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The Development of International Law and Dispute Settlement on the Protection and Return of Cultural Property

Lee, Whie-jin*

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I. Introduction

Throughout its long history spanning a few thousands of years Korea has suffered the destruction and loss of valuable cultural property and treasures. During the invasion by neighboring countries palaces and temples were burned down and precious properties were destroyed, stolen and pillaged. In the colonial period of the early 20th century innumerable numbers of cultural property were stolen or taken out of Korea.[1] The issue has been raised in

* Former ambassador to PNG and consul-general in Sydney. The article does not represent the opinion of the Ministry of Foreign Affairs of Korea.

1) According to Overseas Korean Cultural Heritage Foundation, as of Sept. 1, 2016, 167,968 pieces of cultural property are scattered in the custody of 20 foreign countries, among

the negotiation for normalization of diplomatic relations with Japan which was concluded in 1965 by signing Korea-Japan Basic Treaty. The Treaty is supplemented by four(4) Agreements, one of which provides for cultural property and cultural cooperation.

The Overseas Korean Cultural Foundation was established in 2012 to investigate and manage overseas Korean cultural heritage more comprehensively and systematically. It also aims to retrieve Korean cultural objects which were stolen or pillaged and kept in foreign countries, and support activities related to the information sharing and dispersion of Korean culture. Korean cultural property owned and stored lawfully overseas will be given publicity to enhance understanding of Korean culture by foreigners.

Now international treaties have been concluded based upon the moral and legal grounds for the necessity of the return of displaced and pillaged cultural property. Since the 1950s treaties have been made and come into force. But some former colonial states are not parties to those treaties and treaties have no retrospective effects. Nevertheless, the return of cultural property to the state of origin will have the effect of customary law, since moral and legal grounds are very widely recognized. In reality, its actual effects have been limited.

After two decades of negotiation between Korea and France, pending issues have been settled regarding the return of Oe-kyujanggak archives. It was the outcome of continuous attention and pressure of Korea and diplomacy pursued not just by government officials, but experts, academic, media and ordinary people. Moral and legal ground has been resorted to. This success has provided a momentum about the issue of return of cultural property.

This article looks into the negotiation process for the return of Oe-kyujanggak archives, positions of Korean and French governments and desirable methods for the return of cultural property, examines the legal

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which 43% are held in Japan, equivalent to 66,824 pieces and 28%(46,641 pieces) in the U.S.. Japan returned 1,431 items, 32 % of items demanded by Korea. Yonhap News report, July 28, 2014, “Japanese government’s attempt to conceal inventory of Korean cultural objects during the negotiation for normalization of relations was revealed”. http://www.overseaschf.or.kr/site/homepage (visited on Nov.1, 2016).

grounds and development of international treaties on the protection and return of cultural property and makes suggestions for solution of the issue of return of cultural property.

Ⅱ. The Case of Oe-kyujanggak Archives

1. Summary of the Pillaging Incident

Chosun dynasty of Korea considered western states barbarous and, approached by them, refused to have official and trade relationship in the mid 19th century. Western Christian missionaries undertook evangelical mission and spread their faith in hiding. Chosun dynasty, initially generous and acquiescent made about-face, apprehending and persecuting the Christian faithful, for fear that their religious teachings contravened and threatened the tradition and code of conduct of Korea.

In 1866, about 8,000 Korean Catholics and nine of twelve French missionaries were apprehended for practicing Christianity. The French missionaries stood trial on charge of felony and were found guilty of entering Korea without official permission and of undertaking unlawful missionary work. Refusing to acknowledge their guilt, the nine missionaries were executed. However, one missionary, Father Ridel, escaped to China where he reported to the commander of the French Asiatic Squadron, Admiral Roze. The French navy, in its punitive expedition which was defeated, did numerous atrocities in and around Kanghwa islands to the west of Seoul, burning down valuable documents and cultural property and carried off 297 volumes of the Korean royal archives and other national treasures.

The whereabouts of the royal archives were not known until mid-1975, when Park Byungsun, Korean historian cum librarian with the Paris National Library, came across the collection of archives housed in the storeroom of the Library through her incessant efforts toward the findings

of the documents.[2] She raised the necessity for the return of those document with the Korean government. Korean government was initially reluctant about her suggestion, concerned that the relations between Korea and France would be strained. She continued with her efforts and persuasion for the return of the cultural property.

2. Negotiations for the Return of Archives

Following the request made by the Seoul National University where Kyujanggak library was housed, in 1992 the Korean government made a formal request through diplomatic channels to the French government for the return of its cultural property called the Oe-kyujanggak[3] archives. The archives were a collection of written materials on the palace protocol of the Chosun dynasty[4], which were duplicated and kept in several places to prevent their total disappearance or loss. Therefore, the property is of high value and historical significance, especially for studying the palace protocols and customs of the Chosun dynasty.

