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**INTERNATIONAL LEGAL
INSTRUMENTS AND NEW JUDICIAL
PRINCIPLES FOR RESTITUTION OF
ILLEGALLY EXPORTED CULTURAL
PROPERTIES***

*Ho-Young Song***

Worldwide, many cultural properties have been wrongfully exported to other countries in times of war and colonization. Furthermore, cultural properties are currently constant targets of illegal transaction due to their substantial economic value. Illicit trade in cultural properties is now the third largest black market after drug and firearms. There are several international treaties aimed at combating the illicit export and enabling the restitution of cultural properties. Despite these efforts, more legislative and judicial cooperation between countries will be necessary to truly solve the problem. This article reviews international legal instruments for restitution of illegally exported cultural property, and suggests some new judicial principles that should be applied by domestic courts for supplementing drawbacks of international treaties. The author suggests to adopt "lex originis" rule for choice of governing law instead of traditional "lex rei sitae" rule and to apply to shifting burden of proof to a certain extent to find a solution for disputes over cultural properties.

Keywords

Cultural property, *res extra commercium*, The 1954 Hague Convention, The 1970 UNESCO Convention, The 1995 UNIDROIT Convention, *lex rei sitae*, *lex originis*, Shifting the Burden of proof

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I. INTRODUCTION

In 2011, two significant incidents occurred regarding the restitution of cultural properties: Korea recovered 297 volumes of the royal *Uigwe*¹ that had been carried away by French soldiers from the *Oegyujanggak*² during the French Invasion of 1866 and stored in the *Bibliothèque Nationale de France* (BnF)³; and Turkey recovered the Bogazköy Sphinx, which was the object of a long-running dispute between Turkey and Germany, from the Pergamon Museum in Berlin, Germany.⁴ Those cases captured the world's attention.

The cultural properties in those cases were illegally exported during the Imperial Period. The matter of restitution of cultural properties is mostly recognized as pertaining to cultural properties illegally exported during World War I, World War II, or the period when imperialism was rampant, as these types of cultural properties are at the center of a significant portion of restitution disputes. According to the Cultural Heritage Administration of Korea, as of 2015 a total of 160,342 pieces Korean cultural properties reside overseas. Among those cultural properties, approximately 75,000 pieces are thought to have been illegally exported to an estimated 20 countries.

Most of those cultural properties were illegally exported during the Japanese colonial period, the U.S. military government period, and the historical turmoil of the Korean War. Most cultural

1 The *Uigwe* are Royal Records of the State Rites of the Joseon Dynasty, which ruled the Korean peninsula from 1392 until 1897. Douglas Cox, Case Note, "*Inalienable*" Archives: Korean Royal Archives as French Property under International Law, 18 INT'L J. CULTURAL PROPERTY 410 (2011).

2 The *Oegyujanggak* was the Royal Library of the Joseon Dynasty, located outside of the royal palace. *Id.* at 411.

3 See S. Korea welcomes accord with France on transfer of 'Oegyujanggak' royal books, KOREA HERALD, Mar. 17, 2011, <http://english.yonhapnews.co.kr/national/2011/03/17/34/0301000000AEN20110317001800315F.HTML>; see Cox, *supra* note 1, at 409-23 (for a case study of the *Uigwe*).

4 Çorum - Anatolia News Agency, *Hattusa reunites with sphinx*, HURRIYET DAILY NEWS, Nov. 7, 2011, <http://www.hurriyetdailynews.com/hattusa-reunites-with-sphinx.aspx?pageID=238&nID=7062&NewsCatID=385>.

properties plundered and illegally exported during the age of imperialism have not been returned so far. Even so, the restitution of cultural properties is becoming a bigger global issue. However, not all cultural properties were exported during past, unfortunate periods. Cultural properties are currently constant targets of illegal transaction stemming from their inherently enormous value. According to the United States Department of Justice (DOJ), illegal cultural properties make up the third largest concentrated black market— after the illegal drug and firearms markets.⁵ In particular, illegal transactions of cultural properties in the Middle East are reported to be a basis for funding terrorist groups.^{6,7}

With the development of means of communicating and conducting transactions, the current illegal trade of cultural properties has grown to include not only criminal organizations, but also ordinary people. For example, the illegal transaction of cultural properties is frequently carried out using online auction sites such as *eBay*⁸ and international parcel delivery services.⁹ This situation is

⁵ Noah Charney et al., *Protecting Cultural Heritage from Art Theft: International Challenge, Local Opportunity*, FBI LAW ENFORCEMENT BULL. (U.S. DEP'T OF JUSTICE, D.C.), Mar. 2012, <https://leb.fbi.gov/2012/march/protecting-cultural-heritage-from-art-theft-international-challenge-local-opportunity>.

