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CHINA, CULTURAL HERITAGE, AND INTERNATIONAL LAW

Hui Zhong

China, Cultural Heritage, and International Law

China is a country that is rich in antiquities, but it is also a victim of looting that occurred during the period from the First Opium War to the end of the Japanese Occupation (1840–1945) when innumerable cultural objects were lost overseas. The Chinese Government insists on asserting its interest over its wrongfully removed cultural heritage and has sought for the return of lost cultural heritage by all means in accordance with relevant international conventions and Chinese laws. However, securing the return has been, and continues to be, problematic. Little research has been done regarding the question as to whether China has a legal basis for recovery, which is the first legal hurdle that China needs to get over. In addition, China does not have a legal basis for all cultural heritage taken during the period of 1840–1945. Claims for return without a legal basis are usually silenced or, at best, discussed only but very rarely facilitated.

This book provides an answer for the return of Chinese cultural heritage. It examines the law contemporaneous to the removal of Chinese cultural heritage and its application. For this lack of a legal basis, this book argues that a new customary international law is emerging, according to which the interests of the states of origin in their wrongfully removed heritage should be prioritised. This proposed customary rule supports the return of wrongfully removed heritage. Once this proposed customary rule is accepted, it will provide a stronger argument not only for China, but also for other states of origin with a similar dilemma, including South Korea, Egypt, Greece, Cambodia, Turkey, Peru, and Italy, to recover their wrongfully removed heritage.

While dealing with a large pool of return cases, this book is valuable to museums and art collectors in the event of buying and accepting art objects, and settling recovery disputes with states of origin. It will also be of interest to researchers, academics, policymakers, and students in the fields of cultural heritage law, international law, international trade, and human rights law.

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Routledge
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NEW YORK AND LONDON

First published 2018
by Routledge
711 Third Avenue, New York, NY 10017

and by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Routledge is an imprint of the Taylor & Francis Group, an informa business

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Library of Congress Cataloging-in-Publication Data

Names: Zhong, Hui (Writer on law) author.

Title: China, cultural heritage, and international law / Hui Zhong.

Description: Abingdon, Oxon [UK] ; New York : Routledge,

2018. | Series: Routledge research in international law |

Includes index.

Identifiers: LCCN 2017036625 | ISBN 9781138093249

(hardback) | ISBN 9781351605700 (web pdf) |

ISBN 9781351605694 (epub) | ISBN 9781351605687

(mobipocket)

Subjects: LCSH: Cultural property—Protection—Law and legislation—China—History. | Cultural property—Protection

(International law) | Customary law, International.

Classification: LCC KNQ3183 .Z465 2018 | DDC

344.51/094—dc23

LC record available at <https://lcn.loc.gov/2017036625>

ISBN: 978-1-138-09324-9 (hbk)

ISBN: 978-1-315-10696-0 (ebk)

Typeset in Galliard
by Apex CoVantage, LLC

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Preface and Acknowledgements

I always felt very proud when I saw Chinese art treasures exhibited in foreign museums, until Christie's announced that the two bronzes, a rat head and a rabbit head would be auctioned in Paris in February 2009. These two bronze statues were taken from Beijing's Summer Palace by Anglo-French troops during the First Opium War (1856–1860). After Christie's announcement, the Chinese Government resolutely urged Christie's to stop the sale, stating that the auction would “seriously hurt national sentiment”. For many Chinese, the looting of the Summer Palace has become a source of bitterness, as China's highest culture had been ignored and violently destroyed by Anglo-French troops. A group of Chinese lawyers tried to block the auction, but a French court allowed it to proceed. The two bronze statues were still auctioned for sale, but the auction ended in controversy. This auction made me start thinking about the reasons that make recovery difficult, as well as the possibility for recovery.

To answer these questions, I began my research at the University of Queensland, Australia. Until then, I had not realised the difficulties involved in returning these treasures to the place where they were originally created. China is a country that is rich in antiquities, but it is also a victim of looting that occurred during the period from the First Opium War to the end of the Japanese Occupation (1840–1945). Innumerable cultural objects were lost overseas. However, there are relatively few studies relating to the looting and destruction that occurred between 1840 and 1945. While the Nazi's looting of before and during the Second World War has been condemned, Japan's systematic plunder and destruction of China's cultural heritage during the same war is seldom discussed. The damage to Chinese cultural heritage tends to be forgotten. Furthermore, instead of pressing formal demands for repatriation, the approach used to bring scattered Chinese arts home is still limited to donation, buying-back and diplomatic negotiation. One of the reasons for this is that there is no clear answer as to whether China has a legal basis for the recovery. Little research has been done regarding the law in the Qing Dynasty (1644–1911) and law in the Republic of China (1911–1949), and its application to the removal of China's cultural heritage.

As the research progressed, I also realised that China is not the only country that has been active in pursuing the return of its cultural heritage. In the past

few decades, other states of origin have been expecting the return of their cultural heritage: Greece has been requesting the return of the Parthenon Marbles for decades; South Korea has been requesting the return of its Ugiew, the historical books about its Joseon Dynasty (1392–1910); Egypt has been seeking the return of the Rosetta Stone and Nefertiti; and Nigeria has been demanding the return of the Benin bronzes. However, securing the return has been, and continues to be, problematic. As removals often occurred a long time prior, many claims are time barred, additionally many records and other evidence may have disappeared, and international conventions are not retro-active. Most importantly, there is no law contemporaneous to the removal determining such taking as illegal. Even though the taking was morally wrong, it was perfectly legal. Claims for the return without a legal basis are usually silenced or, at best, discussed only but very rarely facilitated.

