3] belonged to China originally and had shown the strong will of the Chinese people to take them back. However, it is not surprising that they failed at the beginning of litigation, the reason supporting such an upholding is that they could not find enough support from international/transnational law. Such problems not only occurred in this case, but also in other similar disputes.

As a matter of fact, the retrieval for Chinese pillaged cultural relics always faces a dilemma in international law. That is, in morality China's claim for

[2] However, the auction was aborted because the bidder, a Chinese businessman named Mingchao Cai, refused to pay. As a result, the statues were withdrawn from sale, and Christie's, perhaps hoping to erase memory of this awkward moment, blocked the images of the controversial statues. See Richard C. Kraus, *The Repatriation of Plundered Chinese Art*, 199 The China Quarterly 837–42 (2009).

[3] Although some might wonder these relics should be considered as lawful prize or booty instead of illegally stolen or robbed relics, because these are the results of the Second Opium War (1856–60). However, even at that time, traditional international law allowed states to wage war in order to pursue their national strategy; yet just as Grotius had pointed out, only prize and booty taken from a just war can be lawful, and not all the wars are just. See Hugo Grotius, *De Jure Praedae Commentarius*, Clarendon Press (Oxford), at 30–41, 57 (1950). No wonder the Second Opium War was just an invasion and plundering of China, not a just war; the pillaged relics had never been submitted to any prize court but were directly taken by the invaders. So, it can be sure that these cultural relics were pillaged.

recourse is sufficient enough, but in international law China's claim is poorly grounded; neither current international treaties nor international customs can provide sufficient legal ground for such claims. As a result, bidding in auctions and purchasing the pillaged relics seem to be the best possible way to bring the pillaged relics back to China. But this can hardly be regarded as a better solution, as increasingly more Chinese people begin to wonder why should we, as the victims, pay for that had been stolen from us? Will that mean a double theft?

This article takes the litigation on the Auction of the Rat Head and Rabbit Head Bronze Statues[4] as an example, analyzes the dilemma, and tries to look for a solution.

I. INTERNATIONAL TREATIES

Treaty is the most important source of international law.[5] As the expressed agreements between nations, and as the formal source of international law, treaty is easy to apply and is mainly applied by nations. Therefore, if the Chinese hope to retrieve of the pillaged cultural relics by means of law, the best way is to find support from treaties.

At present, the treaties that are likely to be applied to the retrieval of pillaged cultural relics are: (a) Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) (hereinafter, the "1954 Convention"); (b) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) (hereinafter, the "1970 Convention"); and (c) UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995) (hereinafter, the "1995 Convention").

A. The 1945 Convention

Article 4(3) of the 1954 Convention stipulates: "The High Contracting Parties

[4] These two statues are part of the twelve statues in the Old Summer Palace of Emperor Qianlong period. In 1860, French and British troops invaded Beijing and burned the Old Summer Palace, and the 12 statues were pillaged overseas. For more detail of the 12 statues, see Richard C. Kraus, *When Legitimacy Resides in Beautiful Objects: Repatriating Beijing's Looted Zodiac Animal Heads*, Gries, in Peter and Rosen, Stanley eds., *State and Society in 21st Century China: Crisis, Contention, and Legitimation*, Routledge (London), at 195–215 (2004). Until now, the ox head, tiger head, horse head, monkey head, and boar head had been bought back by Chinese companies or collectors, the rat head and rabbit head are in the hands of French collectors, the dragon head is said to be in the hands of a Chinese Taiwan collector, while the whereabouts of the snake head, sheep head, rooster head, and dog head remain unknown.

[5] See Naigen Zhang, 国际法原理 (The Theory of International Law), Chinese University of Political Science and Law Press (Beijing), at 174 (2002).

further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party."

Article 1(3) of the 1954 Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict rules: "Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations."

The above provisions provide the basis for the retrieval of pillaged cultural relics after armed conflicts. The 1954 Convention and Protocol tool effect in France in 1957 and in China in 2000. However, some scholars pointed out that such provisions mainly focus on the lawful and orderly transfers made for the protection of cultural relics at the time of armed conflicts, while they cannot be applied to the illegal transfers made for the theft of cultural relics.[6] In my opinion, such provisions only stipulate that the Contracting Parties shall refrain from requisitioning movable cultural property and return them at the end of hostile conflicts, without mentioning how to deal with the situation when State Parties do not follow these provisions, especially in situations where states do not return the cultural relics they had pillaged long before. As a result, these provisions carry little significance to the retrieval of Chinese cultural relics pillaged overseas.