⁶ See Kimberly L. Alderman, *Honor Amongst Thieves: Organized Crime and the Illicit Antiquities Trade*, 45 IND. L. REV. 601, 609-611 (2012); Russell Howard et al., *Digging in and Trafficking out: How the Destruction of Cultural Heritage Funds Terrorism*, 8 CTC SENTINEL 14, 14-17 (2015); Janine di Giovanni et al., *How does ISIS fund its reign of terror?* NEWSWEEK, Nov. 6, 2014, <http://www.newsweek.com/2014/11/14/how-does-isis-fund-its-reign-terror-282607.html>.

⁷ On Feb. 12, 2015, the UN Security Council adopted Resolution 2199 at its 7379 meeting. Resolution 2199 condemns the destruction of cultural heritage in Iraq and Syria, particularly by ISIL and ANF, and also decrees that all Member States shall take appropriate steps to prevent the trade in Iraqi and Syrian cultural properties and other items of archaeological, historical, cultural, rare scientific, and religious importance that have been illegally removed from Iraq since Aug. 6, 1990 and from Syria since Mar. 5, 2011, including by prohibiting cross-border trade in such items. United Nations, Press Release, Unanimously Adopting Resolution 2199 (2015), Security Council Condemns Trade with Al-Qaida Associated Groups, Threatens Further Targeted Sanctions, Feb. 12, 2015, <http://www.un.org/press/en/2015/sc11775.doc.htm>.

⁸ Kurt Siehr, *Unidroit Convention of 1995 and Unclaimed Cultural Property without Provenance*, 2013 ELTE L. J. 89, 95 (2013).

additionally problematic given the people involved in such transactions are often unaware that the transactions run afoul of the law.

International societies agree on the necessity of preventing illegal transactions of cultural properties and returning them to their source countries. In response to this increasing problem, they have established various international norms, such as the 1970 UNESCO Convention¹⁰ and the 1995 UNIDROIT Convention.¹¹ However, some disputes over the restitution of cultural properties cannot be resolved through such conventions. Those disputes can be resolved through diplomatic channels, mutual agreements, or decisions of domestic courts.

Although each country usually has a national law to prevent illegal exportation of cultural properties, few nations have any special act applicable to disputes over the restitution of cultural properties. Therefore when a lawsuit for the restitution of illegally exported cultural properties is filed in a domestic court, the competent court has no option but to apply general legal principles applicable to a lawsuit over other goods. However, if the court applies general legal principles, it might overlook the unique characteristics of cultural properties. Cultural properties differ from typical goods given that the property contains special relevance to the historical, spiritual, and cultural identity of a state unlike other goods. This intrinsic and specialized value exemplifies why cultural properties should not be distributed by normal market forces.

⁹ *Crime ring busted for smuggling Korean relics overseas*, DONG-A IIBO, Apr. 27, 2012, <http://english.donga.com/List/3/all/26/403691/1>.

¹⁰ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, Nov. 14, 1970, 823 U.N.T.S. 321, reprinted in 10 I.L.M. 289 (1971) [hereinafter 1970 UNESCO Convention]. The Convention has been in force since Apr. 27, 1972, with 131 State Parties as of April 2016. <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=E> (last accessed May 4, 2016).

¹¹ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 35 I.L.M. 1322 [hereinafter 1995 UNIDROIT Convention]. The Convention has been in force since July 1, 1998, with 37 State Parties as of April 2016. <http://www.unidroit.org/status-cp> (last accessed May 4, 2016).

Based on such a viewpoint, this paper suggests some legal principles that could be applied to international disputes over restitution of cultural property, particularly in the global context. Chapter II examines the meaning and characteristics of cultural property. Chapter III reviews international legal instruments for prevention of illegal exportation of cultural property and restitution. Chapter IV identifies some problems posed in cases where a lawsuit over restitution of cultural property is filed in a domestic court, and suggests new judicial principles to solve the problems. Chapter V summarizes the conclusions.