For this lack of a legal basis, this book aims to provide an answer. This book argues that a new customary international law is emerging, according to which the interests of the states of origin in their wrongfully removed heritage should be prioritised. This proposed customary rule supports the return of historically removed heritage, including Chinese cultural heritage that was lost overseas between 1840 and 1945. During the past two decades, more and more cultural heritage objects have been returned to the states of origin by individuals, museums and states. Both international and national laws have evolved in the direction of favouring and respecting the interests of the states of origin in their cultural heritage. One of the consequences is that museums have adopted stricter policies when buying and accepting art objects. These facts support the idea of a new, emerging customary rule. Once this proposed customary rule is accepted as a new customary rule, it will provide a stronger argument not only for China, but also for other states of origin with a similar dilemma, including South Korea, Egypt, Greece, Cambodia, Turkey, Peru, and Italy, to recover their wrongfully removed heritage.

This book is based on my thesis submitted and defended at the University of Queensland for the degree of Doctor in Philosophy. And this brings me to many thanks. The most sincere thanks are due to Professor Craig Forrest, who supervised my doctoral thesis. I really appreciate the way he guided me to undertake academic research and gave me this opportunity to have my questions answered. He provided me with illuminating guidance, precious advice and constant encouragement through the years of my study. I am incredibly fortunate to have had such a good supervisor. I also owe a debt of gratitude to Professor Janet Ulph who offered precious comments and support during my visiting study at the University of Leicester. Thanks also to Dr Justine Bell, who commented on my work and allowed me to improve my thesis.

I also wish to thank Professor Elina Moustaira and Dr Christa Roodt for their valuable advice and comments on all aspects of my thesis. Thanks also to the anonymous reviewers. Their feedback was nothing less than extraordinary.

I am so grateful to my colleagues in the South China Sea Institute, Xiamen University. Special thanks to Professor Kuen-chen FU for offering the

opportunity to continue my research in underwater cultural heritage and law of the sea.

I would also like to express my gratitude to China Scholarship Council for funding my study in Australia. I am fortunate with the opportunity of doing my PhD in the TC Beirne School of Law.

A special thank you goes to my parents, for their unfailing encouragement, for their continuous belief in me and for their unreserved love.

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1 Introduction

1. Introduction

On April 26 2013, the French Pinault family announced that they would donate two \$40 million bronze statues to China.¹ The two bronzes, a rat head and a rabbit head, were among 12 animal heads, replicating the Chinese zodiac, in a central fountain clock at Beijing's Summer Palace, also known as Yuanmingyuan and used by rulers of the Qing dynasty, spewing water to tell time. All disappeared after the Palace was destroyed by Anglo-French troops during the Second Opium War (1856–1860). The return of the two bronze statues enjoyed a warm welcome in China, with the State Administration of Cultural Heritage in China stating that Mr. Pinault's offer was “an expression of friendship toward the Chinese people”. At the same time, however, it also reminded the Chinese people of the auction of the same two bronze sculptures four years earlier.

In 2009, when the statues were put up for auction in Paris, China attempted to stop the sale. The Chinese State Administration of Cultural Heritage (SACH) resolutely urged Christie's to stop the sale, stating that the auction would “seriously hurt national sentiment”.² To China, the looting of the palace epitomises the humiliation it suffered at the hands of imperial Western powers during the Second Opium War. However, Christie's refused to pull the bronze statues from the auction, as it continued to believe that “sale by public auction offers the best opportunity for items to be repatriated as a result of worldwide exposure”.³ A group of Chinese lawyers also launched a legal bid in a Paris court to stop the sale. However, the court ruled against stopping the auction, concluding that the plaintiff did not have a direct interest in the two statues and therefore no standing before the court. The auction ended in

1 Edward Wong and Steven Erlanger, ‘Frenchman Will Return to China Prized Bronze Artifacts Looted in 19th Century’, *The New York Times* April 26 2013 <www.nytimes.com/2013/04/27/world/europe/frenchman-will-return-to-china-prized-bronze-artifacts-looted-in-19th-century.html>.

2 ‘China Condemns Christie's Auction’, *The BBC News* February 26 2009 <<http://news.bbc.co.uk/2/hi/asia-pacific/7911691.stm>>.

3 Ibid.

2 Introduction

controversy. After China failed to block the sale legally, a Chinese businessman successfully bid for them, but refused to pay as a “patriotic” act. Convinced that he had fulfilled his duty as a Chinese citizen, he further stated that “these cultural relics belong to China . . . they were looted by the West in time of war and illegally taken abroad”.⁴ After the auction sale, the SACH announced new limits against Christie’s.⁵ Specifically, the Chinese Government tightened the ownership control over all cultural relics that Christie’s seeks to import or export.

