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Soft Law in Promoting the Return of Zhaoling Two Steeds in Tang Dynasty

Abstract: It is generally accepted that stolen cultural objects shall be returned, but it is still a more complex and comparatively ambiguous matter when it comes to solving cases left over by history. The Six Stone Horse Reliefs are one of the most influential works of art in Chinese history, but unfortunately the beginning of 20th century witnessed the political and social upheaval of China, which resulted not only in people's suffering but also in the loss of the cultural relics. The Six Stone Horse Reliefs were stolen and broken in China. Two of the six stone horses, called Sa Luzi and Quan Maogua, were illegally shipped to the United States and today are exhibited at the University Museum of Pennsylvania. While referring to the example of the Six Stone Horse Reliefs, this article puts forward the argument for using soft-law instruments to break through the shortcomings of existing international treaties and the limitations of domestic law.

Keywords: soft law, China, return of cultural property, United States, codes of ethics

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Introduction

The Six Stone Horse Reliefs, known among experts worldwide as the Zhaoling Liu-jun, were originally placed at the sacrificial altar in Zhaoling, the mausoleum of the Emperor Taizong and his Empress Wende, located at Mount Jiuzong, Liquan county in the Shaanxi province of Northwest China.¹ The Six Stone Horse Reliefs were stolen and broken during the beginning of the 20th century. Two of the six stone horses, called Sa Luzi and Quan Maogua (the Two Steeds),² were illegally shipped to the United States and today are exhibited at the University Museum of Pennsylvania (the Penn Museum). The remaining four are exhibited in the Forest of Stone Steles Museum of Shaanxi.³ In recent years, Chinese museums and overseas NGOs have demanded the return of the artefacts from the Penn Museum.⁴ In examining the case of the Two Steeds, this article analyses the role of soft law in promoting the return of cultural relics taken overseas.⁵

The Six Stone Horse Reliefs – Overview

The Six Stone Horse Reliefs have always been Chinese cultural property under national protection. Renowned worldwide for the exquisite carving techniques and the legendary stories of the six horses with Emperor Taizong of the Tang Dynasty (626-649), the Six Stone Horse Reliefs mark a milestone in the history of Chinese sculpture.⁶

The Six Stone Horse Reliefs were in memory of the six horses that were ridden by Emperor Taizong in the consolidation of the Tang Empire. Emperor Taizong had special affection for these horses, as they were closely connected with his major military triumphs which enabled him to mount the throne in 626. In planning and constructing his own eternal resting place at Mount Jiuzong, he chose the six charges from among many and ordered that their images be carved on stone slabs for

¹ For more details, see China Culture, *Zhaoling Museum*, http://en.chinaculture.org/library/2008-01/18/content_30789.htm [accessed: 25.04.2020].

² For more details, see Zhou Xiuqin, *Emperor Taizong and His Six Horses*, "Orientations" 2001, Vol. 32(2), pp. 40-46.

³ The Stele Forest, or Beilin Museum, is a museum for steles and stone sculptures in the Beilin District in Xi'an, China. The museum, which is housed in a former Confucian temple, has housed a growing collection of steles since 1087.

⁴ Jiang Jie, *Chinese Museum Demands Return of Horse Sculptures from Pennsylvania*, "People's Daily", 13 January 2017, <http://en.people.cn/n3/2017/0113/c90000-9166612.html> [accessed: 25.04.2020].

⁵ More on the significance of soft law mechanisms and alternative means of dispute resolution see M. Cornu, M.-A. Renold, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*, "International Journal of Cultural Property" 2010, Vol. 17(1), pp. 1-31, I. Stamatoudi, *Alternative Dispute Resolution and Insights on Cases of Greek Cultural Property: The J.P. Getty Case, the Leon Levy and Shelby White Case, and the Parthenon Marbles Case*, "International Journal of Cultural Property" 2016, Vol. 23(4), pp. 433-457.

⁶ For more details, see Li Puyuan, *中國藝術史概論* [Introduction to Chinese Art History], ChongWen Press, Wuhan 2015, Chapter 8.

his mausoleum. The text records his words that “[s]ince I engaged in military campaigns, those war chargers which carried me rushing on the enemy and breaking the line, and which rescued me from perils, their true images should be portrayed on stone and be placed left and right of my tomb to demonstrate the righteousness of curtain and cover” (Chinese: 朕自征伐以來所乘戎馬，陷軍破陣，濟朕於難者，刊石為鑿真形，置之左右，以申帷蓋之義).⁷

The six horses were selected, and each one is represented on a separate gray stone slab measuring approximately 0.17 m high, 0.20 m wide, and 0.40 m thick. Yan Lide, a famous architect of the Tang Dynasty, designed and supervised the mausoleum. His brother Yan Liben, a famous court painter, made the drawings of the six horses upon which the reliefs were based. The bodies of the horses are executed in low relief (approximately 0.15 m deep), against a deeply recessed plain background surrounded by a raised border. The horses are depicted with crenellated manes, tied-up tails, round stirrups, and five-stripped saddles. Each slab has a flat squarish space (approximately 0.25–0.30 m high and wide) on either the left or right upper corner. It is said that the horses’ names and laudatory poems were created by the Emperor and written by the noted calligrapher, Ouyang Xun, in this space.