II. THE MEANING OF CULTURAL PROPERTY

A. The Definition of Cultural Property

At the outset, it is imperative to clarify what should be identified as *cultural property*. The classification of the property itself is a preliminary question to all legal challenges in the restitution of cultural property issues. It is difficult to establish a universal definition of cultural property. Broadly stated, the term *cultural property* refers to objects with artistic, ethnographic, archaeological, or historical value.¹² Cultural property includes art, artifacts, antiques, historical monuments, rare collections, religious objects of importance to the cultural identity of a group of people, and other items representing significant historical, artistic, and social accomplishments.¹³

The word *property* has a semantic nuance limited to tangible things. However, a product of the cultural activities of a human being or tribe contains a myriad of intangible things. Therefore, the term *cultural heritage* is sometimes used as a broad concept encompassing not only tangible, but also intangible cultural products.¹⁴ Also, the use of word *property* in relation to cultural property slants considerably

¹² JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES: CRITICAL ESSAYS ON CULTURAL PROPERTY, ART AND LAW 27 (2nd ed. 2009).

¹³ Christine K. Knox, Note: *They've lost their Marbles: 2002 Universal Museums' Declaration, the Elgin Marbles and the Future of the Repatriation Movement*, 29 SUFFOLK TRANSNAT'L L. REV. 315, 317-318 (2006).

¹⁴ Lyndel V. Prott & Patrick J. O'Keefe, 'Cultural Heritage' or 'Cultural Property'?, 1 INT'L J. CULTURAL PROP. 307, 307-08 (1992).

toward economic value and connotes protection of the rights of the possessor.¹⁵ Thus, the term *cultural object* is sometimes used instead of cultural property to exclude the implication of ownership. Because uniform standards have not been established for the definition of cultural property, and each country defines the term according to its national laws or classification by its experts.¹⁶ The terms are commonly used interchangeably without strict differentiation. Since, in the interest of brevity, all the legal definitions of cultural property by each state cannot be reviewed, this section focuses on the definitions in major conventions.

It is noted that the 1954 Hague Convention¹⁷ is the first time the term *cultural property* was employed in an international legal context.¹⁸ The 1954 Hague Convention compromised in defining cultural property by using an illustrative definition in the form of lists of cultural properties as objects of protection. Article 1 of the 1954 Hague Convention describes the objects entitled to consideration as cultural properties regardless of their origin and ownership.¹⁹ By

¹⁵ *Id.* at 307, 309-10.

¹⁶ ART LAW HANDBOOK 391 (Roy S. Kaufman ed., 2000).

¹⁷ Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention]. The Convention has been in force since August 7, 1956 with 127 States Parties as of April 2016. <http://www.unesco.org/eri/la/convention.asp?KO=13637&language=E> (last accessed May 4, 2016)

¹⁸ Manlio Frigo, *Cultural property v. cultural heritage: A "battle of concepts" in international law?*, 86 INT'L REV. RED CROSS 367, 367 (2004).

¹⁹ See 1954 Hague Convention, *supra* note 17, at 242. [Definition of cultural property].

For the purpose of the present Convention, the term 'cultural property' shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph

contrast, Article 1 of the 1970 UNESCO Convention provides a specific definition of cultural property.²⁰ As regards the notion of cultural property, Cultural nationalism and cultural internationalism

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- (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
 - (c) centers containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as ‘centers containing monuments’.

²⁰ See 1970 UNESCO Convention, *supra* note 10, at 234-35.

For the purposes of this Convention, the term ‘cultural property’ means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
- (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- (i) postage, revenue and similar stamps, singly or in collections;
- (j) archives, including sound, photographic and cinematographic archives;
- (k) articles of furniture more than one hundred years old and old musical instruments.

have been a source of contention,²¹ and international conventions properly consider both views. The 1954 Hague Convention defines cultural property as objects of protection from the standpoint of cultural internationalism.²² Although the 1970 UNESCO Convention embraces both cultural nationalism and cultural internationalism, it is generally perceived to have favored cultural nationalism.²³ This understanding is supported by the preamble of this Convention:

Cultural property constitutes one of the basic elements of civilization and national culture, that its true value can be appreciated only in relation to the fullest possible information regarding origin, history and traditional setting, and that it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export.²⁴

This expression puts stresses on the national characteristics of cultural property.