This auction case clearly reflects the importance that societies attach to their cultural relics, which is why related discussions can easily become emotional.⁶ Cultural relics are often the symbols for times of victory, defeat, great suffering, or important occasions in the history of a society.⁷ However, a large number of such cultural relics were taken out of China during times of war and peace, and particularly during the period beginning with the First Opium War to the end of Japanese Occupation (1840–1949). China has since been expecting the return of its scattered cultural relics.⁸ During David Cameron’s 2013 visit in China, he was inundated with demands for the restitution of cultural objects taken from the country.⁹ When the British officials set up the official page on the Chinese social network “Sina Weibo”, China’s version of Twitter, one of the most popular questions concerned the return of Chinese cultural relics. However, securing the return of the relics taken during this period has been and continues to be problematic.

4 Yu Zhang, ‘France Returning Treasure to China Sets Precedent for Further Restitutions’, *Global Times* September 9 2015 <www.globaltimes.cn/content/941506.shtml>.

5 ‘China Tightens Control on Christie’s After Auction’, *The Xinhua News* February 26 2009 <http://news.xinhuanet.com/english/2009-02/26/content_10901300.htm>.

6 Scholarship in this area now clearly differentiates these terms, such as cultural heritage, cultural property, return, repatriation and restitution. For more discussion, see Lyndel Prott and Patrick O’Keefe, “‘Cultural Heritage’ or ‘Cultural Property’?” (1992) 1(2) *International Journal of Cultural Property* 307; Wojciech Kowalski, ‘Types of Claims for Recovery of Lost Cultural Property’ (2005) 57(228) *Museum International* 85.

But in Chinese legal documents, the terms antiquities, ancient objects, and cultural relics, are more commonly used. This book will use cultural heritage and return in most of its context as the primary purpose of this book is arguing for a new customary rule based on the increasing recognition of connection between states of origin and cultural heritage. But when analysing Chinese legislation, this book will use the relevant terms according to the context in which they appear.

7 Stefan Gruber, ‘The Fight Against the Illicit Trade in Asian Cultural Artefacts: Connecting International Agreements, Regional Co-operation, and Domestic strategies’ (2013) 3(2) *Asian Journal of International Law* 341, 343.

8 China’s recovery efforts will be discussed in Chapter 2.

9 “‘Give Us Back Our Treasure’: Chinese Demand Cameron Returns Priceless Artefacts Looted during 19th Century Boxer Rebellion”, *Mail Online* December 4 2013 <www.dailymail.co.uk/news/article-2518111/China-demand-David-Cameron-return-Boxer-Rebellion-artefacts.html>.

2. A Victim of Loss of Cultural Heritage

China has an abundance of cultural relics created through its history of more than 5,000 years. However, due to the decay of the Qing Government and the military superiority of European forces, China was forced to open its gates after the defeat in the First Opium War in 1840, and incurred invasions from foreign countries.¹⁰ During this period, China was dragged into the First Opium War (1840–1842), the Second Opium War (1857–1860), the Sino-French War (1883–1885), the First Sino-Japanese War (1894–1895), the Pillage of Beijing by Eight-Nation Alliance (1900),¹¹ the British invasion of Tibet (1903–1904), the First World War (1917–1918) and the Second World War (also known as the Japanese Occupation, 1937–1945).¹² China lost almost all of the wars it fought, and was forced to give major concessions to the great powers in the subsequent treaties. At the same time, China was plagued by destruction and a large-scale loss of its cultural heritage on a large scale.¹³ Generally speaking, Chinese cultural heritage was lost in two ways: first, plunder and looting in times of armed conflicts; and, second, taking by individual behaviours, such as expedition, theft and exportation, during both times of war and peace.

Large-scale looting during wartimes have resulted in massive losses of Chinese cultural heritage, in particular, during the sacking of the Summer Place by Anglo-French troops during the Second Opium War (1856–1860), the plunder of Beijing by the Eight-Nation Alliance in the Battle of Beijing (1900); and the Japanese looting in the Second Sino-Japanese War (1931–1935). For example, the Old Summer Palace was where the emperors of the Qing Dynasty lived and handled government affairs. Reputed as the “Garden of Gardens”, the Summer Palace is well-known for its magnificent architecture and extraordinary history, as it took the Qing people from 1709 to 1772 to complete this grand complex of buildings and gardens. Also, countless priceless Chinese artworks, antiquities, unique copies of literary works and compilations were collected from all over the country and stored in this Palace. However, when Anglo-French forces occupied Beijing, the invaders torched

10 For more historical backgrounds, see John King Fairbank, *The Cambridge History of China Volume 10: Late Ch'ing 1800–1911, Part 1* (Cambridge University Press, 1978); David Scott, *China and the International System, 1840–1949: Power, Presence, and Perceptions in A Century of Humiliation* (State University of New York Press, 2008).

11 The Eight-Nation Alliance was an international coalition set up in response to the Boxer Rebellion by the nations of Japan, Russia, the British Empire, France, the US, Germany, Italy, and Austria-Hungary.

12 Japan started fighting against China intermittently since 1931, but the total war started in 1937.

13 This book will not go to the details of the loss of Chinese cultural heritage. For more details, see Lei Peng, *A Research on Legal History of Return of Relics (in Chinese)* (Nanjing: Yilin Publishing, 2012); Zuozhen Liu, *The Case for Repatriating China's Cultural Objects* (Springer, 2016), Chapter 1.