B. The 1970 Convention

Article 11 of the 1970 Convention stipulates: "The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit." Article 13 rules: "The States Parties to this Convention also undertake, consistent with the laws of each State: (a) to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property; (b) to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner; (c) to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners; (d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto*

[6] Yuxue Li, 文物返还问题的法律思考 (A Legal Consideration on the Return of Cultural Relics), 128(6) 中国法学 (Journal of Chinese Law), at 100 (2005).

not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported."

The above provisions make it clear that it is illegal to transfer cultural relics by illicit means, and impose the obligation of returning such cultural relics on contracting parties. This convention was rejected by some Western countries such as the UK, Germany, and Japan; but, other Western countries such as the US, France, Canada, and Australia, joined the convention. And, China joined the convention in 1989. It seems the above provisions are helpful for China's retrieval for the return of cultural relics pillaged overseas; however, some scholars pointed out that the 1970 Convention cannot settle the recovery of the cultural relics which had been lost and acquired by private owners, for these cultural relics had been transformed into private property through various transactions in public markets.[7] In my opinion, these provisions should only be effective to the contracting parties after its entry into this convention; unless the parties agree otherwise, such provisions cannot be applied to the recourse of Chinese cultural relics pillaged overseas.

C. The 1995 Convention

The 1995 Convention was rejected by many Western countries with France as an exception, And amongst the developing countries, China acceded to this convention. The provisions of the 1995 Convention have binding effect on both France and China. According to article 3(1) and 3(2), the possessor of a cultural object which has been stolen (including unlawfully excavated or lawfully excavated but unlawfully retained) shall return it. But, article 3(3) stipulates "[A]ny claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft." This suggests a prescription that had been set to the retrieval of pillaged cultural relics.

Although article 3(5) allows contracting parties to declare that a claim is subject to a time limitation of seventy-five years or longer period according to the 1995 Convention, which is of little use to the retrieval of Chinese cultural relics pillaged overseas, since it is generally acknowledged that these cultural relics were pillaged about 150 years ago. In addition, when China joined the convention, the Law of the People's Republic of China on the Protection of Cultural Relics did not mention anything about the recourse at all, much less stipulating a longer time limitation. When China amended the Law on the

[7] Id. at 99.

Protection of Cultural Relics in 2002, the situation remained unchanged. Namely, the 1995 Convention cannot provide legal basis for China's recourse.

Even article 10(3) emphasizes that: "[T]his convention does not in any way legitimize any illegal transaction of whatever which has taken place before the entry into force of this convention or which is excluded under paragraph (1) or (2) of this article, nor limit any right of a state or any other person to make a claim under remedies available outside the framework of this convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this convention."

Yet as known, such provision is just an announcement without legal effect, since this convention has no legal effect on the legal issues occurred before its entry into force or outside of its scope. Specifically, in what way the contracting parties might negotiate for their disputes on cultural relics outside the prescription stipulated by the convention is the parties' own business and is irrelevant with the convention.

On this point, although China, when joining the convention in 1997, declared that China reserves the right to recover pillaged cultural relics without time limitation, such declaration is not a real reservation to the convention. For a declaration to be a reservation it must preclude or change the convention's certain legal effects on the contracting party who make it, otherwise it is not a reservation.[8] As a matter of fact, the above declaration has nothing to do with the issues regulated by the convention; how can it preclude or change the effect of the provisions of the convention? Such declaration will have no effect on other contracting parties, which can only serve as an announcement of China's standpoint at the most. As a result, it is apparent that due to the time limitation of the convention, China cannot find legal basis for the recourse of cultural relics pillaged overseas at the moment.

As a matter of fact, even if the 1954 Convention had supplied sufficient remedies for the recourse, even if the 1995 Convention had set no time limitation for the recourse, we still cannot make a breakthrough in the recourse of pillaged cultural relics, for a treaty, as positive international law, has a fundamental nature — *lex prospicit non respicit*. That is to say, a treaty is only binding on states after it has taken effect. Further, when the cultural relics were pillaged, there were no treaties dealing with the recourse of such properties at all. Using contemporary treaties as the legal basis to recover the cultural relics pillaged more than 100 years before is not legally sufficient.