Article 1 of the 1970 UNESCO Convention enumerates 11 abstract categories in its definition of cultural property and commissions a concrete definition of cultural property to a special designation within each state. That is, among the items enumerated from (a) to (k), only those “specifically designated” by each state are acknowledged as cultural properties.²⁵ In other words, the 1970 UNESCO Convention vests each country with broad discretion to determine what should be protected as cultural properties. Accordingly the State Parties deem which specifically designated items will be protected as cultural properties under their national laws pursuant to this Convention. In addition to the categories provided in Article 1, Article 4 establishes five categories of cultural properties.²⁶ Article 4 protects items that are worth protecting, but

²¹ John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT’L L., 831, 831-833 (1986).

²² *Id.* at 833.

²³ *Id.* at 842.

²⁴ See 1970 UNESCO Convention, *supra* note 10, at 232.

²⁵ See *supra* text accompanying note 20.

²⁶ See 1970 UNESCO Convention, *supra* note 10, at 237-38:

not specifically designated as cultural property under national law per Article 1.

The most controversial issue in the drafting of the 1995 UNIDROIT Convention was how to define *cultural objects*.²⁷ Some advocated a comprehensive definition, while others sought a concrete and enumerative definition. Ultimately, the Convention used an eclectic approach.²⁸ Particularly, the Convention adopted a comprehensive clause for the definition of cultural property in Article 2²⁹ and enumerated concrete objects to be regarded as cultural property in the Annex.³⁰

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:

- (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
- (b) cultural property found within the national territory;
- (c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
- (d) cultural property which has been the subject of a freely agreed exchange;
- (e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property.

²⁷ IRINI A. STAMATOUDI, CULTURAL PROPERTY LAW AND RESTITUTION: A COMMENTARY TO INTERNATIONAL CONVENTIONS AND EUROPEAN UNION LAW 72 (2011).

²⁸ *Id.*

²⁹ See 1995 UNIDROIT Convention, *supra* note 11, at 464, which states: For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention.

³⁰ *Id.* at 473. The Annex states:

- (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- (b) property relating to history, including the history of science and technology and military and social history, to the life of

B. Cultural Property as *res extra commercium*

Things (goods) can be classified according to diverse academic criteria. One type of classification is the characterization of goods as *res in commercio* (a thing inside commerce) or *res extra commercium* (a thing outside commerce).³¹ *Res in commercio* includes objects that can be transacted under private laws; contrariwise *res extra commercium* objects cannot be so. Most countries have cultural property protection-related laws, which prohibit the transfer or distribution of cultural property. The origin of such provisions needs some explanation.

The classification of objects into *res in commercio* and *res extra commercium* dates back to the *Institutiones* and *Digesta* of the *Corpus iuris civilis* issued from 529 to 534 by order of Justinian I, Eastern Roman Emperor.³² The *Corpus iuris civilis* classifies objects into those subject

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- national leaders, thinkers, scientists and artists and to events of national importance;
 - (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
 - (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
 - (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
 - (f) objects of ethnological interest;
 - (g) property of artistic interest, such as:
 - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii) original works of statuary art and sculpture in any material;
 - (iii) original engravings, prints and lithographs;
 - (iv) original artistic assemblages and montages in any material;
 - (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
 - (i) postage, revenue and similar stamps, singly or in collections;
 - (j) archives, including sound, photographic and cinematographic archives;
 - (k) articles of furniture more than one hundred years old and old musical instruments.

³¹ AMAILE WEIDNER, KULTURGÜTER ALS RES EXTRA COMMERCIMUM IM INTERNATIONALEN SACHENRECHT 15 (2001).

³² *Id.* at 15.

to human law (*res humani iuris*) and those subject to divine law (*res divini iuris*). *Res divini iuris*, things that build the relationship between god and man, were regarded as *res extra commercium* and could never be alienable in any case.³³ Things among *res humani iuris* could also be regarded as *res extra commercium*, such as *res publicae*, which belongs to the state; *res communes omnium*, which refers to natural things such as air, sea, and rivers; and *res in patrimonio Caesaris*, which refers to Caesar's Legacy.³⁴ In the case of artworks, the *Corpus iuris civilis* established some as *res divini iuris* and others as *res publicae*, both of which were *res extra commercium*. The remaining artworks could be transacted as *res private*, which were personal belongings.³⁵ The current classification of things and the concept of cultural property under the cultural property protection-related laws of each country thus fundamentally originated in the *Corpus iuris civilis*. *Res sacra* under Canon Law succeeded *res extra commercium* for artworks under the *Corpus iuris civilis*. Afterwards, first in Europe, Greece promulgated a cultural property protection law in 1834, followed by France in 1887, Italy in 1902, and Germany in 1955.