4 Introduction

or levelled as many as 200 buildings, stripping a nearly thousand-acre site of sculptures, silk robes and jewellery.¹⁴

Japan is another major destination for the looted Chinese cultural heritage. During the Second Sino-Japanese War, public museums, libraries, imperial palaces and private houses were all targets of pillage for Japanese troops due to Japan's notorious "Three Alls Campaign", also known as "Burn all, loot all, and kill all".¹⁵ The damage to China's cultural heritage during the armed conflicts was massive.¹⁶ For example, Chongqing, with a long history dating back at least 3,000 years, enjoys a prestigious historical reputation and is famous for a series of Chinese religious sculptures and carvings, depicting and influenced by Buddhist, Confucian and Taoist beliefs. However, the 1939 carpet bombing of Chongqing in two days of air raids was described by a survivor as "a sea of fire". It was reported that 741 historical sites, more than 15,000 paintings and over 3,000,000 books were damaged or destroyed in this act.¹⁷ It was also reported that only in 1944, 11,022 volumes of ancient books in the Forbidden City and 1,372 pieces of treasures in the Peking History Museum were pillaged by the Japanese.¹⁸

Apart from war looting, countless Chinese cultural heritage was stolen, excavated, and exported from China by individuals during both times of war and peace. Since the end of the 19th century, foreign explorers, sinologists and missionaries had come to China to collect Chinese cultural heritage. During the period of 1850 and 1940, 151 archaeological explorations were conducted by foreign expedition teams in Northwest China.¹⁹ The most well-known example occurred in 1907 when Auriel Stein convinced the guardian in the Mogao Grottoes to sell a collection of 260 paintings and more than 8,000 manuscripts to the British Museum.²⁰

In a recent donation case in 2014, seven marble columns from the Summer Palace were handed over to China from the KODE Art Museums of Bergen, a

14 Karl Meyer, 'The Chinese Want Their Art Back', *New York Times* June 20 2015 <www.nytimes.com/2015/06/21/opinion/the-chinese-want-their-art-back.html?_r=0>.

15 Louis G. Perez, *Japan at War: An Encyclopedia* (ABC-CLIO, 2013), 484.

16 For a general account of the Japanese plunder, see Yan Changhong and Li Xia, 'A Review of Japan's Cultural Aggression against China during Anti-Japanese War' (in Chinese) (2005) 25(4) *Journal of South-Central University for Nationalities (Humanities and Social Sciences)* 12.

17 'War Damage on Cultural Relics Commission under the Department of Education', *China Cultural Relics* August 22, 2007 <www.xhgx.com/html/View_9270.html>.

18 Peng, *A Research on Legal History*, above n 13, 26–34.

19 Twenty explorations were conducted by Germans, 53 by Russians, 30 by British, one by Hungarian, 13 by Japanese, eight by French, three by American, 22 by Swedish, and one by an unknown expedition team. Ibid, 34–55; Liu, *Repatriating China's Cultural Objects*, above n 13, 13.

20 James Cuno, *Who Owns Antiquity?: Museums and the Battle over Our Ancient Heritage* (Princeton University Press, 2008), 88–89.

Norwegian museum.²¹ The columns were part of an over 4,000-piece collection of Chinese artefacts in the KODE museum that were donated by Johan Munthe between 1907 and 1935. Munthe lived in China from 1886 to 1935 and was first employed in the Chinese customs service. He fought on the Chinese side in the First Sino-Japanese War and was named a lieutenant general by Yuan Shikai, who would later become the first president of the Republic of China. As an avid collector of Chinese art, Munthe had a significant collection of Chinese sculpture, jade, porcelain, paintings and Chinese antiques. However, it was unclear how he obtained and transported them to Norway.

From 1840 to 1949, Chinese cultural heritage was lost in amazing figures, calculated in millions of pieces, including hundreds of thousands of works of superb quality, scattered over 47 countries.²² Britain has the richest collection of Chinese cultural objects, next comes France. It is estimated that the British Museum has around 23,000 cultural heritage objects, including Chinese paintings and calligraphy, ancient books, jade, porcelain and bronze dating from different historical periods.²³ In Guimet museum, over half of the works collected are of Chinese origin, more than 30,000 pieces in number.²⁴ The US is another destination for a great deal of the lost Chinese paintings and calligraphy. It is estimated that the Freer Gallery alone has a collection of over 1,200 paintings and the Metropolitan Museum of Art owns more than 500 pieces.²⁵

All of this loss and the taking of Chinese cultural heritage have made the return all the more important and meaningful. China has begun insisting on asserting its interests over cultural heritage removed during this period. In the auction case of 2009, China's State Administration of Cultural Heritage stated that:

China does not acknowledge what it called the illegal possession of the two sculptures and would continue to seek the return of looted and/or stolen cultural objects and other illegally exported relics by all means in accordance with relevant international conventions and Chinese laws.²⁶

21 Bree Feng, 'Despite Frigid Relations, Chinese Relics Coming Home From Norway', *New York Times* February 12 2014 <http://sinosphere.blogs.nytimes.com/2014/02/09/despite-frigid-relations-chinese-relics-coming-home-from-norway/?_r=0>.

22 'Chinese Experts Demand Return of Cultural Relics' in Lyndel Prott (ed), *Witnesses to History* (UNESCO, 2008) 119, 119.

23 'Give Us Back Our Treasure', above n 9.