From the above discussions we could have a better understanding with regard to the current existing Conventions are not able to adequately address the

[8] See Haopei Li, 条约法概论 (Introduction to Treaty Law), 2nd edition, Law Press (Beijing), at 125 (2003).

veracious complexity of these claims or the multifaceted issue of protecting cultural heritage. This led to my belief of the reason why scholars conclude that, strictly speaking, China has no international legal claim to those above-mentioned cultural relics.[9]

Under such circumstances, article 15 of the 1970 Convention — "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" — might offer some implications on this point, i.e., China shall endeavor to conclude special agreement on the recourse of Chinese cultural relics pillaged overseas with relevant nations; these nations should recover the lost cultural relics and return them to China, while China should pay for this.

In this aspect, the 2000 Agreement on the Protection and Recovering Cultural Property between the Government of the People's Republic of China and the Government of the Republic of Peru can serve as a guideline. According to article 3 of the Agreement, upon the request of one contracting party, the other party shall, within its reach, recover and return the cultural relics pillaged from the territory of the former state party with legal methods; such request should be made through diplomatic channels; the state party who makes such request shall pay for the recovery and return of the properties.

Consequently, in the special agreement on the recourse of pillaged cultural relics, recovery should only be made "within the reach" of the state parties and shall not be compulsory. Except such special agreements, any legal basis cannot be found in treaty law for the recourse of pillaged cultural relics overseas.

II. INTERNATIONAL CUSTOM

International custom is another formal source of international law, which can be applied to the entire international community but excluding the persistent objector.[10] The question posed is: Is it possible to retrieve the cultural relics

[9] See William Xiaojun Wei, Mathew Levitt, *The Qing Bronze Heads Case: Problems and Suggestions Regarding the Repatriation of Cultural Property, World Heritage and Cultural Diversity*, German Commission for UNESCO, at 182 (2010).

[10] A persistent objector means that a sate, at the beginning of making certain international custom, clearly shows its objection and maintains such objection all along; as a result, when the above international custom is constituted, the state will not be bound by it. Just as some experts pointed out, no matter what a legal base is for this doctrine, it is fully recognized by international tribunals and practices. See Ian Brownie, *Principles of Public International Law*, 7th edition, Oxford University Press (Oxford), at 10–15 (2008).

pillaged overseas by proving the international custom that requires the return of such relics? If such attempt is insisted, then it is necessary to prove the existence of the two elements of international custom which are *usus* and *opinio juris*.[11]

As to the current situation, almost every nation recognizes and supports the prohibition of pillaging foreign cultural relics, which, of course, are not something that take place as frequent as it used to be — except in such special areas as Afghanistan and Iraq. But as to the question of whether the pillaged cultural relics should be returned, international society has yet to reach an agreement.

The existence of *usus* is questionable, much less proving it. Although many examples of the return of pillaged cultural relics can be named (for example, Germany returned the cultural relics it had pillaged in World War I to France after the war; in 1980, Iraq recovered part of Babylonian Code and Hammurabi Code from France; in 2002, Egypt recovered a golden comb of ancient Pharaoh from Germany), there are much more failure of such retrieval cases.[12] Just considering the situation in China, of more than 17,000,000 cultural relics that were lost, including more than 1,670,000 cultural relics collected in more than 200 museums scattered in 47 countries, most of which have not been returned.

One of the most famous examples is the eighth-century copy of Kaizhi Gu (顾恺之)'s the fourth-century *Admonitions of the Instructress to the Court Ladies* (女史箴图), the return of which had been refused by the British Museum that claimed it having bought it from a British officer and having held it in trust for the British nation,[13] although some experts pointed out that such descriptions sound increasingly bizarre today.[14]

In 2002, 18 top Western museums published a Declaration on the Importance and Value of Universal Museums, clearly objecting to the return of cultural relics to their home countries. Although such a declaration was criticized by many people, yet the fact is, in the international community, the chances of returning pillaged cultural relics to its original country are often unpredictable.

More doubts may be raised for the proving of *opinio juris*, which is more important for international custom. Although the international community does

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[11] *Usus* means nations' repeating similar activities, and *opinio juris* means nations are convinced that these usages are binding. See Tieya Wang, 国际法 (International Law), Law Press (Beijing), at 14 (1995).

[12] Although many national governments and international organizations try to address the issue, all of these efforts have met with limited successes, the recovery rate for stolen art is only 12% (Is this figure precise or approximate?). See Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95(2) Columbia Law Rev. 377–417 (1995).