The translation of the horses’ names, poems, and other related information were as follows:

1. Saluzi (飒露紫) or Ziyianliu (紫燕骝), meaning “Autumn Dew”, was also known as “Whirlwind Victory”, was ridden during the siege of the eastern capital of Luoyang in 621.
2. Telebiao (特勒骠) had yellow and white hair with a slight black snout and was ridden in the battle against Song Jingang in 619.
3. Quanmaogua (拳毛騧), a saffron-yellow horse with a wavy coat of hair described as “Curly”, was ridden in the battle against Liu Heida in 622.
4. Qingzhui (青骢), a piebald, was ridden in the battle against Dou Jiande in 621.
5. Baidiwu (白蹄乌), a black horse with four white feet was referred to as a “white-hoofed crow” and was ridden in the battle against Xue Renguo in 618.
6. Shifachi (什伐赤), a brick-red horse, was ridden in the battle against the forces of Dou Jiande and Wang Shichong in 621.⁸

The artistic expression of the Six Stone Horse Reliefs led the trend of tomb carving in the Tang Dynasty. Following the original shape of the six large stone panels, the design of the Six Stone Horse Reliefs created exquisite art images in a limited space by using high-relief techniques, where in general more than half the mass of the sculpted figure projects from the background. The high-relief techniques significantly enriched the tomb carving, representing the highest level of stone carving in the early Tang Dynasty.⁹

⁷ Zhou Xiuqin, *Zhaoling: The Mausoleum of Emperor Tang Taizong*, “Sino-Platonic Papers” 2009, No. 187, p. 78.

⁸ *Ibidem*, pp. 78-81.

⁹ For more details, see *ibidem*, pp. 141-160.

Although the Six Stone Horse Reliefs aimed to depict the six real horses, they were also combined with bold imagination and creativity. High-level carving techniques featuring seamless flow of lines and exquisite patterns lively depicted the muscles and pulses of the horses, delivering a unique visual art of the Six Stone Horse Reliefs, one which remains charming and impressive despite thousands of years of vicissitudes.

In addition to the carving techniques, the spirit of the Six Stone Horse Reliefs endowed by the designers and sculptors also provided unique elements of art. In Chinese traditional culture, life is short and less powerful when compared with the spirit representing eternity.¹⁰ The designers and sculptors commissioned by the Emperor devoted themselves to combining realism and romanticism and made breakthroughs in creating the masterpieces, making the Six Stone Horse Reliefs one of the most influential works of art in Chinese history.¹¹

A General Outline of the Process Whereby the Two Steeds Were Taken Overseas

There were various stories about the theft of Zhaoling Liujun in China, but until 2001 the process of and motivation behind how the Two Steeds came to be owned by the Penn Museum was controversial.¹² In 2001, the thesis *Emperor Taizong and His Six Horses*, issued in Hong Kong, raised public concern in the Chinese mainland because this thesis disclosed for the first time information on how the Penn Museum came to own the Two Steeds.¹³ The author, Ms. Zhou Xiuqin, worked at the Penn Museum, and therefore had first-hand access to lots of materials. Since then, Chinese scholars have tried to find out evidence to justify the thesis that the Two Steeds illegally crossed the border. By referring to two papers: *The Process of The Two Steeds' Loss* by Zhou Xiuqin, published in 2002; and *New Evidence about the Loss of the Emperor's Two Steeds from Zhao Mausoleum* by Prof. Chen Wenping of Shanghai University, published in 2017, below is a brief description of the key points outlining how the Two Steeds came to be shipped overseas.

In May 1913, foreign antique dealers hired a group of people to destroy the Six Stone Horse Reliefs and steal the Two Steeds from the Zhao Mausoleum.¹⁴

¹⁰ Yuan Ting, *A Study on the Influence of the Chinese Traditional Theory of "Harmony Between Nature and Men" to the Tomb Carving Art in Ancient China*, "The Silk Road" 2011, Vol. 2, p. 66.

¹¹ Li Langtao, "昭陵六骏"群雕赏析 [Appreciation of the Zhaolin Liujun's Sculptural Art], "World of Antiquity" 2002, Vol. 4, pp. 65-66.

¹² Peng Jianpin, *Re-Examination of the Theft of Zhaoling Liujun*, "Relics and Museology" 2000, Vol. 3, p. 64.

¹³ Zhou Xiuqin, *Emperor Taizong...*, p. 40.

¹⁴ Chen Wenping, 昭陵两骏流失海外真相新证 [New Evidence about the Loss of the Emperor's Two Steeds from Zhao Mausoleum], "Collections" 2017, Vol. 2, p. 105.

The Two Steeds were transferred several times and finally destined to be purchased by Lu Qinzhai (C. T. Loo), a famous Chinese antique dealer. The Two Steeds were shipped to Beijing in 1915.¹⁵

In February 1916, the Penn Museum completed its round and column-free exhibition hall. Dr. George Byron Gordon, the Director of the Penn Museum, sent invitation letters to the world's major antique dealers to participate in a Chinese Art Exhibition. Lu Qinzhai also received an invitation.¹⁶

On 9 March 1918, Lu Qinzhai's assistant took Dr. Gordon to the NY metropolitan storage room and showed him the Two Steeds. Then Dr. Gordon wrote Lu Qinzhai a letter to express interest on the part of the Penn Museum in the possible purchase of the Two Steeds.¹⁷

On 8 May 1918, the Two Steeds arrived at Philadelphia via the LaiYuan Company, which was owned by Lu Qinzhai in America. The day before, a staff of this company wrote Dr. Gordon a letter enclosing two sets of photos and stating that "we have numbered the pieces one by one and I'm sure you'll have no trouble putting them together".¹⁸ Thus we can conclude that the Two Steeds had been broken before they left China.