24 Irini A. Stamatoudi, *Cultural Property Law and Restitution: A Commentary to International Conventions and European Union law* (Edward Elgar Publishing, 2011), 25.

25 'Culture Insider: Chinese Cultural Relics Lost Overseas', *China Daily* August 15 2014 <www.chinadaily.com.cn/culture/art/2014-08/15/content_18311574.htm>.

26 'China Condemns Christie's Sculpture Sale, Warns of "Serious Effects"', *Xinhua News* February 26 2009 <http://news.xinhuanet.com/english/2009-02/26/content_10900960.htm>.

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However, when the Chinese Government made this statement, it did not refer to a specific law that entitles China to claim for the return of the disputed art treasures. On the other hand, to obtain the return of removed heritage, repatriation cases have suggested that the first legal question China needs to deal with is to prove that China has a legal basis for the recovery.

Although international legal instruments, such as the 1954 Hague Convention,²⁷ the 1970 UNESCO Convention²⁸ and the 1995 UNIDROIT Convention,²⁹ which provide for the restitution of cultural heritage, have emerged over the last 70 years, they do not apply retroactively. Most historical events, for example the Looting of the Summer Palace, that have given rise to current restitution claims occurred before the promulgation of such measures. Thus, one of the fundamental reasons for disputes being unresolved is that there was no law contemporaneous to the removal regulating such taking as illegal. In other words, current possessors are under no legal obligation to return. The usual result for the recovery claims is that enforceable legal action is not an option, resulting in an unsatisfying outcome both legally and ethically.

3. Increasing Demand for Return, but Lacking a Legal Basis

China is not the only country that has been active in pursuing the return of its cultural heritage. In the past few decades, other states of origin have been expecting the return of their cultural heritage: Greece has been requesting the return of the Parthenon Marbles for decades; South Korea has been requesting the return of its *Ugiew*, the historical books about its Joseon Dynasty (1392–1910); Egypt has been seeking the return of the Rosetta Stone and Nefertiti; and Nigeria has been demanding the return of the Benin bronzes. In many situations, in order to bring their heritage home, many states of origin have taken legal action against current possessors. Turkey petitioned the European Court of Human Rights for the return of the *Helicarnassus*; Italy took legal action against Marion True, the former curator of the Getty Museum, which was revealed to have accepted stolen Italian cultural objects; and Cambodia requested the US Government to apply civil forfeiture for the return of Khmer statues. As commented by a Turkish archaeologist, “we know

27 Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention). The Convention was completed by the Protocol for the Protection of Cultural Property in the Event of Armed Conflict (First Protocol—May 14 1954, 249 UNTS 358) and Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Second Protocol—March 26 1999, 38 ILM 769 (1999)).

28 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention).

29 Convention on Stolen or Illegally Exported Cultural Object (1995 UNIDROIT Convention).

100 percent that these objects at the Met are from Anatolia. And we only want back what is rightfully ours.”³⁰

However, the lack of law regulating such removals as illegal makes it difficult for the claims to be successful. In May 2015, Greece stated that it had ruled out taking legal action in its battle to reclaim the Parthenon marbles from the UK, which ended the legal battle in one of the world’s most debated cultural disputes.³¹ Arguments for the return of the marbles have been made on both cultural and ethical grounds, and diplomatic efforts have been attempted since the mid-1980s.³² The case was brought before the UNESCO Intergovernmental Committee; however, very little progress has been made. The fundamental reason for the dispute being unresolved is that there is no law contemporaneous to the removal regulating such taking as illegal. Neither the British Government nor the British Museum is under any legal obligation to return the Parthenon marbles to Greece.³³ In other words, claims for the return of relics without a legal basis are usually silenced or at best discussed, but very rarely facilitated.

In the absence of mandatory obligation, although return could still be triggered through diplomatic negotiation or voluntary donation, the fate of disputed cultural heritage is left to the current possessor to decide. The available practices demonstrate that relying on another party’s goodwill is unpredictable and unrewarding. In 1978, the Netherlands handed over to Indonesia some colonial art treasures of cultural and historical significance; however, earlier requests from Indonesia related to a list of 10,000 objects.³⁴ Therefore, an ethics discourse is ineffective and inadequate to prompt large-scale restitution. Both China and other states of origin need a stronger argument to claim for the return of their cultural heritage.

4. Is a New Customary Rule Emerging?

In the past two decades, an increasing number of cultural heritage objects have been returned to states of origin by governments, museums, and individuals throughout the world. In particular, many claims that had been largely

30 Dan Bilefsky, ‘Seeking Return of Art, Turkey Jolts Museums’, *New York Times* September 30 2012 <www.nytimes.com/2012/10/01/arts/design/turkeys-efforts-to-repatriate-art-alarm-museums.html?pagewanted=all&_r=0>.

31 Helena Smith, ‘Greece Drops Option of Legal Action in British Museum Parthenon Marbles Row’, *Guardian* May 14 2015 <www.theguardian.com/artanddesign/2015/may/13/greece-drops-option-legal-action-british-museum-parthenon-marbles-row>.

32 Michael Reppas, ‘Deflowering of the Parthenon: A Legal and Moral Analysis on Why the Elgin Marbles Must be Returned to Greece’ (1999) 9 *Fordham Intellectual Property, Media and Entertainment Law Journal* 911.