The Korean government, in recognition of the historical value and nature of the archives, and supported by international law, decided to attempt to restore this part of its cultural property. Korea and France agreed upon the method of 'exchange and loan'[5] in principle. French president Francois Mitterand returned one copy symbolically during his official visit to Korea in 1993.[6]

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2) Yeong-don Loh, "The Return of Materials of the Oe-kyujanggak Archives and International Law", 「Professors' Journal」 3-1, Inha University, 2004, p.548.

3) The Oe-kyujanggak, built in March 1781, was a branch of the Kyujanggak library cum institute and was located on Kanghwa islands, about 60 km to the west of Seoul. Tae-jin Yi, "The Pillaging of the Oe-kyujanggak Manuscripts and their Current Storage in the Paris National Library", 「The Oe-kyujanggak Books: What are the Problems?」, Seoul National University Press, 1999, p.65.

4) The Chosun dynasty lasted for 519 years from 1392 to 1910, the year of colonization by Japan.

5) Because of domestic acts, France could not return foreign cultural objects to the state of origin. This French position was very firm and unchanging. France was concerned that the precedent of one return might open a floodgate so that France could receive lots of return requests from concerned countries.

Despite the principled agreement the negotiations have not proceeded smoothly. The two governments have shown differing interpretation on the method of 'exchange and loan'. France interpreted that the loan of Oe-kyujangjak archives will be provided on the condition of exchange of objects of equal value and equal quantity. Korea objected to that interpretation, likening it to the rescue of one hostage in return for another hostage. France seemed to give the impression of resorting to procrastination tactics in the negotiation. No progress has been made in the negotiation led by the governments. Therefore, government delegation was replaced by civilian expert delegation. In the third and final stage of negotiation of 2004 to 2011 the negotiation was again led by the government delegates. Korea made suggestions of holding Korean cultural exhibitions in France featuring royal protocol books and other valuable objects to promote cultural understanding. The negotiations have gone through ups and downs in this process. The method of reciprocal exchange of the same royal protocol books which was tentatively agreed by the civilian expert delegation was not accepted by the Korean government. Strong criticism has been raised by the media and public in Korea buttressed by the prevalent moral and legal grounds. France has not been swayed in its position.

There have been two perspectives concerning the issue of return of cultural property; the school of principle versus the school of practicality. In the case of Oe-kyujanggak archives the school of practicality has ultimately triumphed. That was more realistic compromise in consideration of French domestic law and position. Otherwise, with the position of principle the negotiations would run parallel, having no progress at all.

Through strenuous efforts and many rounds of negotiations for 20 years the settlement was finally reached in 2010 and all 297 copies of archives were returned to Korea in 2011 in the form of permanent loan, required to be

6) French president brought two copies with him during his visit to Korea, but it is said that he could not hand over one copy to the Korean government due to intransigent attitude of French librarians.

renewed every 5 years. A section of public and media was not happy with such a compromise, critical of the short period of loan requiring renewal every 5 years. It should be admitted, however, that Korea has de facto ownership over the archives.

3. Legal Reasoning and Argument

The issue of the return of Oe-kyujanggak archives has legal points and ground, upon which Korea and France have posited their position and argument. Korea above all starts from the moral and legal superiority resulting from the illegal nature of the pillaging act by the French navy. Legal points and counter-points are enumerated in detail as follows.

1) Illegality of the Act of Plunder of Archives

Among the western societies in the 19th century there was growing consciousness that the pillage and plunder of cultural property should be avoided except when militarily imperative, and an international legal norm had been formed to regulate the protection of cultural property. However, some jurists have argued that international law was not applied evenly outside Europe, which regarded Asian and African countries as the object of colonization, not as equal partners in the application of international law. France also argued that the pillage and destruction of the archives was committed as part of reprisal for the killings of nine missionaries.

Acts of pillage and destruction might be rationalized and justified with this reasoning, though this argument would not get full and complete endorsement from the other legal points of view. French missionaries came to Korea to spread the gospel of Christianity, and it met strong resistance from the Korean government, which feared the pollution and tarnishing of the traditional Confucian culture and lifestyle and the ultimate weakening of the royal government. The French attempt ultimately led to the conclusion of the

Amity and Commerce Treaty with Korea in 1886. This treaty demonstrates the French view of Korea as an equal partner, ready to accept Korea into the purview of the international legal regime.[7)]