[13] See Shane McCausland, *The Admonitions Scroll: Ideals of Etiquette, Art and Empire from Early China*, 32(5) Orientations 26–27 (2001).

[14] See Kraus, fn. 2.

not deny that, in terms of moral concerns, the pillaged cultural relics should be returned, yet such obligation is just in moral sense, which does not carry legal significance. If nations return the pillaged cultural relics, such deeds will be respected; if they do not, they will only be condemned by public opinion.

In 1995, the United Nations Educational, Scientific and Cultural Organization — UNESCO promoted the principle of Returning Pillaged Cultural Relics during War, which means that all the pillaged or lost cultural relics should be returned without time limitation. However, UNESCO is not a legislative organization. The principles it posed can only be suggestions or models; only when they are collectively accepted by nations can these principles be international custom.

Surely, the nations that suffered greatly from the robbery, theft, and larceny of cultural relics, such as China, Egypt, and Iraq, insist on the recourse of pillaged cultural relics, but many nations do not respond to such requests, some have even clearly refused any returns.[15] As a result, international society cannot be certain about the legal obligation to return the pillaged cultural relics. And it can be seen that the situation more clearly from the fact that the above conventions which mentioned the obligation to return the pillaged cultural relics have been ignored in many Western countries. Since many nations, especially the nations who have a huge cultural relics market, refuse to join such conventions and deny the obligation of returning pillaged cultural relics, how can it be proved that the international society believes that such an obligation commonly exists?

Even if the existence of *usus* and *opinio juris* about the returning of pillaged cultural relics have been proved (namely, such an international custom requiring the return of pillaged cultural relics exist in today's world), the obstacles posed by *lex prospicit non respicit* cannot be overcome. According to this principle, the international customs can only regulate contemporary international relations and international relations thereafter; it cannot be applied to the issue of returning Chinese cultural relics pillaged overseas taking place more than 100 year ago, unless the international custom at that time also supports such request — while the truth is, it was a *usus* for the super powers to pillage the weak at that time. So it is virtually impossible for China to recover the cultural relics pillaged overseas according to international customs.

III. GENERAL PRINCIPLES OF LAW

Most contemporary scholars believe the general principles of law are the

[15] See John Henry Merryman ed., *Imperialism, Art and Restitution*, Cambridge University Press (Cambridge), at 15 (2006),

principles commonly shared by various national legal systems.[16] That is to say, general principles of law are, by nature, national legal principles; they become international legal principles due to the reason that various national legal systems share the same or similar principles. But, in my opinion, that is a misunderstanding of the concept of general principles of law,[17] and such misunderstanding prevents general principles of law from performing their due effect.[18]

If the mistaken concept of the general principles of law is followed, then it will be very difficult to find a solution for the recourse of Chinese cultural relics pillaged overseas by means of such general principles.

Firstly, it is impossible to prove the world's dominant legal systems share a similar principle of returning pillaged cultural relics. To China, the Law on the Protection of Cultural Relics does not mention such matters either expressly or implicitly; to most Western countries, their national laws also do not contain any provisions about the return of pillaged cultural relics.[19]

Secondly, even if the fact that the world's dominant legal systems share a principle of returning the properties illegally possessed can be proven,[20] this principle is so abstract and trivial that it is incapable of settling the specific dispute without detailed agreements between the relative states.

Thirdly, even if to recover the pillaged cultural relics can be attempted through the abstract principle, there are so many limitations to the rights of the

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[16] See Huhua Wang ed., 国际公法 (Public International Law), Zhejiang University Press (Hangzhou), at 23 (2007).

[17] In my opinion, the general principles of law belong to natural international law, not positive international law. But they were pushed into the positive legal system forcefully by the Statute of International Court of Justice, and the result is that they cannot perform their due function as natural law and at the same time they cannot be transformed totally into positive law. See Steel Rometius, 国际法本体论 (On the Noumena of International Law), Law Press (Beijing), at 23 (2008).

[18] Although article 38(1) and (3) of the Statute of International Court of Justice recognize that they are basis for making judgment, yet actually the ICJ and PCIJ (Permanent Court of International Justice) never apply them directly, instead they were only used as a part of judicial reasoning without formal mention or citation; only in individual or dissenting opinions were they mentioned formally. In addition, they can only be applied by international arbitral tribunals. See Ian Brownlie, *Principles of Public International Law*, 6th edition, Cambridge University Press (Cambridge), at 17 (2003); Timothy Hiller, *Principles of Public International Law*, 2nd edition, Cavendish Publishing Limited (London), at 10 (1999).