On 6 December 1918, after careful consideration the Penn Museum's Board of Directors approved the purchase of the Two Steeds for display provided that they could raise the funds. The board planned to raise \$180,000.¹⁹

Three years later, on 7 January 1921, Lu Qinzhai received full payment from the Penn Museum, and the final price was \$125,000.²⁰

On 14 September 1926, Lu Qinzhai wrote Dr. Gordon a letter to describe how difficult it was to transfer the Two Steeds, saying that: "They spent four or five years to get the Two Steeds by many trials and hardships, risking imprisonment and even death. Nowadays, it is extremely difficult to make antiques in China. It is almost impossible to get such rare cultural relics due to two reasons: one is the high risk, the other is that the best cultural relics have been almost poured out".²¹ The risks referred to in the letter were by no means exaggerated. In fact, the behaviour by which the Two Steeds were stolen and sold was illegal in China, and Dr. Gordon should have fully understood the meaning of this letter. As early on 16 June 1914, the Shanghai newspaper "Shen Bao"²² published the Presidential Order for Prohib-

¹⁵ Ibidem.

¹⁶ Zhou Xiuqin, *The Process of The Two Steeds' Loss*, "Forest of Stone Steles Collection" 2002, p. 225.

¹⁷ Ibidem.

¹⁸ Ibidem.

¹⁹ Ibidem.

²⁰ Ibidem.

²¹ G. Lenain, 盧芹齋傳 [Biography of Loo Qinzhai], China Federation of Literary and Art Circles Press, Hong Kong 2015, p. 102.

²² "Shen Bao", formerly transliterated as "Shun Pao" or "Shen-pao", was a newspaper founded in Shanghai, China by Ernest Major (1841-1908), a British businessman, in 1872.

iting and Restricting the Export of Antiquities by Yuan Shikai, the first President of Republic of China. Its content was as follows:

China's monuments and antiques are the essences of Chinese culture, which shall be protected by the whole society rather than preserving [them] in foreign countries for archaeological studies. I hereby order and restrict the exportation of monuments and antiques for the benefit of the Chinese people. Both the Departments of Interior and Taxation shall classify monuments and antiques, and enact policies punishing exporters. The Department of Taxation needs to draft the regulation of Restrictions on the Export of Monuments and Antiques, which shall be followed by Custom. The Department of Interior shall be in charge of the preservation of all monuments and antiques, persons who are outside of Beijing engage in selling monuments and antiques shall be punished, and all local governments shall ban this kind of behaviour to avoid cultural relics lost overseas.²³

According to historical records, the Department of Interior drew up the Provisional Administrative Measures for the Preservation of Antiquities in 1916. However it was not until 1925 that the Department of Interior discussed the restriction of antiquities with the Department of Taxation, although both departments declared that they would maintain the seriousness of the laws and regulations on the preservation of antiquities and protect the safety of state antiquities in accordance with the law.²⁴

To sum up, the beginning of 20th century witnessed a political and social upheaval in China, which resulted in not only people's suffering but also in the loss of cultural relics. The theft of the Two Steeds and their illegal shipment to the United States were in violation of the Presidential Order issued in 1914.

Legal Obstacles to Promoting the Return of the Two Steeds

The limited scope of multilateral treaties

Three main conventions on the recovery of lost cultural relics have been drafted after the Second World War. They are the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict and its Protocols²⁵ ("the 1954 Convention"); the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property²⁶ ("the 1970 Convention"); and the 1995 Convention on Stolen or Illegally Exported Cultural Objects²⁷ ("the 1995 UNIDROIT Convention").

²³ Chen Wenping, *op. cit.*, p. 105.

²⁴ Li Xiaodong, 民国文物法规史评 [Historical Review of Cultural Relics Regulations of the Republic of China], Cultural Relics Publishing House, Beijing 2013, pp. 43-44.

²⁵ 14 May 1954, 249 UNTS 240.

²⁶ 14 November 1970, 823 UNTS 231.

²⁷ 24 June 1995, 34 ILM 1322.

The 1954 Convention was adopted in the wake of the massive destruction of cultural heritage during the Second World War. It is the first international convention with a world-wide scope focusing exclusively on the protection of cultural heritage in the event of armed conflict. It covers both immovable and movable cultural heritage, including monuments of architecture, art or history, archaeological sites, works of art, manuscripts, books and other objects of artistic, historical, or archaeological interest, as well as scientific collections of all kinds regardless of their origin or ownership (Article 1(a-c)). The 1954 Convention is supplemented by two optional protocols, one concluded at the same time as the 1954 Convention and now known as the First Protocol, the other a Second Protocol concluded in 1999. Together, the Convention and Protocols provide a detailed international legal framework for the protection of cultural property during armed conflict, including belligerent occupation.²⁸ To date, 133 States have ratified the 1954 Convention, 110 of them are also Parties to the First Protocol and 82 of them to the 1999 Second Protocol. China acceded to the 1954 Convention and the First Protocol to the 1954 Convention in 2000. The United States has only ratified the 1954 Convention.²⁹

The 1970 Convention, a key component in the international legal fight against the illicit traffic in cultural objects, recognizes international cooperation as one of the most effective ways to protect cultural property from illegal imports, exports, and the illegal transfer of ownership. Pursuant to Article 7(b)(ii), States Parties must, at the request of the State Party of origin, take appropriate steps to recover and return cultural property stolen from a museum, public monument, or the like and imported after the entry into force of the Convention; and pursuant to Article 13(c) States Parties must, consistent with their national law, admit actions for recovery of any stolen cultural property brought by or on behalf of its rightful owners. In accordance with Article 13(b), States Parties must ensure that their heritage services cooperate in facilitating the restitution to its rightful owner of illicitly exported cultural property. In this latter regard, Article 11 requires States Parties to regard as illicit, for the purposes of the Convention, the export of cultural property under compulsion arising directly or indirectly from belligerent occupation. Concerning the interpretation of clauses in this treaty, Prof. Patrick J. O'Keefe, in his second edition of the *Commentary on the 1970 UNESCO Convention* published by the Institute of Art and Law in 2007, provides the most thorough treatment of the Convention to date. The *Commentary* is an indispensable resource for anyone teaching, writing, or thinking about the Convention.³⁰ So far, the 1970 Convention has been

²⁸ R. O'Keefe et al., *Protection of Cultural Property: Military Manual*, UNESCO, Sanremo 2016, p. 3, <https://unesdoc.unesco.org/ark:/48223/pf0000246633> [accessed: 01.05.2020].