Beginning with the Vienna conference to conclude the Napoleanic War and followed by Lieber Code in the 19th century, which provided for the return of cultural property, the relevant provisions prove the general trend and willingness of warring parties to return cultural property to the state of origin. In the mid-19th century treaties and declarations[8)] mention the obligation to prevent the wanton pillage and destruction of cultural property, which implies that the obligation, through usage(usus) and opinio juris, started to be embodied into customary international law at that time. It can therefore be deduced that the French naval forces violated the obligation implied in international law not to pillage and destroy cultural objects.[9)]

2) Preponderance of International Law over Domestic Law

A host of cultural objects displayed or housed in French Museum are known to be pillaged foreign assets, which were made public property by domestic legislation, and therefore prohibited from being transferred to foreign countries. Unless this legislation is amended, or annulled, the return of foreign property will not be permissible under the present system. However, it is argued that the provisions of domestic legislation should not be treated as a

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7) Choong-hyun Paik, "International Law and the Return of the Oe-kyujanggak Books", 「The Oe-kyujanggak Books: What are the problems?」, Seoul National University Press, 1990, p.106.

8) The 1874 Brussels Declaration, though without binding force, stipulates the seizure and destruction of cultural property as chargeable.

9) To this argument, a counterargument is put forward as follows: though recognizing that the customary law was in the process of formation at the time of the incident, customary law was not sufficiently consolidated. The Lieber code, while prohibiting the seizure and destruction of cultural property in principle, permits its seizure and destruction on the condition of not damaging it if national interest necessitates it. The 1874 Brussels Declaration could not turn into the format of a treaty with binding force due to the British objection. Thus it is doubted that the existence of sufficient opinio juris is consolidated to complete the condition of customary law.

justifiable pretext to avoid the obligations imposed by international law.

Normally in most nations, domestic law and treaties are on equal legal footing in the domestic field in accordance with the constitution, yet they have a different legal effect in the international arena, where international law prevails over domestic law. As to relations between two disputing countries, one party bears the responsibility to correct the wrongs made under international law. In this respect France needs to make restitution of the pillaged archives or make correction by way of reparations or other means.

3) The Applicability of Prescription and Acquiescence

Suppose that the pillaged cultural property should be returned, yet the factor of the passage of time needs to be taken into consideration.[10] After more than 100 years, would it be justified to reverse the present state of affairs and turn the clock back? The system of extinctive prescription comes into play in making an argument about the appropriateness of the return of cultural property taken away so long ago. The normal condition for the application of the prescription is that the present holder has possessed the property in public and the original owner has not claimed its ownership. The Korean authorities at the time assumed that the archives had been burnt by the French naval forces, thus leaving no room for negotiation for their return. It follows that, had the authorities known their storage in France, a demand would have been made to the French authorities for their restitution. The existence of the archives came to the attention of Korean government after a scholar came across the existence of the archives in the Paris National Library in 1975, and in this case it would be unreasonable to assume the applicability of prescription.

The prescription itself causes controversy and confusion. Under the ancient Roman principle of ex injuria non oritur jus, illegal acts do not engender or

10) Choong-hyun Paik, op. cit., p.110.

provide a cloak of legality.

4) Inter-temporal Law

An argument could be made that inter-temporal law did not provide for the return of cultural property to the state of origin where international law was not considered to apply. Korea was not considered in the eyes of the French authorities as a subject of the application of international law. It would follow that the pillage of the Korean archives could not be regarded as a violation of international law due to its inchoate status in international law. It should be remembered, however, that Korea was approached in the mid-19th century by western countries for commerce, diplomacy, and the spread of religion. A series of continuous approaches and the conclusion of treaties with western nations in the 1880s attest to the recognition of the legal entity of Chosun dynasty which made it worthy of being treated as an equal partner under international law.

5) Conclusion: Return of Oe-kyujanggak Archives

In light of the above legal reasoning and argument the return of cultural property has taken on the nature of customary law. The act of pillage of the cultural property in the mid-19th century is, needless to say, inconsistent with international law of the day and accordingly the cultural property should be returned to the state of origin, Korea. Focusing upon the nature of customary law, there would not be any serious problem as regards their return, but the French authorities are worried that the return would acknowledge the illegality of pillage and provide an impetus for the repatriation of many of the other foreign assets stored in France.

Faced with the real obstacles of intractable French position which protracted the negotiation for 20 years, Korea had no other choice but to reach a compromise of loan method. Permanent loan provides a de facto

ownership of the archives to Korea. The settlement of the Oe-kyujanggak archives was the outcome of diplomatic consideration, not just legal argument, as the long-lasting Korea-French negotiations attest. Legal argument has been in a way supplementary to the diplomacy.