Currently, most states acknowledge inalienability for certain types of cultural properties according to their own cultural property protection-related laws. Nowadays, the idea of cultural properties as *res extra commercium* means the property can be inalienable and imprescriptible under private law. Furthermore, the property can be state-owned under public law and thus be forbidden goods for export and import under international trade law.³⁶

In Korea, Article 21 of the Cultural Heritage Protection Act forbids the export of cultural properties. Article 54 of the same Act prohibits any transfer or establishment of private rights for state-owned cultural properties. The foundation of those provisions is in

³³ *Id.* at 15-16.

³⁴ *Id.* at 18-19.

³⁵ *Id.* at 19-21; MARC WEBER, UNVERÄUßERLICHES KULTURGUT IM NATIONALEN UND INTERNATIONALEN RECHTSVERKEHR 6 (Dr. Wilfried Fieldler, Dr. Dr.h.c. Erik Jayme, Dr. Kurt Siehr, eds., 2002)

³⁶ WEIDNER, *supra* note 31, at 35-43. See also Kurt Siehr, *Legal Aspects of the Mystification and Demystification of Cultural Property*, 16 ART, ANTIQUITY & LAW 173, 202-203 (2011).

the classification of *res extra commercium* for artworks under the *Corpus iuris civilis*.

III. INTERNATIONAL LEGAL INSTRUMENTS FOR RESTITUTION OF CULTURAL PROPERTY

A. Multilateral Conventions

1. The 1954 Hague Convention

World War I and World War II brought unprecedented plunder and destruction of cultural property to the world, which clarified a need to establish an international convention to protect cultural heritage in time of war. In 1954 at The Hague, the Convention for the Protection of Cultural Property in the Event of Armed Conflict³⁷ and a separate optional protocol called the First Protocol were adopted. The 1954 Hague Convention and the Regulations for the Execution of the Convention, which constitute an integral part of it, are the basic and comprehensive international treaty focusing on the protection of cultural property during wartime or armed conflict.³⁸ The 1954 Hague Convention is supplemented by the First Protocol,³⁹ adopted with the Convention, and the Second Protocol,⁴⁰ adopted in 1999. It is also influenced by incidents that took place in Yugoslavia during the 1990s.

³⁷ See 1954 Hague Convention, *supra* note 17.

³⁸ John Alan Cohan, *An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part Two)*, 28 ENV'T'L L. & POL'Y J. 1, 38 (2004).

³⁹ Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954, The Hague 14 May 1954 [hereinafter First Protocol] First Protocol of has been in force since 7 August 1956 with 104 States Parties as of April 2016. <http://www.unesco.org/eri/la/convention.asp?KO=15391&language=E> (last accessed May 4, 2016).

⁴⁰ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, March 26, 1999

The major content of the 1954 Hague Convention about the restitution of cultural property is contained in the First Protocol. Each signatory state agrees to prevent the exportation of cultural property from any territory it occupies during an armed conflict⁴¹; to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory⁴²; and to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property in its territory.⁴³ Cultural property taken from the territory of a signatory state and deposited by it in the territory of another signatory state for the purpose of protecting such property against the dangers of an armed conflict shall be returned by the latter at the end of hostilities to the competent authorities of the territory from which it came.⁴⁴

2. The 1970 UNESCO Convention

Given the 1954 Hague Convention was promulgated on the premise of a special situation, the protection of cultural property in the event of armed conflict, international society started debating the need to establish a more comprehensive international instrument applicable for a broader protection of cultural property.

Immediately after World War I, the League of Nations debated the matter of plunder of cultural property.⁴⁵ UNESCO prepared a draft convention about the restitution of artistic, historical, or scientific objects illegally transferred in cooperation with the *Office International des Musées* (OIM).⁴⁶ However, this attempt failed to advance further because of the outbreak of World War II in 1939, and afterward, UNESCO could not help concentrating on the 1954

[hereinafter Second Protocol]. The Second Protocol has been in force since 27 April 1972 with 68 State Parties as of April 2016. <http://www.unesco.org/eri/la/convention.asp?KO=15207&language=E> (last accessed May 4, 2016).