²⁹ See http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Updated-list-State-members-electoral-group-En-Final_01.pdf [accessed: 25.04.2020].

³⁰ A. Adler, *Review of Patrick J. O'Keefe Commentary on the 1970 UNESCO Convention*, "Art Antiquity & Law" 2010, Vol. 15(3), p. 281.

ratified by 140 Member States, including many culture-rich countries as well as former hubs of illicit traffic. China acceded to the 1970 Convention in 1989.³¹

The United States is one of the world's largest antiquities markets and has long pursued a liberal trade in antiquities. In the context of the increasing plunder of cultural relics which has come to pose a serious threat to the common cultural heritage of mankind, the United States was once actively involved in the negotiations of the 1970 Convention, even though the domestic traders had a different view. After consideration by the Committee on Foreign Relations, which found no opposition to the Convention, the Senate unanimously gave its advice and consent to ratification on 11 August 1972. The Senate's action included one reservation and six understandings. One understanding made clear that the 1970 Convention is not self-executing and will have no domestic legal effect except as defined by implementing legislation.³² After over a decade, the Convention on Cultural Property Implementation Act (CPIA) was finally approved and became US federal law on 12 January 1983, and then in September 1983 the United States submitted its instrument of ratification of the 1970 Convention.

The purpose of the International Institute for the Unification of Private Law (UNIDROIT) is to study the needs and methods for modernizing, harmonizing, and coordinating private and, in particular, commercial law between States and groups of States. In order to enhance international cooperation, UNIDROIT was asked by UNESCO to develop the 1995 UNIDROIT Convention as a complementary instrument to the 1970 Convention. The 1995 UNIDROIT Convention underpins the provisions of the 1970 Convention, supplementing them by formulating minimal legal rules on the restitution and return of cultural objects. It guarantees that the rules of private international law and international procedure make it possible to apply the principles set down in the 1970 Convention. The two Conventions are at once compatible and complementary, which is also reflected in Preamble of the 1995 UNIDROIT Convention.³³

In the 1995 UNIDROIT Convention, States commit to a uniform treatment for the restitution of stolen or illegally exported cultural objects and allow restitution claims to be processed directly through national courts.³⁴ Moreover, the 1995 UNIDROIT Convention covers all stolen cultural objects, not just inventoried

³¹ See <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties/> [accessed: 25.04.2020].

³² *U.S. Senate Report, 97-564 Implementing Legislation for the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property*, p. 4, <https://eca.state.gov/files/bureau/97-564.pdf> [accessed: 25.04.2020].

³³ Paragraph 9 of the Preamble of the 1995 UNIDROIT Convention reads: "Recognizing the work of various bodies to protect cultural property, particularly the 1970 UNESCO Convention on illicit traffic and the development of codes of conduct in the private sector".

³⁴ The 1995 UNIDROIT Convention, art. 8(1-3).

and declared ones, and stipulates that all cultural property must be returned.³⁵ However, because of conflict with the interests of traditional cultural market countries, the 1995 UNIDROIT Convention has only 48 Contracting States and no major market countries, including the United States. China made three declarations at the time of its accession in 1997.³⁶

The above-mentioned international conventions have established a multilateral cooperation mechanism for the supervision and recovery of the illegal circulation of cultural property, which has played an active role in the return or restitution of the cultural relics lost overseas and the protection of domestic cultural property. However, these conventions do not apply to those cases which took place before their date of entry into force, for example to the claims for the return of the Two Steeds. While neither the 1954 Convention nor the 1970 Convention have any explicit provisions on retroactivity, Article 28 of the 1969 Vienna Convention on the Law of Treaties stipulates that unless a different intention appears from the treaty or is otherwise established, the provisions of a treaty do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. Therefore, the above two conventions are generally considered to have no retroactive effect on cultural property that was illegally transferred before their entry into force. In particular with regard to colonial heritage, including the Two Steeds, the 1970 Convention lacks retroactivity. The 1995 UNIDROIT Convention specifically stipulates that it shall only apply after the Convention has entered into force with respect to a State where the claim is brought.³⁷ Although this Convention does not in any way legitimize any illegal transaction which has taken place before its entry into force, it is nevertheless not retroactive.³⁸

The China-US bilateral treaty

Both China and the United States are parties to the 1970 Convention. Article 9 of the Convention establishes a mechanism for bilateral cooperation between the States concerned, which recognizes that any State Party may appeal to other States affected when its cultural heritage is in danger as a result of the looting of archaeological or ethnographic material.³⁹

The United States CPIA authorizes the President to impose import restrictions on archaeological and ethnographic materials from other State Parties at their request, because such looting has put their cultural heritage at risk. The CPIA stipulates

³⁵ *Ibidem*, art. 1(a-b).

³⁶ See <https://www.unidroit.org/status-cp> [accessed: 25.04.2020].

³⁷ The 1995 UNIDROIT Convention, art. 10(1-2).

³⁸ *Ibidem*, art. 10(3).