[19] See Merryman, fn. 16 at 19–25.

[20] In Roman law, *rei vindicatio* is the most powerful way to protect property rights. The civil law system developed the ownership returning petition right. Article 985 of the German Civil Code, article 641(2) of the Sweden Civil Code, and article 549 of the French Civil Code all mention such rights. In the common law system, the law of restitution is one of the pillars of the law of obligation. Article 117(1) of the Chinese General Principles of Civil Law and article 243 of the Chinese Property Law both mention the similar rights.

true owner, such as good faith acquisition, *usucapio*, extinctive prescription, which also constitute the general principles of law (to be discussed in the following sections). Nevertheless, the relative states have no reason to give up the right to make counterargument in accordance with the above contradictory general principles of law.

Fourthly, since the general principles of law are actually used by the ICJ only as subsidiary sources, China cannot expect to be benefited by the direct application of such principles.

In my opinion, in the model of the application of international law, general principles of law (as natural international law) can be applied directly to international relations in two ways: One is through the agreement of nations, and the other is through unilateral legal activities.[21] According to this model of application, it is possible to settle the international dispute on the retrieval of Chinese cultural relics pillaged overseas through the application of general principles of law.

As the first choice, in specific cases such as recourse for the Rat Head and Rabbit Head Bronze Statues, if China can reach an agreement with the states in concern, they can authorize international legal institutions to apply general principles of law directly to this case. However, it is to point out that if the states choose to settle the dispute in the ICJ, due to the limitation of its statute, they could only authorize the ICJ to adjudicate the case with the principle of *ex aequo et bono* according to article 38(2), instead of adjudicating the case with general principles of law according to article 38(1) and (3). This is because the consent of two states is not enough to prove the existence of general principles of law, and the fact is that the ICJ itself never proved and applied general principles of law directly.

However, if nations choose international arbitral tribunals to settle the dispute, there will be more flexibility to deal with the case. As long as China concludes arbitration agreement with related states, the tribunal can apply general principles of law directly, and the parties can even appoint specific general principles of law to be applied. That is to say, if compromise is achieved under full negotiation, certain general principles of law that might hinder the settlement of the dispute (such as good faith acquisition, *usucapio*, extinctive prescription) can be given up by the state parties and will not be applied in the international arbitral tribunal, thus the dispute will be resolved more smoothly.

As the second choice, nations related to the dispute can conduct certain unilateral legal activities according to the general principles of law on the return of illegally possessed properties, recover and return the pillaged cultural relics to China unilaterally; and China, when taking back its lost cultural relics, can take

[21] See Rometius, fn. 18 at 220–21.

certain unilateral legal acts according to the general principles of law on the just and rational compensation, making good faith compensation to the possessor and related nations. Generally, nations need to reach certain tacit agreement or understanding before undertaking such unilateral activities.

Consequently, there are two choices in the recourse of cultural relics pillaged overseas according to the general principles of law: One is to make an agreement with relative states, authorizing certain international legal organizations to decide the case according to the general principles of law. If such organization is the ICJ, then the relative states can authorize the court to decide the case according to the principle of *ex aequo et bono*; however, the best way is to conclude an international arbitration agreement and renounce the application of certain general principles of law that might hinder dispute resolutions. The other choice is to make unilateral legal activities with each other according to the relative general principles of law, on condition that certain tacit agreement or understanding had been achieved between the nations beforehand.

IV. CIVIL LITIGATION IN FOREIGN COURTS

Since the recourse of Chinese cultural relics pillaged overseas encountered tremendous difficulties in international law, there is an alternative choice — commencing legal lawsuit in foreign civil courts in accordance with foreign laws.[22] In the recourse for the Rat Head and Rabbit Head Bronze Statues, what the Chinese Bar Fellowship commenced was only transnational civil litigation procedure. However, the application was rejected in the stage of property preservation and the procedure was ended thereafter. It demonstrates that it is likely that China may also expect strong obstacles in recovering Chinese cultural relics pillaged overseas in foreign civil courts.

A. The Right to Sue

If retrieving the pillaged cultural relics in foreign civil courts may be attempted, then, it is necessary to consider who should be the applicant. Observably, not all persons or legal entities have the right to do so. Generally only the parties whose benefits are directly affected can have the right to sue.