In an administrative lawsuit filed in France by Korean Cultural Solidarity in 2007, French Administrative Court of Law dismissed the lawsuit in a judgment handed down in 2010 which stated that the Oe-kyujanggak archives are recognized as French national assets, with the circumstances of acquisition and condition of the archives having no effects upon the status and nature of national assets.[11)]

In theory the issue could be raised by Korea through international legal proceeding by filing a lawsuit with the International Court of Justice(ICJ), but it is doubtful whether French government will accept the jurisdiction of the ICJ. The advice and opinion of most of experts who attended 'International Experts' Meeting concerning the Promotion of Cultural Property and Prevention of Illegal Trading' was negative about the possible solution through legal proceedings.[12)]

Ⅲ. Development of International Law for the Protection and Return of Cultural Property

1. Legal Grounds for the Protection and Return of Cultural Property

In the 18th century enlightenment thinkers espoused and laid the foundation for the protection of cultural property. Their ideas and argument

11) Sang-chun Chung, "Negotiation Process on the Return of Oe-kyujanggak Archives in France and its Appraisal", 「Korean Journal of Political and Diplomatic History」, 33(1), 2011, P.247.

12) Sang-chun Chung, op. cit., p.248.

have been adopted in the peace treaties of the 19th century to reduce unnecessary damage of cultural property in the war or conflict. In the early 20th century the protection of cultural property was provided for in the Land Warfare Code of the 1907 Hague Convention. The provision of the treaties had not the effect of hard law, but over time it was accepted as customary law.

After the Second World War, decisions of each national court were made on the basis of this principle. i.e., that cultural property taken away from the state or place of origin during occupation must be returned.[13] The 1975 UN -resolution 3391 brought about developments in this field, although not the same as before. The supporters of this resolution were of the view that the return of cultural property as such is an act of international concern and cooperation. In other words, the aspiration for the restitution of cultural property is not simply based on justice, but must be fulfilled within the framework of international concern and cooperation.[14]

Non-aligned nations have held a number of meetings, such as the Conferences of Heads of State or Government of Non-aligned Countries, and concentrated on the discussion of issues directly related to the plunder of cultural objects during the colonial period. Particularly, at the fourth conference in Algiers, in September 1973, it was stated that "The peoples of the third world maintain their identity, revive and enrich their cultural heritage…". This sentence was contained in the foreword of the 1973 United Nations General Assembly Resolution.[15] Subsequently, in the fifth conference in Colombo, in August 1976, two further resolutions concerning this issue were adopted.[16]

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13) "Rosenberg v. Fischer, Switzerland(Chamber of the Restitution of Assets Seized in Occupied Territories), 3 June 1948", 「International Law Reports」, Vol. 13, 1948, p.467; Hyung-man Kim, "the Return of Cultural Property in International Law", doctoral dissertation, Yonsei University, 1997, p.125.

14) Hyung-man Kim, op. cit., pp.117-118.

15) UNGA Resolution 3187 of 1973; UNGA Doc. A/9199, 2.

16) UNGA A/31/1976 Annex IV.

In the mid-20th century, treaties were concluded to embody the obligation for the return of cultural property, but these treaties were not retroactive in effect, reflecting the wishes of the former colonial countries. Besides the legal obligation set out in the treaties, there are a number of recommendations and decisions passed by UNESCO and other institutions and committees, which demonstrate the aspiration for the return of property to the state of origin. The treaty provisions and recommendations of UNESCO are generally derived from the legal and moral justification for the return of cultural property, which has been recognized and established in peace treaties and customs.

2. Customary Law Concerning the Protection and Return of Cultural Property

It is difficult, or rather almost impossible, to ascertain the point in time from when the state practice of returning cultural property has evolved and been established. Customary law is generally based upon the traditional requirements of a uniform and repeated practice(usus) and the recognition of following it as a legal rule(opinio juris). A state may claim the existence of customary rules imposing on the other state a duty to return cultural property taken during an armed conflict. In case a dispute as to the existence of customary law arises between the state parties, which often occurs in light of the nature of customary law, the final decision will be made by the judicial organization. From a general point of view, customary international law prohibiting the destruction of cultural property has been progressively developing over a long period of time.[17] The development of customary law is related to the codification of treaties, which clarify the

17) Professor Stanislaw Nahlik maintained that by the end of 19th century the norm of protecting cultural property was established in practice and theory, thereby becoming customary law. Stanislaw Nahlik, “Cultural Property in Armed Conflicts”, 27 Hastings L.J. 1069, 1071, 1976.

implication of customs in the form of agreement by states. Some argue that state practice appeared in the early 19th century around the time of the Vienna conference, which decided upon the return of cultural property illicitly taken during the Napoleonic war. However, other views are less optimistic about such contention and deny its declaratory value, at least of the existence of general customary law in 1815.[18] In the 20th century, after undergoing two world wars and codifying treaties under the auspices of UNESCO, customary law has firmly established the principle of the protection of cultural property. Following the First World War, the Versailles peace treaty provided for the return of cultural property, strengthening the necessity not to take, remove or destroy objects unless militarily necessary.