³⁹ See the 1970 Convention, art. 9.

that a State Party's request will be reviewed by the Cultural Property Advisory Committee, and that if the Committee finds that the relevant conditions of the requesting State meet the criteria, the United States will sign an agreement with that State to restrict the import of certain cultural relics from that State to the United States.⁴⁰

Based on the 1970 Convention and the American law described above, the Government of the United States and the Government of the People's Republic of China finally signed "The Memorandum of Understanding Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Imposition of Import Restrictions on Categories of Archaeological Material from the Paleolithic Period Through the Tang Dynasty and Monumental Sculpture and Wall Art At Least 250 Years Old" (the "MOU") on 14 January 2009 in Washington, DC. Under the MOU, the United States imposes import restrictions based on the "Designated List" of Chinese cultural relics. The MOU is to be updated every five years, with most recent update having taken place in January 2019.⁴¹ The signing and implementation of the MOU has had a far-reaching impact on the protection of China's cultural heritage. So far, there have been three large-scale returns. However, pursuant to Articles 1(3) and 2(10) of the MOU, it is still not retroactive. The MOU only restricts the illegal exports from the Chinese mainland of objects on the "Designated List" after the MOU took effect.

In addition to the above, the United States has promulgated a series of criminal and administrative regulations in the field of cultural property protection. In the federal law system those laws that relate to the stolen property include in particular: the National Stolen Property Act of 1934, which prohibits as federal crimes the transportation, transmission, or transfer in interstate or foreign commerce of any goods of a value of \$5,000 or more, knowing the same to have been stolen, converted, or taken by fraud, as well as the receipt, possession, concealment, storage, barter, sale, or disposition of any goods of a value of \$5,000 or more, knowing the same to have been stolen, unlawfully converted, or taken. This Act aims to coordinate the prosecutions of illegal interstate transportation of stolen property between federal and state courts.⁴² It is complemented by the Archaeological Resources Protection Act of 1979, which provides that any person may apply to the federal land manager for a permit to excavate or remove any archaeological resource located on public lands or Indian lands, and that such application is required. A permit may be issued only if the excavation or removal is undertaken for the purpose of furthering archaeological knowledge in the public interest and ensures that the archaeological resources

⁴⁰ See Convention on Cultural Property Implementation Act, p. 2-4, <https://eca.state.gov/files/bureau/97-446.pdf> [accessed: 25.04.2020].

⁴¹ See 中美再次签署关于限制进口中国文物的谅解备忘录 [China and the United States Once Again Signed a Memorandum of Understanding on Restrictions on the Import of Chinese Cultural Relics], 14 January 2019, http://www.gov.cn/xinwen/2019-01/14/content_5357843.htm [accessed: 25.04.2020].

⁴² See National Stolen Property Act, 18 U.S.C. §§ 2314-2315.

which are excavated or removed from public lands will be preserved by a suitable university, museum, or other scientific or educational institution.⁴³

As far as which law applies, the nature of the Two Steeds, i.e. that they were stolen and illegally exported from China, determines that the Archaeological Resources Protection Act does not apply, but that they meet the substantive requirements of National Stolen Property Act of 1934. However, the theft and illegal transportation of the Two Steeds occurred before the National Stolen Property Act was passed, thus it cannot be applied to the case of the Two Steeds due to the non-retroactivity of criminal statutes. In addition, the statute of limitations is also a major issue in pursuing their return through the US domestic civil procedure. In the Commonwealth of Pennsylvania there is a two year limitation for a civil action for taking or detaining property.⁴⁴ Due to the particularity of the lost cultural property, there is indeed a question with regard to when the statute of limitations starts to run. In the United States, there is a legal precedent that the statute of limitations should be beneficial to the original owners of cultural relics, but it is unclear whether this is applicable to the Two Steeds.⁴⁵

Soft Laws as an Alternative Solution

The value of soft law

A quite large number of legal scholars have touched upon the use of “hard” and “soft” law at the international level. Soft law refers to expectations without legally binding protection, or in some cases to expectations whose binding protection is somewhat weaker than the binding force of traditional law. In a word, “soft” law refers to quasi-legal instruments which have neither legal force nor coercive mechanisms.⁴⁶ According to the study of Gregory C. Shaffer and Mark A. Pollack, scholars from the international sphere fell into three camps: legal positivists, rationalists, and constructivists. They concluded that the above three groups shared one point in common: hard law and soft law interacted complementarily in practice. Besides, they all believed that soft law could lead to hard law and was able to expand hard law in detail after its formation, which facilitated law-making and greater regulatory cooperation.⁴⁷

⁴³ See Archaeological Resources Protection Act, 16 U.S.C. §§ 470aa–470mm, sec. 2(4)b.

⁴⁴ Pennsylvania Consolidated Statutes. Title 42 – Judiciary and Judicial Procedure, Chapter 55: Limitation of Time, sec. 5524, <https://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/42/00.055..HTM> [accessed: 25.04.2020].

⁴⁵ See *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, 98 Civ. 7664(KMW), 1999 U.S. Dist. (S.D.N.Y. 30 August 1999).

⁴⁶ B.H. Druzin, *Why Does Soft Law Have any Power Anyway?*, “Asian Journal of International Law” 2017, Vol. 7(2), pp. 361-378.

⁴⁷ G.C. Shaffer, M.A. Pollack, *How Hard and Soft Law Interact in International Regulatory Governance: Alternatives, Complements and Antagonists*, in: S.J. Evenett, R.M. Stern (eds.), *Systemic Implications of Transatlantic Regulatory Cooperation and Competition*, World Scientific Publishing, Singapore 2011, p. 65.