33 ‘UK Government Rejects Parthenon Marbles UNESCO Mediation’, *Elginism* March 27 2015 <www.elginism.com/elgin-marbles/uk-government-rejects-parthenon-marbles-unesco-mediation/20150327/7859/>.

34 Jos van Beurden, ‘How to Break the Deadlock in the Debate About Colonial Acquisitions?’ in Valentina Vadi and Hildegard Schneider (eds), *Art, Cultural Heritage and the Market: Ethical and Legal Issues* (Springer, 2014) 165, 167.

unsuccessful in the late 20th century have now been successfully negotiated and settled. In 2006, the Metropolitan Museum of Art stated that it would relinquish ownership of a 2,500-year-old Greek vase to Italy, reversing a position it had held for more than 30 years.³⁵ In the case of *Iran v Wolfcarius*, while the Iranian Government initiated legal action in the Belgian court in 1981 for the return of disputed art objects, the litigation was pending until December 2014. The court finally acknowledged the Iranian government's legal right to all the disputed cultural relics and ordered for them to be returned to Iran, more than 30 years after Iran first sued for the return.³⁶ In 2011, Japan eventually returned to South Korea over 1,200 precious ancient royal manuscripts, known as the Uigwe collection, more than 100 years after they were taken to Japan.³⁷ The evolving law and retuning cases strongly contribute to the idea that the interests of states of origin in their wrongfully removed cultural heritage have been increasingly respected and recognised. Based on the increasing recognition, this book argues that a new customary rule is emerging and will likely come into existence in the future. The proposed customary rule recognizes that the interests of states of origin in their wrongfully removed heritage should be respected and such heritage should be returned.

To argue for the proposed customary rule, this research critically examines the types of state practices that should be considered as relevant evidence for the formation of the customary rule. Against this background, it is timely to identify the types of return that will be analysed in the following chapters: (1) historically removed heritage; and (2) illegally removed cultural objects, which were removed either, (a) during armed conflicts; or (b) because of individual illegal behavior, such as theft, illicit excavation or illegal export during times of both war and peace. The reason that cultural heritage should be treated differently is that the legality of various types of legal removal is determined by different bodies of law. As for illegal removal due to war or occupation, the question remains as to whether the law of war prohibited such taking and provided for the return of cultural heritage afterwards. The illegal removal of cultural items by individuals during both times of war and peace is an issue due to the contravention of national laws. One further clarification is necessary for illegal removal due to individual behavior and its sub-categories: (1) stolen heritage and (2) illegally exported heritage. The difference is that a foreign court may be inclined to help an original owner recover stolen property, but will be reluctant to help a foreign government enforce its export

35 Randy Kennedy and Hugh Eakin, 'The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy', *New York Times* February 3 2006 <www.nytimes.com/2006/02/03/arts/03muse.html>.

36 Janet Blake, *International Cultural Heritage Law* (Oxford University Press, 2015), 62–63.

37 Danielle Demetriou, 'Japan Returns Looted South Korean Documents to Homeland', *Telegraph* December 6 2011 <www.telegraph.co.uk/news/worldnews/asia/japan/8937503/Japan-returns-looted-South-Korean-documents-to-homeland.html>.

rules.³⁸ In other words, even though an object may be classified as illegally exported, the illicit removal does not necessarily constitute an illegal import, as a state is not obliged to recognise and enforce a foreign state's export law in the absence of a treaty or bilateral agreement.³⁹

Despite the increasing returns made throughout the world, it should be admitted that the fundamental reason for many successful repatriations is that the states of origin generally have a legal basis and strong evidence to convince the courts that the disputed objects were illegally removed. However, for historically removed heritage, the obstacle standing in the way of return is a lack of law regulating such taking as illegal. In order to argue for the proposed customary rule, the crux of this research is to link the return of illegally taken heritage to historically removed heritage. Thus, the central questions lying at the basis of this book are whether an increasing recognition of states of origin's interests can be found in state practices when illegally removed heritage is returned, and whether such recognition is sufficient to create the proposed customary rule to support the return of historically removed heritage. The increasing recognition of the interests of states of origin in their wrongfully removed cultural heritage is the bridge between illegally removed heritage and historically removed heritage. If state practices suggest that illegally removed heritage should be returned, it may reflect an increasing recognition and respect for states of origin and therefore constitute strong evidence for the formation of the proposed customary rule. Once state practices have shown a uniform and general recognition of states of origin's interests, this proposed rule will be recognised as a new customary rule. In other words, it will create a legal basis for states of origin to claim for the return of their historically removed heritage against current possessors. There will be more than just a moral and ethical connection between removal and return.

However, a question may arise as to whether the proposed customary rule is an overly optimistic view. To create a new customary rule, it is essential that the states whose interests are "specially affected" by the proposed customary rule should be in favour of the creation of this rule. Put simply, the uniform state practice in the specially affected states is required. In this regard, although there is an increasing recognition that foreign states should have sufficient interests to argue for the return of their wrongfully removed heritage, the uniformity among specially affected states is still lacking. For example, unresolved recovery issues during the Second World War suggests the lack of concurrence of those particularly affected states with the proposed customary

38 James Gordley, 'The Enforcement of Foreign Law: Reclaiming One Nation's Cultural Heritage in Another Nation's Courts' in Francesco Francioni and James Gordley (eds), *Enforcing International Cultural Heritage Law* (Oxford University Press, 2013) 110, 110–118; Yunxia Wang, *Cultural Heritage Law* (The Commercial Press, 2012), 376–378.