In the latter half of the 20th century, UNESCO has made great contributions to the codification of treaties, making clear the obligation of states to return cultural property. Considering that as of the year 2016, 127 states are parties to the 1954 Hague Convention, it can be argued that the contents of relevant provisions are reflected in customary law.

3. International Agreements on the Protection and Return of Cultural Property[19]

International treaties on the protection and return of cultural property were concluded following World War II, though partially mentioned before that time in the humanitarian law like Hague Convention of 1907. The

18) G. Carducci, "Return of Cultural Property under International Customary Law and the 1954 Hague Convention", The International Expert Meeting on the Return of Cultural Property and the Fight against its Illicit Trafficking, 30 September-3 October 2002, Seoul, p.81.

19) International agreements do not generally provide for retroactivity, limiting the effect of the provision to actions that were committed after the agreements came into force. Nevertheless, it was confirmed during the negotiation conference that the non-retroactivity would not justify the pillaging act of cultural property in the previous period.

formation of treaties demonstrated the willingness of international community to protect cultural property. The three typical treaties are: the 1954 Hague Convention and protocols, the 1970 UNESCO Convention and 1995 UNIDROIT Convention.[20] The conventions have no retrospective effects and some states which have taken and housed the cultural property of other countries do not join those treaties.

1) The 1954 Hague Convention for the Protection of Cultural Property and the First and Second Protocols

The 1954 Hague Convention is the first comprehensive international agreement for the protection of cultural property in time of war or armed conflict. It came into force on August 7, 1956 after five states had ratified it, as required in article 33. The convention is composed of three documents: the Convention for the Protection of Cultural Property in the Event of Armed Conflict, Regulations for the Execution of the Convention and the Protocol. It is highly significant that the documents are to be taken as a veritable code for the protection of cultural property in the event of war.[21]

All the cultural property defined in article 1 of the Convention is the subject of general protection. A party to the Convention has an obligation not to use cultural property for military purposes of any sort, the purpose which is likely to expose the cultural property to destruction or damage in armed conflict. The other party has an obligation not to take hostile acts of any sort directly against cultural property. This fundamental obligation is accompanied by a significant limitation: the obligation of respect for cultural property may be waived only where military necessity imperatively requires such a waiver.

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20) The number of countries that have ratified or acceded to the Conventions is as follows as of January 2016: the 1954 Hague Convention(127), The 1st Protocol(104) and the 2nd Protocol(69); the 1970 UNESCO Convention(131); the 1995 UNIDROIT Convention(37).

21) Nahlik, op. cit., p.206.

Despite the significance of the Convention as the first comprehensive treaty on the protection of cultural property, it has limitations in achieving the objective of cultural protection because of some inherent, fundamental flaws. Military necessity is widely recognized as an exception, reducing the extent of cultural protection, and the contents of some of the main provisions are abstract and broad, without applicable binding force, and further implementation of the Convention was entrusted to measures of member states. In a word, the nature of the Convention is non-self-executing. The sanctions[22] clause for the violation of the Convention is vague, demanding further legislative measures of member states.

The First Protocol accompanying the convention provides for the return of cultural property pillaged by the victor state in war. The adoption of the Protocol was a response to the events of the Second World War which saw not only the destruction of cultural property but also the systematic pillage of occupied territories. The issue of return of cultural property to the state of origin was first dealt with in the draft convention.[23] Objection was raised to the inclusion of the provision in the convention and it was dropped from the text of the Convention. Nevertheless, the provision remains important, as evidenced by the fact that 104 states are parties to the Protocol as of the year 2016.

The return of cultural property involves elements of private and public law, as was argued by the UNIDROIT delegation during the drafting conference. The First Protocol includes in a simplified form only provisions of public law to the exclusion of private law. Despite the significance of the Protocol in providing for the return of cultural property, its normative force has been reduced, for this provision was moved to the Protocol from the

22) The Convention has only one sanctions clause, article 28, which reads: "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatsoever nationality, who commit or order to be committed a breach of the present Convention."

23) Article 5 of the Convention originally included a provision on the return of movable property. Later, this question was incorporated in a special protocol.