A threshold issue is the precise meaning of the term “soft law”. It is defined differently by different scholars. Some scholars prefer to describe it as a continuum, or spectrum, running between fully binding rules and purely political arrangements.⁴⁸ However, it is acknowledged that – even assuming the accuracy and reasonableness of the existing literature – the scope and nature of soft law cannot be easily summarized, as the normative nature of such expectations may vary and manifest itself to differing degrees and at different stages in different instruments.⁴⁹ Some believe that soft law is a type of a social rather than legal norm.⁵⁰ This article considers “soft law” as a term without legally binding force, which is an alternative or complementary solution for treaties and customary international law.

The term “soft law” emerged in diplomatic language in the middle of last century, and has since become a common term in international law circles. It refers to the existence and development of a ramified network of permanent institutions, both at the universal and regional levels, since the end of the Second World War. Among them, the United Nations (UN) plays a leading role. These institutions offer the world community a permanent structure of cooperation which makes it possible to organize permanent and on-going political, economic, and normative negotiations among the Member States of the community. Furthermore, the increasingly important function of non-governmental organizations provides an efficient complement to the existing intergovernmental framework by assuring, in particular, a dynamic relationship between inter-State diplomacy and international public opinion.

In state practice, soft law is designed as a popular alternative solution to treaties and customary international law. This is because international soft-law instruments often provide ethical guidelines and alternative dispute resolution mechanisms which allow sovereign States to overcome the fragmented situation of the existing treaties and the problems of cooperation therein, while at the same time making allowances for State’s interests and concessions so that a better deal can be attained in the future.⁵¹ From this viewpoint, using soft-law instruments to promote the return of the Two Steeds would seem to be a feasible option.

Codes of ethics

Since the beginning of the 20th century codes of ethics, guidelines, and codes of practice have been used by the museum profession to organize and regulate best practices. In this context, the ICOM Code of Ethics for Museums (“the ICOM

⁴⁸ A.T. Guzman, T.L. Meyer, *International Soft Law*, “Journal of Legal Analysis” 2010, Vol. 2(1), p. 173.
⁴⁹ D. Thürer, *Soft Law - Norms in the Twilight between Law and Politics*, in: D. Thürer, *International Law as Progress and Prospect*, Dike Publishers, Zurich 2009, pp. 160-161.
⁵⁰ D. Shelton, *Soft Law*, in: D. Armstrong (ed.), *Routledge Handbook of International Law*, Routledge, London 2008, p. 3.
⁵¹ E. Campfens, *Restitution of Looted Art: What About Access to Justice?*, “Santander Art and Culture Law Review” 2018, Vol. 2(4), pp. 185-220.

Code”), the UNESCO International Code of Ethics for Dealers in Cultural Property (“the UNESCO Code”), and the ILA Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material (“the ILA Principles”) have to be considered as key soft law documents concerning the return of cultural objects transferred in times of peace.⁵²

The ICOM Code, after being first adopted in 1986 and revised in 2004, has been translated into 38 languages. The ICOM Code stands for the common values and basic principles of the global museum industry. It not only plays an important role in promoting the formation of the relevant international legal order, but also regulates and restricts the museum management activities of its Member States and the professional behaviour of Members, at least to a certain extent.⁵³ The provisions of primary relevance to the topic of this article state as follows:

Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally (including the museum’s own country). Due diligence in this regard should establish the full history of the item since discovery or production. [...] Museums should not acquire objects where there is reasonable cause to believe their recovery involved unauthorised or unscientific fieldwork, or intentional destruction or damage of monuments, archaeological or geological sites, or of species and natural habitats. In the same way, acquisition should not occur if there has been a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities.⁵⁴

The museums should be prepared to initiate dialogues for the return of cultural property to a country or people of origin. [...] When a country or people of origin seeks the restitution of an object or specimen that can be demonstrated to have been exported or otherwise transferred in violation of the principles of international and national conventions, and shown to be part of that country’s or people’s cultural or natural heritage, the museum concerned should, if legally free to do so, take prompt and responsible steps to cooperate in its return.⁵⁵

In addition, “museums should abstain from purchasing or acquiring cultural objects from an occupied territory and fully respect all laws and conventions that regulate the import, export and transfer of cultural or natural materials”.⁵⁶

It should be noted that the ICOM Code arose from and embodies the core principle underlying both the 1970 Convention and the 1995 UNIDROIT Convention, i.e. that “stolen or illegal export should be restituted or returned to its country of or-

⁵² A. Taşdelen, *The Return of Cultural Artefacts: Hard and Soft Law Approaches*, Springer, Cham 2016, p. 154.

⁵³ Referring to the Preamble of the Code, see ICOM, *Code of Ethics for Museums*, 2017, <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf> [accessed: 25.04.2020].

⁵⁴ *Ibidem*, paras. 2.3-2.4.

⁵⁵ *Ibidem*, paras. 6.2-6.3.

⁵⁶ *Ibidem*, para. 6.4.

igin and [a museum] should abstain from purchasing or acquiring cultural objects from an occupied territory”, and in particular stresses the aspect of cooperation.