If China wants to recover personal properties, such as the Rat Head and Rabbit Head Bronze Statues in French courts, the French law, as *lex loci rei sitae,*

[22] That is a type of transnational or international civil litigation, which means the subject, or the object, or certain procedures or activities of the civil litigations are in foreign countries. See Depei Han ed., 国际私法新论 (New Topics on Private International Law), Wuhan University Press (Wuhan), at 603 (1997).

should be applied.[23] According to article 30 of the 1975 New French Civil Litigation Code, only the parties who have a legal benefit to the result of such a pleading can have the right to sue.

As a result, firstly, the French court has to deal with one problem in this case — who can represent China and claim the legal rights on the cultural relics pillaged from Yuanmingyuan?[24] The ownership of such rights should be decided by Chinese law. In addition, according to article 5 of the Law on the Protection of Cutural Relics, the Rat Head and Rabbit Head Bronze Statues belong to the state. That means, only the national authorities, such as the Ministry of Foreign Affairs, the State Administration of Culture Heritage, the Administration Department of Yuanmingyuan, and the subjects who have the authorization of the above national authorities can have the right to sue. It is understandable that the Chinese authorities will not be involved in such litigations except for making some unilateral statements or even sanctions to foreign-related parties.

It is evident that, just as the French court had decided, they had no rights to apply for an attachment on the two bronze statutes. Chinese law and the authorities never entitle APACE the right to represent Chinese government or Chinese people.

B. Good Faith Acquisition

Good faith acquisition, also known as "mediate acquisition," is an important institution in both civil and common law systems. According to articles 550, 2268 and 2269 of the French Civil Code, if the possessor has no reason to know the defects in the certificate of the transfer of ownership, then his/her acquisition of the ownership is in good faith; good faith is always presumed, and it lies with the party who alleges bad faith to prove it; it suffices that good faith existed at the moment of acquisition.

According to these provisions, the Chinese parties should prove the defendant is not in good faith when acquiring the ownership of the cultural relics — surely, this is very difficult. Although we can point out that it is well known that these cultural relics were pillaged from Yuanmingyuan, and that any reasonable person

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[23] Certain members of Chinese Bar Association thought the bronze statues are realties, and thus Chinese law shall be applied. However, when they were pulled out of the Yuanmingyuan and transferred abroad, they had changed their status and been transformed into personal properties.

[24] Yuanmingyuan was the Old Summer Palace for Qing dynasty, which is located in north-west of Beijing. Built in 1707, Yuanmingyuan was the real political centre of China during the 18–19th century, for over 150 years most of the national affairs were handled by the emperors and their advisers. During Opium War II in 1860, Yuanmingyuan was burned by the British and French troops, and many relics were pillaged over the seas.

should be aware that only China is the true owner of these cultural relics and therefore the buyers must all be in bad faith, yet the understanding of such general knowledge is insufficient to deny the existence of good faith; nonetheless, the most crucial thing for the Chinese parties is to prove the defendant was in bad faith at the time the ownership of the cultural relics was acquired.

As a matter of fact, the lost cultural relics have been transferred to different owners so many times in more than 100 years, the actual possessor of the cultural relics are not those who had pillaged them from China; they had acquired them from the merchants who had clear legal certificate of ownership, or from public markets. In any case, at least they have enough reasons to claim that they did not know the possible defects of the certificate and they believed they were dealing with the true owner when acquiring such cultural relics, which lead to the conclusion that they were in good faith at that time.

C. Usucapio

The legal system of *usucapio* is inherited from Roman law, which means if the party who lacks ownership possesses a property in good faith, and if such possession is maintained publicly and peacefully for a definite period stipulated by law, then he/she can acquire ownership of the property. In Roman law, the *usucapio* for personality is three years, and that for realty is ten or twenty years, depending on whether the parties live in the same area or not. This system was inherited by continental European countries to different extents. German law extended the time period of *usucapio*,[25] while French law generally maintained the Roman time period — three years for personality and ten or twenty years for realty, depending on whether the true owner lives in *lex rei setae* or not.[26]

To the recourse of Chinese cultural relics pillaged overseas, *usucapio* should not be applied to those who pillaged them from China and those who acquired them in bad faith, for its application is dependent on good faith; however, to the ones who were in good faith, or at least who have reasons based on which can claim to have acquired in good faith, the actual possessors generally fall into the category, *usucapio* should be applied.