Convention and the contents of the provision have been broad and sketchy, allowing for the discretion of member states. The discrepancy between state practices and the provision has been noticed following the entry into force of the Protocol. Generally treaties do not have retroactive effect, as is provided in article 28 of the Vienna Convention on the Law of Treaties. A non-retroactivity clause was inserted after serious discussions at the 1970 UNESCO convention and the 1995 UNIDROIT Convention. The Protocol, however, does not have an explicit clause on non-retroactivity, which, though showing the ambiguity of the Protocol, enhances the possibility of its invocation.[24]

The Second Protocol, adopted in 1999, has strengthened the degree of the protection of cultural property provided for in 1954 Hague Convention in several ways.[25] However, it does not provide specific rules on the return of cultural property, mostly to avoid overlapping with the provisions of the First Protocol. The Second Protocol provides for more appropriate, intensive procedures relating to the protection of cultural property, for the preamble considers that the rules governing the protection of cultural property in the event of armed conflict should reflect developments in international law.

2) The 1970 UNESCO Convention

The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property is the climax of efforts to reach an international agreement on the protection and return of cultural property. It deals most directly with the return of cultural property in relation to illicit trafficking. The Convention seeks to protect cultural property at its source by preventing export and import into other states. A system of export certificates is envisaged which would specify that the

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24) Keun-gwan Lee, “A Study on the Hague Convention for the Protection of Cultural Property in the event of Armed Conflict”, 2003, p.31.

25) See Part E. on the problem of the Convention.

export of a cultural object is authorized. The states undertake to prohibit the exportation of cultural property from their territory unless accompanied by the export certificate.[26] As to the state's international obligations, the state undertakes to implement measures consistent with its national legislation to prevent its museums and similar institutions from acquiring illegally exported cultural property originating in another state. There is to be a total prohibition on the import of an object stolen from a museum or from a religious or secular public monument or similar institution, provided that the object is documented in an inventory of that institution.[27] A state whose cultural property is in jeopardy from pillage of archaeological or ethnological materials may call upon other states to participate in a concerted international effort to determine and carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned.

The Convention, which is mostly concerned with the protection of cultural property in time of peace, provides for its protection in armed conflict in article 11.[28] This article is rather special and exceptional. It is supplementary to articles 1 through 4 of the First Protocol to the 1954 Hague Convention. While article 1 of the First Protocol aims to prevent the exportation of cultural property from an occupied territory, article 11 of the UNESCO Convention regards as illicit the export and transfer of ownership of cultural property with regard to both the occupying authorities and all the parties to the UNESCO Convention. As opposed to article 1 of the First Protocol, article 11 of the UNESCO Convention is concerned not just with the export but with any transfer of ownership of cultural property under compulsion. The prevention of exportation under article 1 of the First Protocol is limited to a time of armed conflict, yet the 'occupation' in article 11 of UNESCO Convention

26) Article 6 of the Convention.
27) Article 7 of the Convention.
28) Article 11 stipulates: "The export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit."

is broader, for occupation may take place outside the context of armed conflict.

3) The 1995 UNIDROIT Convention

The 1995 UNIDROIT Convention extends the scope of application of the protection of cultural property by including unregistered cultural property and cultural property held by private persons. The Convention makes distinction between stolen cultural property and illegally exported cultural property, in that the possessor of cultural property which has been stolen shall return it[29] and a contracting state may request the court of other competent authority of another contracting state to order the return of cultural property exported from the territory of the requesting state.[30] The Convention aims to unify the legal reasoning of private law on the return of cultural property and presupposes the application of principles contained in civil code and other private law. The provisions of public law including the consideration and decisions made by judicial institutions about the request for return of cultural property are also included in the Convention.

Ⅳ. Suggestions for the Settlement of Disputes over the Protection and Return of Cultural Property

Treaties and customary laws have developed over the years to recognize and effect the return of cultural property, enabling the return of pillaged property to the state of origin. However, the relevant provisions of international conventions do not guarantee the actual return and based upon their provisions, further action on the part of the requesting state is required.

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29) Article 3(1) of the Convention.
30) Article 5(1) of the Convention.

The ways to effect the return of cultural property can be in practice classified into mainly two types; negotiation and legal proceedings. The result of negotiation can appear in the form of exchange, indefinite loans, voluntary return etc.[31] These methods are not exclusive of each other, but rather can be complementary and related to each other. Legal action should normally be taken as a last resort.

1. Negotiations and Bilateral Agreements

If a dispute arises, the primary mode of settlement is through talks, with the two parties explaining their positions. During the negotiations arguments will be made and counterarguments put forward. The positions of the two parties will run parallel in most cases, reflecting its national interests. In the tense atmosphere compromise could be sought and met, with each side yielding its position somewhat. This process of negotiation could apply to disputes relating to the return of cultural property. The claimant state would explain and justify its position based upon the illegality of the pillaging act but this argument could be refuted and not accommodated by the holding state. The element of consideration is not just legal, but cultural, historical, political and social. This negotiation is a continuous, protracted wrangling over an emotive, psychological and legal issue.