The ICOM Code is enforceable, although it is not a legal document. Its rules function through peer pressure, and the loss of accreditation and/or being banned from the museum association are two typical penalties, whereas professional isolation may bring about embarrassment and shame at a more personal level.⁵⁷ According to the ICOM Statutes, one of the prerequisites for Members is to accept and comply with the ICOM Code.⁵⁸ Therefore, the ICOM set up an Ethics Committee to oversee the implementation of the ICOM Code.⁵⁹ Membership of ICOM may be discontinued by a decision of the Executive Council for a breach of profession ethics.⁶⁰ So far, the ICOM Code can boast an impressive network of more than 20,000 museums, 35,000 experts, 119 national committees, 30 international committees, five regional alliances, and 21 affiliated organizations present in 136 countries and territories.⁶¹

The UNESCO Code is different from the ICOM Code as it has been passed by the Intergovernmental Committee for Promoting the Return of Cultural Property and endorsed by UNESCO in 1999.⁶² It was adopted because the Member States particularly recognized the key role traders in cultural material play in combatting the illicit trafficking in cultural property. At the same time, the UNESCO Code is interlinked with Article 5(e) of the 1970 Convention, which imposes on State Parties the obligation to ensure that their national services are established for the benefit of dealers in cultural property, the rules are in conformity with the ethical principles set forth in the Convention, and to take steps to ensure the observance of these rules.⁶³

According to Articles 3 and 4 of the UNESCO Code, if a trader has reasonable cause to believe that an object has been the product of a clandestine excavation, or has been acquired illegally or dishonestly from an official excavation site or monument, or an item of cultural property has been illegally exported, the trader will not assist in any further transaction with that object or item except with related agreements. Once he/she is in possession of the object or the item, this person will take all legally permissible steps to co-operate in the return of that object to the country

⁵⁷ A. Bounia, *Codes of Ethics and Museum Research*, “Journal of Conservation and Museum Studies” 2014, Vol. 12(1), <https://www.jcms-journal.com/articles/10.5334/jcms.1021214/> [accessed: 25.04.2020].

⁵⁸ See ICOM, *Statutes*, 2017, art. 4 (sec. 1), https://icom.museum/wp-content/uploads/2018/07/2017_ICOM_Statutes_EN.pdf [accessed: 25.04.2020].

⁵⁹ See <https://icom.museum/en/committee/ethics-committee/> [accessed: 25.04.2020].

⁶⁰ See ICOM, *Statutes*, art. 4 (sec. 4).

⁶¹ See <https://icom.museum/en/faq/how-many-members-does-icom-have-and-how-are-they-organised/> [accessed: 25.04.2020].

⁶² See UNESCO, *International Code of Ethics for Dealers in Cultural Property*, 1999, p. 3, <https://unesdoc.unesco.org/ark:/48223/pf0000121320> [accessed: 25.04.2020].

⁶³ A. Taşdelen, op. cit., pp. 169-170.

of origin as long as that country seeks its return within a reasonable period of time. What's more, the Code requires traders to do their best to maintain the integrity of cultural property.

By adopting and implementing the UNESCO Code, a State Party not only fulfils this requirement, but due to the global uniformity of the regulations created by the Code it also ensures that their national dealers in cultural objects do not face competitive disadvantages compared to dealers situated in the territory of other State Parties. Hence the UNESCO Code, like the ICOM Code, follows the spirit of the 1970 UNESCO and 1995 UNIDROIT Conventions, as well as the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP), and in particular enhances the aspect of cooperation contained in these instruments by expanding their spirit.⁶⁴

In turn, the ILA Principles, adopted by the International Law Association in 2006,⁶⁵ emphasize a general duty on the part of institutions and governments to enter into "good-faith negotiations" regarding restitution claims by persons, groups, or States. The Principles also list what factors should be taken into account during those negotiations, namely "[...] the significance of the requested material for the requesting party, the reunification of dispersed cultural material, accessibility to the cultural material in the requesting state, and protection of the cultural material".⁶⁶ Insofar as concerns the outcome, a focus is placed on "caring and sharing", and the alternatives to outright restitution mentioned include loans, production of copies, and shared management and control.⁶⁷ Two categories are singled out: Principle 4 sets out the obligation "to respond in good faith and to recognize claims by indigenous groups or cultural minorities whose demands are not supported by their national governments"; whereas Principle 5 confirms the special status of human remains, with a straightforward obligation of repatriation.⁶⁸

The ILA Principles are a further development of the soft law in the field of claims for the return of cultural objects. They share much in common with the ICOM Code and UNESCO Code. These principles do not impose an unconditional obligation to return on recipients, but rather require them to enter into good faith negotiations, and as with other soft law sources are not legally binding.⁶⁹

⁶⁴ Ibidem, pp. 177-178.

⁶⁵ International Law Association, *Report of the Seventy-second Conference, Held in Toronto, 4-8 June 2006*, <https://heinonline.org/HOL/LandingPage?handle=hein.ilarc/ilarc0072&div=1&src=home> [accessed: 25.04.2020].

⁶⁶ Ibidem, Principle 8.

⁶⁷ Ibidem, Principle 3.

⁶⁸ E. Campfens, *op. cit.*, p. 201.

⁶⁹ A. Taşdelen, *op. cit.*, p. 184.

Code of ethics for American museums

The American Alliance of Museums (AAM), as a member of ICOM, regulates professional practice and performance for museums and their staff through its Code of Ethics, reinforcing the protection of rightful ownership of the country of origin and the original owner of cultural property.

The AAM Code of Ethics for Museums (“the AAM Code”), developed in 1993 and revised in 2000, governs all categories of governmental and private museums, and although their mandates differ they all share a common status as a non-profit organization and a commitment to public service. According to the AAM Code, the law provides the basic framework for museums’ operations. As non-profit institutions, museums should comply with all applicable local, state, and federal laws and international conventions, as well as with the specific legal standards governing trust responsibilities. This Code takes such compliance as a given, but bearing in mind that legally-binding standards are actually minimal. Museums and those responsible for them must do more than just avoid legal liability – they must take affirmative steps to maintain their integrity so as to warrant public confidence. They must act not only legally but also ethically. This Code, therefore, outlines ethical standards that frequently exceed legal minimums.⁷⁰ Thus, the American museums regulate their collective behaviour based on higher standards. The collections in their custody should be lawfully held, protected, secure, unencumbered, cared for, and preserved; and claims of ownership should be handled openly, seriously, responsibly, and with respect for the dignity of all parties involved.⁷¹

In 2008, AAM adopted the Standards Regarding Archaeological Material and Ancient Art. These Standards recommend that museums require documentation that the object was out of its probable country of modern discovery by 17 November 1970, the date on which the 1970 Convention was signed, and as regards new acquisitions the museum must comply with all applicable US laws, including treaties and international conventions of which the US is a party and which govern ownership and title, import, and other issues critical to acquisition decisions; and finally that museums should respectfully and diligently address ownership claims to antiquities and archaeological material and take all measures to ensure that each claim, whether based on ethical or legal considerations, will be considered on its own merits, and in addition museums should seek to resolve claims through voluntary discussions directly with a claimant or facilitated by a third party.⁷² The codes listed above have thus embodied the core principle of the 1970 Convention.