39 Paul M. Bator, 'An Essay on the International Trade in Art' (1982) 34(2) *Stanford Law Review* 275, 287.

Is a New Customary Rule Emerging?

Figure 1.1

rule. Further, despite the return cases during the past two decades, actions by individuals and institutions do not constitute state behaviour and can therefore not create customary international law. More importantly, there is no indication that countries holding foreign cultural heritage removed in early times were willing to give them up at a large scale. All these issues raise uncertainty about the future of the proposed customary rule: whether the proposed customary rule can continue to develop, and eventually be recognised as a new customary rule.

5. Book Scope

Starting with the dispute surrounding the Chinese bronze statues, this book first aims to answer the question as to whether China has a legal basis to recover its cultural heritage taken during the period of 1840–1945. Although China has been expecting the return of its cultural heritage lost overseas, securing the return is problematic. Instead of pressing formal demands for repatriation, the approach used to bring scattered Chinese arts home is still limited to donation, buying-back, and diplomatic negotiation.⁴⁰ The main rea-

⁴⁰ Gao Sheng, 'Recovering Illegally Removed Cultural Property and Improving Cultural Property Protection: A Chinese Perspective' (2009) (1) *Art Antiquity and Law* 1, 9–14.

son for this is that there is no clear answer as to whether China has a legal basis for the recovery. While many contributors have studied the topic of China's cultural heritage, they mostly focus on the cultural heritage law in the People's Republic of China (1949–present) and on other specific issues, including regulating the art market, preventing theft, illegal excavation and illegal export of cultural heritage, and promoting international cooperation. To the extent that these studies have considered the issue of the return of Chinese cultural heritage, they have focused on present day illegal trafficking of cultural objects instead of items that were looted before the founding of the People's Republic of China. Little research has been made on the applicable laws contemporaneous to removals that occurred during the period of 1840–1945, which is law in the Qing Dynasty (1644–1911) and law in the Republic of China (1911–1949). On the other hand, the question as to whether China has a legal basis for recovery is the first legal hurdle that China needs to get over. Thus, this research aims to examine the availability of a legal basis for the recovery of China's cultural heritage.

While the first part of the book is aimed at China specifically, the positioning of China in this book is not merely as a case study. This book is also valuable to all states that are active or involved in the field of restitution of cultural heritage. When ethics discourse is ineffective and inadequate in promoting large-scale restitution, the proposed customary rule will provide a solution. The proposed customary rule will allow not only China, but also other states of origin with a similar dilemma, to obtain the return of both illegally and historically removed heritage. In other words, all states of origin should have a right to the return of their wrongfully removed cultural heritage according to this proposed customary rule. China has been used as a case study in this book because of its experience with the process.

As it will be analysed, China does not have a legal basis for all cultural heritage taken during the period of 1840–1945, in which case the proposed customary rule may provide an answer. The second part of this book will answer questions about whether the proposed customary rule is emerging. Premised on the assumption that the new rule has come into existence, it will provide China and other states of origin a stronger and legal argument to claim against museums and art collectors for the return of cultural items. To argue for the proposed custom, this book provides a systematic and critical examination of the types of state practice that should be considered as relevant evidence for the formation of the customary rule. This book argues that the available state practice has shown a clear tendency towards supporting the return of wrongfully removed heritage.

Several further aspects necessitate clarification. First, this book focuses on the return of Chinese cultural heritage taken from the First Opium War to the end of the Japanese Occupation (1840–1945). The proposed timeframe (1840–1945) falls short of the period during which some of the most important Chinese material was relocated to Taiwan from the mainland by the Kuomintang. The reason that this book does not go beyond the date of 1945 is

the return of cultural heritage taken to Taiwan raises an entirely different set of issues and would be best left to another book in the future.⁴¹ Similar reasons apply to the ongoing illicit trafficking of stolen and smuggled cultural heritage in China. Although all these issues are of great importance for the management and protection of Chinese cultural heritage, they are beyond the discussion of this book, which primarily focuses on historically removed heritage.

Second, despite the different theories in terms of creating a new customary rule, this research adopts the ideas of Brownlie and Shaw, according to which the most crucial factor is the concurrence of specially affected states in that particular field. States whose interests are especially affected must belong to those endorsing the creation of the rule. In the field of restitution, specially affected states can be divided into two groups: current possessors, including the UK, the US, France, Japan, Germany, and Switzerland; and states of origin, such as China, Cambodia, Egypt, Greece, Italy, Turkey, and Peru. This book focuses on these specially affected states to argue that there is an increasing endorsement of the proposed customary rule.

Third, it should be further noted that what makes return legally complex is that it lies at the interface of a number of distinct branches of law: the law of war, private international law, human rights, cultural heritage law, and national laws (such as criminal law, property law, contract law, and tort law). These legal areas are quite different in nature, but form the basis for supporting the return of illegally removed heritage. This book will examine all the relevant laws that may form a basis for the return of wrongfully removed heritage.