According to article 2279(2) of the French Civil Code, the true owner can recover the lost or stolen property as long as the claim for the properties is made within three years, and compensation should be made to the possessor who is in

[25] According to article 937 of German Civil Code, the *usucapio* for personality is 10 years and the possessor should be in good faith not only when acquiring the property but also afterwards; according to article 900 of this law, the *usucapio* for realty is 30 years.

[26] See the French Civil Code, art. 2265, 2279(2).

good faith;[27] however, if such claim has not been made within three years, the present possessor can acquire the ownership of the properties. It should be pointed out that in French law *usucapio* is computed from the day of the loss or robbery, not from the time when the claimant knew the location of the cultural object and the identity of its possessor, which is stipulated in the 1995 Convention.

Therefore, as to the recourse for the Rat Head and Rabbit Head Bronze Statues, the three-year period has elapsed, the actual possessor can claim relative proprietary right based on *usucapio*, as long as it can be proved that acquisition was made in good faith.

D. Extinctive Prescription

Extinctive prescription means, if certain right has not been used for a definite period of time, such right will be void or will not be protected by law. Such prescriptions commonly exist in various national legal systems. According to article 2262 of the French Civil Code, which states "All actions, as well real as personal, are prescribed by thirty years, without compelling the party who alleges it to produce a document thereon, or without permitting an objection to be opposed to him derived from bad faith," even if Chinese parties can deny actual possessor's proprietary rights to the Rat Head and Rabbit Head Bronze Statues based on good faith acquisition and *usucapio*, the latter can still acquire such proprietary rights or be exempted from the possible obligations to return the statues or make relative compensation automatically.

No matter what ground China is based on, 30 years' time period should not be exceeded, which is not at all helpful to the recourse for cultural relics pillaged more than 100 years ago. Observably, if China tries to recover the pillaged cultural relics in foreign civil courts, there are numerous obstacles in foreign national laws making such attempt almost impossible.

V. CIVIL LITIGATION IN CHINESE COURTS

If Chinese parties choose to sue the actual possessor of the Chinese cultural relics pillaged overseas long ago in Chinese civil court according to Chinese law, it means that they will commence another kind of transnational or international

[27] Especially, article 2280 of the French Civil Code stipulates, "If the actual possessor of the thing stolen, or lost, has purchased it in a fair, or in a market, or at a public sale, or from a merchant who sells similar article, the original proprietor can only procure it to be restored to him on repayment to the possessor the price which it cost him."

civil litigation. Such litigation is called foreign-related civil litigation in China. In theory, Chinese parties can try to recover the cultural relics through this channel; but in practice, with many legal barriers such litigation is virtually impossible. As a result, if such litigation procedure is initiated, the result is likely to be counterproductive.

A. The Right to Sue

According to article 108 of the Chinese Civil Procedure Law, the plaintiff should have a direct connection to the result of the case; that means, just like in French Court, if the Bar Fellowship cannot find the right national authorities which represent national interest or the parties who have the authorization of these national authorities to act as the plaintiff, then the Bar Fellowship cannot initiate the lawsuit.

B. The Jurisdiction

Even if the Bar Fellowship acquired the right to sue for the recourse of the Rat Head and Rabbit Head Bronze Statues, it would be difficult for the Chinese court to establish its jurisdiction. Article 22 of the Chinese Civil Procedure Law has stipulated the principle that the plaintiff should sue the defendant where the latter lives, and according to article 241 of the law, which regulates the foreign-related disputes on property rights, only when the subject matter of the litigation is in the territory of China, or the defendant has attachable properties in China, or the defendant establishes certain representative offices in China, can the Chinese court establish its jurisdiction. Although one of the defendants in the case related to the recourse of the Rat Head and Rabbit Head Bronze Statues, Christie's, has representative offices in Beijing and Shanghai,[28] which means China might attach the properties of the two representative offices and make service of judicial documents on them, practically such actions cannot achieve what is intended, because the subject matter in the case are specific objects and worth more than the properties that might be attached. In addition, according to the fundamental principle for establishing jurisdiction in transnational or international civil litigations, such cases generally should be decided by the court *lex rei setae*.[29]

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[28] Christie's also has an auction center in Hong Kong, which is not within the legal domain of Chinese courts in the Mainland of China.

[29] See Jin Huang, 国际私法 (Private International Law), 2nd edition, Law Press (Beijing), at 641 (2005).