⁷⁰ American Alliance of Museums, *AAM Code of Ethics for Museums*, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/code-of-ethics-for-museums/> [accessed: 25.04.2020].

⁷¹ *Ibidem*, Collections.

⁷² See American Alliance of Museums, *Archaeological Material and Ancient Art*, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/archaeological-material-and-ancient-art/> [accessed: 25.04.2020].

Authenticity and the Integrity of the Six Stone Horse Reliefs

The word “authenticity” originated in medieval Europe and conflates the Greek and Latin terms for “authoritative” and “original”. In the medieval times, when religion was dominant, the word was used to refer to the authenticity of religious texts and relics. The authenticity of sacred religious objects did not need to be based on facts but could be based on legendary anecdotes.⁷³ With the development of Western civilization, the pursuit of authenticity rose above the narratives of religion and embodied the rational and empirical spirit of the times.

Since the introduction of the concept of authenticity in the field of heritage protection in the 1960s, authenticity has evolved along with modern society and the understanding of heritage, and today it goes far beyond its orthodox meaning. The Venice Charter for the Conservation and Restoration of Monuments and Sites, created on 31 May 1964 (“the Venice Charter”), laid down the significance of authenticity for the protection of modern heritage, and proposed that “it is our responsibility to pass on the cultural heritage in a true and complete manner”.⁷⁴ The Venice Charter itself is the best interpretation of the role of authenticity in the protection of cultural heritage.

However the Nara Document on Authenticity, adopted in Nara, Japan in December 1994, is the most important international document on the issue of authenticity. The Nara Document acknowledges that authenticity as an essential factor in the identification and assessment of cultural heritage.⁷⁵ Following the Nara Document, the World Heritage Committee also encourages a wide-ranging dialogue between different regions of the world and various conservation groups on the diversity of cultural heritage and the concept of authenticity associated therewith.

The concept of integrity is primarily aimed at the protection of natural heritage. The 2015 Operational Guidelines for the Implementation of the World Heritage Convention have diluted the boundary between natural heritage and cultural heritage protection. Integrity in these Operational Guidelines is a measure of the wholeness and intactness of the natural and/or cultural heritage and its attributes.⁷⁶

As one of the most influential works in Chinese history, the authenticity of the Six Stone Horse Reliefs lies not only in commemorating the six horses ridden by Emperor Taizong, but also in deeper cultural connotations reflecting the spirit of the age. At the same time, the integrity of the Six Stone Horse Reliefs not only refers to the integrity of each individual piece, but also the unity of the six pieces. More

⁷³ D. Lowenthal, *Authenticity: Rock of Faith or Quicksand Quagmire?*, “The Getty Conservation Institute Newsletter” 1999, Vol. 14(3), https://www.getty.edu/conservation/publications_resources/newsletters/pdf/v14n3.pdf [accessed: 25.04.2020].

⁷⁴ The Venice Charter, p. 1, https://www.icomos.org/charters/venice_e.pdf [accessed: 25.04.2020].

⁷⁵ <https://www.icomos.org/charters/nara-e.pdf> [accessed: 25.04.2020].

⁷⁶ UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention*, 8 July 2015, WHC.15/01, para. 88.

importantly, the Six Stone Horse Reliefs consist of six horses as well as the multi-tier bases connected with the stelae. Thus, the “true and complete image” of the horses can be revealed only by the combination with their bases. Now that the Two Steeds are lost overseas, the Six Stone Horse Reliefs are separated and incomplete.

Considering that authenticity and integrity are two of the basic principles in the protection of cultural relics, the collection of the Two Steeds by the Penn Museum can be seen as destroying in some ways the authenticity and integrity of the Six Stone Horse Reliefs. It is important to note that the terms authenticity and integrity refer not only to the integrity of physical protection, but also to the protection of the cultural contexts to which they belong.

Conclusions

State practices have proven that soft law plays an important role in facilitating and mobilizing the consent of States required to establish binding international law, mainly because both moral and political considerations underlie these seemingly non-binding instruments. As State Members to the 1970 Convention, China and the United States support their close cooperation in combating the smuggling of cultural relics under existing mechanisms. The actions taken by both governments, including the enactment of the CPIA and the conclusion of the MOU, all reflect the importance attached by them to the protection of cultural heritage in light of the 1970 Convention. The practices described above show that both countries respect the object and purpose of the 1970 Convention.

One should appreciate that the Penn Museum has taken good care of the Two Steeds. However, the conduct of removing the Two Steeds in China constituted illicit stealing. The smuggling and the cross-border trade in cultural relics violated the Presidential Order declared by President Yuan Shikai. Based on the codes of ethics, we sincerely hope both museums will enter into a dialogue and reach a consensus that the Two Steeds were stolen and shipped illegally, and respect the authenticity and integrity of the Six Stone Horse Reliefs. We are looking forward to the return home of the Two Steeds via a cooperative agreement between governments and museums.

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