Due to the complexity of the political, historical and cultural nature of the argument and an aversion to the return of cultural property on the part of holding countries, returns will, under normal circumstances, take a long time and require protracted negotiations, occasionally leading to an agreement on the return of cultural property. Unconditional return or restitution, in recognition of the illegality of the pillage or plunder during armed conflict is the most idealistic, yet in actual fact the negotiations do not normally proceed in a linear, simple manner. In the interests of both parties compromise is often sought.

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31) Jeanette Greenfield, The Return of Cultural Treasures, 2nd edition, Cambridge University Press, 1996, p.294.

2. Legal Action

It has become more common for disputes to be settled through domestic legal action. A party brings a suit against another party in its domestic court[32] which, considering all relevant factors, adjudicates the dispute. At the first stage the court considers the admissibility of the claim and once the claim is recognized as admissible, the merits of the claim will be given consideration. The court, in light of its domestic nature, applies domestic legislation and international law, but normally refuses to apply the foreign legislation.

In theory, disputes could be settled in the International Court of Justice (ICJ).[33] However, there are many impediments in instituting proceedings in the ICJ, including the necessity of obtaining consent from the defendant state. Preliminary objections as to jurisdiction and admissibility may be

32) To take some examples of domestic lawsuits, it is as follows; 1) In the case of the Attorney-General of New Zealand v. Ortiz, the New Zealand government argued the return of Taranaki panels in a British court. The New Zealand contention that the lawsuit was brought to enforce the ownership of the objects, not seeking to implement the relevant laws, was not accepted by the appeals court. The court held that it could not recognize the extraterritorial application of the New Zealand laws, especially in consideration of the penal law nature of forfeiture clause. 2) In the 1990s several countries successfully litigated in U.S. courts for the recovery of cultural property. For example, a Buddha stele was returned to Burma in 1995 through a court decision. The treasure was stolen in 1989 and smuggled out in breach of Burmese law. In the civil proceedings initiated by the U.S. government, Burma waived its sovereign immunity to institute the proceedings in the U.S. district court which ruled in favor of Burmese position.

33) The ICJ handed down its judgment on the issue of the return of cultural property in 1962 in the case of the Temple of Preah Vihear. The subject of dispute was the land between Cambodia and Thailand where the temple was located. In its judgment the Court, by nine votes to three, ruled that the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia and, in consequence, that Thailand was under an obligation to withdraw any of its military or police forces, or other guards or keepers, stationed at or in the vicinity of the Temple, on Cambodian territory. By seven votes to five, the Court found that Thailand was under an obligation to restore to Cambodia any sculptures, stelae, fragments of monuments, sandstone models and ancient pottery which might, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities.

raised before the merits of a case can be considered. The Court can also give advisory opinion in accordance with the article 65(1) of the Statute of the Court.[34] States would have to seek this procedure through a majority of the General Assembly, which, together with the Security Council, is empowered to request an advisory opinion under article 96 of the UN Charter. Unlike a judgment of the Court, the advisory opinion does not have binding force and exercises only moral pressure.

The fundamental problem with legal action is that the dispute involves not only legal matters, but political, cultural and historical interests, thus limiting the resolution of disputes simply through the application of laws. Nevertheless the possibility of dispute settlement in the court is likely to increase with regard to the recent incidence of cultural property displaced during armed conflict or that has been illicitly trafficked, as more countries join the international convention and the elements of legal application are established.

It has been suggested that the international legal mechanism for settling disputes could be made possible through the establishment of a special international tribunal. This tribunal would consider the country of origin, the significance of the property to the claimant country, and the manner in which the property was removed from its country of origin. One example would have been an International Tribunal for the Settlement of Cultural Property Disputes by which disputes are settled by legal decision.[35] This proposal is based upon an amendment to the article 25 of the 1970 UNESCO Convention. Its advantage would be that it does not have retrospective effect and disputes with non-parties can be brought before the tribunal. For this purpose preconditions should be met that include a

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34) Article 65(1) of the Statute provides: "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

35) A. Prunty, "Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to keep Greece from losing its Marbles", 「Georgetown Law Journal」 Vol.72, 1983-1984, p.1167.

bilateral agreement to utilize the tribunal and the exhaustion of other attempts at conciliation. The tribunal, if established, could contribute to the clarification of international conventions through its function of applying international legal norms to disputes and by providing criteria for settlement of disputes by expressing advisory opinions.

Ⅴ. Conclusion

Through customs, treaties and recommendations of international organizations, it can be deduced that the principle of prohibition of pillage and destruction and the return of cultural property has been established. Multilateral conventions which have attracted a number of states as parties exert binding force as regards the return of cultural property. The provisions of these conventions are occasionally the reflection of customs, in which case they could also apply to non-parties to the convention.