C. The Applicable Law

Even if the Chinese court established its jurisdiction in this case, it can hardly apply Chinese law to the case. Although Chinese law states nothing on the applicable law on personal property rights, according to the well-recognized principle of *lex loci rei sitae*, not the law of the forum, but the law of the place where the property is located should be applied to the relative disputes.

In accordance with article 142 of the General Principles of the Civil Law of the People's Republic of China, *lex loci rei sitae,* as an international usage on choice of law of property rights, can be applied by the Chinese court.[30] The law only mentions "can" instead of "should"; however, it is evident that the Chinese court will not violate the state's positive attitude toward international usage, and it cannot explain the reason why Chinese law must be applied in such a case adequately — especially when Chinese law states nothing on such matters. As a result, about the recourse of the Rat Head and Rabbit Head Bronze Statues, even if the litigation was initiated in a Chinese court, it is French law, not Chinese law, that should be applied.

D. The Making of Judgment

It is assumed that the Chinese court accepted the pleading, established its jurisdiction, applied Chinese law to the dispute, then can a judgment advantageous to the Chinese parties be made? The answer is not so encouraging to the parties from China.

In China, the Law on the Protection of Cultural Relics states nothing concerning the recourse of pillaged cultural relics, and although article 117 of the General Principles of Civil Law and article 243 of the Property Law confirm the pillaged national properties should be returned, according to article 135 and article 137 of the General Principles of the Civil Law, the prescription of the plea for the protection of civil rights is two years, the time should be computed from the day when the parties know or should know their rights had been infringed; from the day when such infringement happened, if no request was made during twenty years, the court will not provide legal protection for civil rights except in certain special circumstances.

In general, it means that the Chinese court should not provide legal remedies for the cultural relics pillaged overseas more than 100 years ago, unless the

[30] Article 142 of the General Principles of Civil Law of China stipulates, "When Chinese law and the treaties concluded or joined by China have no regulation on certain matters, international usage can be applied."

defendant voluntarily returns them. There will be only one way for a Chinese court to choose if it wants to make a judgment advantageous to Chinese parties — that is, to declare the case to be a "special circumstance" stipulated in article 137, and extend the prescription. However, why should such a case be a special circumstance? Why cannot the prescription be extended from 20 years to about 150 years? The above questions are difficult to get the solved.

E. The Recognition and Enforcement of Judgment

Presuming a Chinese court made a judgment in favor of Chinese parties, it is doubtful that such judgment will be enforceable. What China desired here is the return of pillaged cultural relics, not the attachment of several representative offices or certain properties owned by the defendant, as a result, the recognition and enforcement of judgment by relative states are needed. Evidently, without the agreements of legal assistance, the recognition and enforcement of judgment cannot be guaranteed; however, even if there is a legal assistance agreement between relative states, such a judgment for this particular case will probably be rejected by other states.

Take the recourse of the Rat Head and Rabbit Head Bronze Statues for example, the judgment in favor of the Chinese parties cannot play its due role without the recognition and enforcement of French authorities. Although France and China had concluded a mutual agreement for legal assistance on civil and commercial matters in 1997, and this agreement was put into effect in 1998; yet to a judgment which caused so much disagreement and related to such major interest and advantages to China, the French authorities have so many reasons to reject it. At least, they can find the following reasons according to article 22 of the 1997 Agreement, which stipulates that when the judgment was made by a court without jurisdiction, or when the enforcement of the relative judgment is harmful to the public order of the contracting state, the judgment can be refused from recognition and enforcement in the contracting state.

Consequently, if the Chinese parties insist on initiating civil litigation in Chinese courts for the recourse of cultural relics pillaged overseas, not only will the expected goal not be achieved, but also there will be international reproach and retaliation for the violating international usages and engaging in unilateralism. In addition, the direct confrontation with other states on the recognition and enforcement of judgments will definitely magnify international disputes and intensify international tensions, which is not what China intends.

CONCLUSION

In summary, facing the dilemma concerning the recourse for Chinese cultural relics pillaged overseas, China should take up rational, beneficial, and moderate legal actions to claim and protect national rights. The recourse on the ground of international custom is next to impossible; the recourse in a foreign country's court are faced with many solid legal obstacles, and the recourse in a national court will not only achieve expected goals but also can result in huge disadvantages. If China hopes to recover the pillaged cultural relics through international treaties, China will have to conclude special agreements with relative states. The latter shall try their best to recover the cultural relics and return them to China, while China shall pay for this.