⁴¹ First Protocol, *supra* note 39, at Part I.

⁴² *Id.* at Part I.2.

⁴³ *Id.* at Part I.3.

⁴⁴ *Id.* at Part II.5.

⁴⁵ PATRICK J. O'KEEFE & LYNDAL V. PROTT, CULTURAL HERITAGE CONVENTIONS AND OTHER INSTRUMENTS 64 (2011).

⁴⁶ PATRICK J. O'KEEFE, COMMENTARY ON THE 1970 UNESCO CONVENTION 3 (2nd ed. 2007).

Hague Convention.⁴⁷ As newly independent and East European countries with particular interest in the restitution of cultural property increasingly participated in that Convention, UNESCO came to face new challenges. In particular, Mexico and Peru posed problems of unlawful trade in cultural property during the 11th General Conference of UNESCO in 1960, and it became clear that the First Protocol to the 1954 Hague Convention alone could not deal with these problems comprehensively.⁴⁸ Accordingly, UNESCO adopted the *Recommendation on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property* in 1964 as a preliminary step.⁴⁹ A convention draft based on that Recommendation was circulated to collect the opinions of member states in 1968, and the *Convention on the Means of Prohibiting and Preventing the Illicit Export, Import and Transfer of Ownership of Cultural Property* was adopted on November 14, 1970 by the General Conference of UNESCO at its 16th session. This is called the 1970 UNESCO Convention, and it established an international normative framework to prevent the illicit traffic of cultural property during peacetime.⁵⁰

This Convention, which contains a preamble and 26 articles, protects cultural property from illicit trade by means of administrative enforcement and international cooperation, rather than by private law. The major contents of this Convention are as follows: (a) the Convention acknowledges that the import, export, or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention is illicit⁵¹; (b) member states undertake to set up national services and establish a list of important public and private cultural properties to be protected⁵²; (c) they undertake to introduce an appropriate certificate for the export of cultural property⁵³; (d) they agree to take the necessary measures

⁴⁷ O'KEEFE & PROTT, *supra* note 45 at 64.

⁴⁸ O'KEEFE, *supra* note 46 at 5.

⁴⁹ *Id.*

⁵⁰ Jennifer N. Lehmen, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, The UNESCO Convention, and The UNIDROIT Draft Convention*, 14 ARIZ. J. INT'L & COMP. L. 527, 538 (1997).

⁵¹ 1970 UNESCO Convention, *supra* note 10, art. 3.

⁵² *Id.* at art. 5.

⁵³ *Id.* at art. 6.

against the acquisition or import of illegally removed cultural property⁵⁴; (e) they undertake to impose penalties or administrative sanctions on any person involved in the illicit import or export of cultural property⁵⁵; (f) they undertake to participate in a concerted international effort to determine and carry out the necessary concrete measures under the Convention⁵⁶, and (g) the Convention regards 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 as illicit.⁵⁷

3. The 1995 UNIDROIT Convention

Problems with the 1970 UNESCO Convention underlay the emergence of the 1995 UNIDROIT Convention.⁵⁸ First, the 1970 UNESCO Convention was not self-executing, and thus the signatory states had to adopt domestic legislation to implement it.⁵⁹ In other words, unless the signatory states to the UNESCO Convention legislate domestic laws, the Convention does not become effective to the signatory states directly. Second, with respect to the implementation of the Convention, the signatory states can adjust the provisions or measures of the Convention pursuant to their domestic laws or regulations. Thus, the contents or level of scrutiny of the Convention adopted by each signatory state lack uniformity. This becomes an impediment to achieving purposes of the Convention.⁶⁰ Third, Article 1 of the UNESCO Convention defines *cultural property* only as cultural properties specifically designated by each member state, leaving undiscovered or unexcavated cultural property

⁵⁴ *Id.* at art. 7.

⁵⁵ *Id.* at art. 8.

⁵⁶ *Id.* at art. 9.

⁵⁷ *Id.* at art. 11.

⁵⁸ Nina R. Lenzner, *The Illicit International Trade in Cultural Property: Does The UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 U. PA. J. INT'L BUS. L., 469, 490-91 (1994); Carol A. Roehrenbeck, *Repatriation of Cultural Property-Who Owns the Past? An Introduction to Approaches and to Selected Statutory Instruments*, 38 INT'L J. LEGAL INFO 185, 196 (2010).