At the moment the return of cultural property to the state of origin is regarded as an obligation in customary law, accepted generally as a rule of law in the international community. A state may request the return of cultural property based upon the existence of customary rules prescribing to the other state a duty to return cultural property displaced in armed conflict. Though it cannot be said to have obtained the status of jus cogens, with the accession of significant number of countries to the 1954 Hague Convention and the 1970 UNESCO Convention, over time it will be strengthened and its status will become entrenched in international law. Nevertheless, in reality many problems remain unresolved by way of such principles.

Another major obstacle to the resolution of disputes is the attitude of cultural internationalism of European colonial states, which have not ratified or acceded to the 1954 Hague Convention and other relevant treaties.

With such ambiguities and differences of opinion regarding the return of

cultural property taken away centuries earlier, there are limitations to the resolution of disputes by resorting just to legal methods. In consideration of the complexities of the nature of pillaged cultural property, a comprehensive method, including both a legal and a diplomatic, political approach should be sought.

Following the settlement of Oe-kyujanggak issues, Korean Overseas Cultural Heritage Foundation was set up to pay more attention to the retrieval of Korean cultural property overseas. With the awareness of the displaced or pillaged property overseas that has been raised over the long negotiation with France, more properties are expected to be returned to Korea through various channels, either diplomatic negotiation or legal action.

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[국문초록]

문화재의 보호와 반환에 관한 국제법의 발전과 해결방안

이 휘 진*

문화재의 보호와 반환에 관한 조약이 2차대전 이후 체결되어 약탈 또는 도난된 문화재는 원소유국에 반환되도록 하고 있다. 이 조약은 소급효를 가지고 있지 않고 외국의 약탈 문화재를 보유하고 있는 일부 국가가 가입하지 않고 있어 문화재의 반환에는 한계가 있다. 문화재의 보호와 반환에 관한 조약이 없어도 이에 관한 관습법의 효력이 적용되고 있다고 할 수 있다.

프랑스에 소장된 외규장각 도서의 반환을 위하여 지난 20년간에 걸쳐 어려운 협상을 통해 2011년 영구임대의 형식으로 반환된 바 있다. 한국이 소유권을 되찾는 방식이 아니고 영구임대형식으로 반환되는데 대한 비판과 불만이 제기되었으나 사실상 한국이 소유하게 되는 형태를 띠고 있다고 할 수 있다. 프랑스의 국내법의 규정을 존중하는 방식을 취하게 되는 궁여지책의 결과이다.

문화재의 반환을 위해 외교교섭과 법적 쟁송을 통한 해결이 시도되고 있으며 문화재 약탈의 복잡한 성격을 감안할 경우 법적 쟁송 방법 보다는 외교교섭의 방식이 바람직하다고 볼 수 있다.

한국은 역사적으로 많은 문화재의 파괴, 약탈이나 도난을 겪었다. 해외소재문화재단을 설립하여 문화재의 반환과 보호 및 홍보를 위해 노력하고 있다.

주제어 : 문화재의 반환, 협약, 외규장각 도서, 영구임대, 도난 또는 약탈, 소급효

* 주 파푸아뉴기니 대한민국대사관 전 대사, 주 시드니 대한민국 총영사관 전 총영사.

[Abstract]

The Development of International Law and Dispute Settlement on the Protection and Return of Cultural Property

Lee, Whie-Jin*

Since 1950s treaties have been concluded to regulate the issue of protection and return of cultural objects. The 1954 Hague Convention, the 1970 UNESCO Convention and the 1995 UNIDROIT Convention have no retroactive effects and are not joined by some concerned countries. Nevertheless, return of pillaged property has the effects of customary law.

The return of Oe-kyujanggak archives has been pending over the past 20 years or so between Korea and France. Through tedious and incessant negotiations the issue was settled in the way of permanent loan. Criticism has been raised of the method of permanent loan, with the legal ownership still vested with France. Korea holds de facto right of ownership.

The ways to effect the return of cultural property can be classified into two types; negotiation and legal proceedings. The result of negotiation can appear in the form of exchange, indefinite loans, voluntary return etc. These methods are not exclusive of each other, but rather can be complementary and related to each other. Legal action should normally be taken as a last resort.

Throughout its long history Korea has suffered destruction, theft and pillage of innumerable numbers of cultural property. Currently Korean Overseas Cultural Heritage Foundation was set up to strive to retrieve displaced and pillaged cultural property and enhance the understanding of Korean culture overseas.

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* Former ambassador to PNG and consul-general in Sydney. The article does not represent the opinion of the Ministry of Foreign Affairs of Korea.

Key words : Return of Cultural Property, Convention, Oe-kyujanggak Archives, Permanent Loan, Stolen or Pillaged, Retroactivity.