Fourth, this book will not be limited to legal analysis, as the return of cultural heritage cannot be dealt with on a strictly legal argument alone. In the realm of cultural heritage, a wide range of guidelines, policies and other so-called soft laws have played an important role in facilitating the return of cultural heritage. Additionally, an increasing number of cultural objects have been returned to states of origin by private museums, non-governmental institutions, auction houses and individuals throughout the world. Although they do not constitute state behaviour and therefore cannot create customary international law, they are still worth discussing in this book, as the return of cultural heritage is not a theme that can be treated convincingly without a fully grounded engagement with ethics. The legal doctrinal discourse in this book is contextualised with reference to the moral arguments that support the return of wrongfully removed heritage.

41 For example, the return of cultural heritage to Taiwan is closely linked with the question as to whether “Taiwan is part of China’s territory”. The answer to this question is significant, as it will then determine the law applied to the question of removals’ legality. According to the author, Taiwan is part of China’s territory, which means the taking itself is an internal matter and should be governed by China’s domestic law. However, others may have a different opinion and believe that Taiwan should be considered as an independent state. Therefore, the question of legality should be answered under the framework of public international law.

While discussing materials of both state practice and non-state practice, this book is significant and valuable to museums and art collectors in the event of buying and accepting art objects. First, this book deals with a large pool of repatriation cases and compares all available solutions, including litigation, negotiation, cooperation, buying-back, conditional return, art loan, donation, or simply stepping up the pressure. A problem-sensitive, practical approach is provided. Though this comparative study, the book provides a useful tool for a disputing party, including museums, art collectors, auction houses, and governments, to settle cultural disputes peacefully and to avoid unnecessary negative headlines, reputational damage or the impoverishment of their collections. In particular, through the systematic analysis of different branches of law in specially affected states, this book provides some suggestions on how museums, art collectors and auction houses should buy and accept foreign art, in case of getting embroiled in a dispute with a foreign government. Furthermore, from the perspective of cultural heritage law, this book is also structured on three categories of cultural heritage: (1) heritage looted during armed conflicts; (2) heritage stolen, illegally excavated, or illegally exported in peacetime; (3) and historically taken heritage. By examining the evolving cultural heritage law, this book is significant in suggesting the protection and management of cultural heritage, which will eventually have an impact on the art market, museums and art collections.

6. Chapter Summary

After this introductory chapter, the book is structured in the following ways. Chapter 2 investigates the long-lasting legal, moral and societal debates surrounding the allocation of cultural heritage. This chapter argues that although cultural heritage should be available to and protected by all humankind, it should be conducted in a reasonable way and respect the will of the people from states of origin. Cultural heritage that was removed against the will of the original owners should be returned due to the special and strong connection between states of origin and their cultural heritage.

Chapter 3 focuses on the legal grounds that exist for China to request the return of its cultural heritage in order to determine whether the taking of objects during 1840 to 1949 was prohibited under either China's national law or international law. This chapter concludes that China does not have a basis for the return of all removals that occurred between 1840 and 1945, and, in these cases, the customary rule may provide an answer. This chapter ends with a discussion about the definition of historically removed heritage and its return, which is the fundamental question that this book aims to resolve.

With regards to the creating of a new customary rule, there is considerable academic debate as to whether and when a new rule can be accepted as a customary rule. Chapter 4 explores the notion of customary international law and the process of creating a new customary rule. This chapter argues that the

most crucial factor is the concurrence of “specially affected” states in the field of the removal and return of cultural heritage.

The following two chapters focus on the two premises needed to create the proposed customary rule: the return of looted heritage during wartime; and the return of stolen and illegally exported heritage in peacetime respectively. Chapter 5 examines the evolving international law and practice regarding the prohibition of looting of cultural heritage during wartimes and the repatriation of removed arts after the end of war. This chapter argues that specially affected states have shown an increasing agreement that cultural heritage looted, stolen or illegally exported during wartime should be returned. However, the unresolved issues of war repatriations during the two world wars have constituted a powerful deterrent to the creation of the proposed customary rule.

Chapter 6 discusses the restitution of stolen and illegally exported arts taken during peacetime. This chapter examines international law, European law, as well as laws in the market states, including the US, Germany, Switzerland, the UK and the Netherlands. This chapter reaches the conclusion that state practice has shown a growing recognition that stolen and illegally exported cultural objects should be returned to states of origin. However, the lack of uniformity suggests that the proposed customary rule is at the very beginning of the process of its formation.

Chapter 7 focuses on the practice of individuals, private museums and auction houses, in order to explore whether there is increasing public endorsement for the return of wrongfully removed heritage and moral acknowledgment of claims by the states of origin. Although they do not constitute state behaviour, they are still a noteworthy issue, as public attitudes and ethical considerations generally precede the development of legal rules. In other words, they are important in suggesting whether the proposed customary rule is likely to come into existence. Additionally, the return of cultural heritage is not a theme that can be treated convincingly without a fully grounded engagement with ethics.

Chapter 8 first examines three return cases of historically removed heritage, which show that a dialogue about the future of historically removed objects is complicated and will not be a quick-fix. This concluding chapter then answers the final question as to whether a new rule of customary international law is emerging, to the effect that historically removed cultural heritage should be returned to states of origin; and, if such a rule is emerging, what are the likely limitations to this rule.

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