⁵⁹ ANDREA F. G. RASCHÈR, *KULTURGÜTERTRANSFER UND GLOBALISIERUNG* 53 (2000).

⁶⁰ *Id.* at 61.

unprotected.⁶¹ Fourth, because the UNESCO Convention operated mainly in terms of public law, it had limitations to stipulating clear regulations in terms of private law, such as good faith acquisition.⁶²

To solve those problems, UNESCO requested the *International Institute for the Unification of Private Law* (UNIDROIT) to complement the regulations of private laws for a substantial implementation of the 1970 UNESCO Convention.⁶³ Accordingly, a preliminary draft was prepared by an expert study group, mainly written by Austrian professor *Gerte Reichelt*. The Diplomatic Conference to adopt the draft convention was held in Rome under the auspices of the Italian government in June 1995, and the current 1995 UNIDROIT Convention⁶⁴ was adopted through the voting of member states on July 24, 1995. The 1995 UNIDROIT Convention was intended to solve the problems inherent in the 1970 UNESCO Convention, to embody the regulations of the UNESCO Convention, and to establish uniform rules among states that would facilitate the effective restitution of unlawfully possessed cultural properties in terms of private law.

The adoption of the 1995 UNIDROIT Convention does not reduce the meaning or function of the 1970 UNESCO Convention. Whereas the UNESCO Convention aimed to “prohibit” and “prevent” the export, import, and transfer of ownership of stolen or illegally exported cultural properties, the UNIDROIT Convention focuses on the “restitution” or “return” of stolen or illegally exported cultural properties. So, the directing points of these two conventions differ. Besides, the UNESCO Convention authorizes the contracting “state” to take mainly “administrative” measures to prevent the export and import of unlawful cultural properties, whereas the UNIDROIT Convention gives the “owner” or “state” “judicial”

⁶¹ Ian M. Goldrich, *Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Gold Phiale*, 23 FORDHAM INT'L L. J. 118, 137-138 (1999); Kathleen Anderson, *The International Theft and Illegal Export of Cultural Property*, 8 NEW ENG. J. INT'L & COMP. L. 411, 421 (2002).

⁶² RASCHÈR, *supra* note 59, at 65.

⁶³ Lyndel V. Prott, *UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects*, 1 UNIF. L. REV. 59, 61 (1996).

⁶⁴ See 1995 UNIDROIT Convention, *supra* note 11.

powers to demand restitution or the return of cultural properties. In this sense, the two Conventions have complementary goals.⁶⁵

The features of the 1995 UNIDROIT Convention are summarized as follows: First, the UNIDROIT Convention enables claimants to demand the restitution of unregistered cultural properties or privately owned cultural properties, unlike the UNESCO Convention.⁶⁶ Second, the UNIDROIT Convention does not allow the good faith acquisition of stolen or illegally exported cultural properties. Instead, such cultural properties should be compulsorily returned.⁶⁷ Third, it stipulates that a fair and reasonable compensation should be paid to an acquirer in good faith instead of unconditional restitution.⁶⁸ Forth, the Convention imposes limitation periods within which claimants must demand the return or restitution of cultural property.⁶⁹

B. Bilateral Agreements

1. Overview

Because multilateral conventions must contain common concerns among all stakeholder countries, agreeing on concrete content is difficult. In contrast, bilateral agreements can express the interests of both parties; therefore, bilateral agreements are more effective than a multilateral convention in attaining specific goals. In cases where the return of a specific cultural property emerges as an issue between country A and country B, the best way to solve the problem is generally to conclude a bilateral agreement on the return of the cultural property in dispute. For instance, Korea recovered the *Oegyujanggak Uigwe*, stored previously in the BnF, through an Intergovernmental Agreement on the Restitution of the *Oegyujanggak Uigwe* between France and Korea in 2011.⁷⁰ That same year, Korea recovered another *Uigwe* of the Joseon Dynasty, which had been held

⁶⁵ STAMATOUDI, *supra* note 27, at 67.

⁶⁶ 1995 UNIDROIT Convention, *supra* note 11, at art. 3, 5.

⁶⁷ *Id.*

⁶⁸ *Id.* at art. 4, 6.

⁶⁹ *Id.* at art. 3, 5.

⁷⁰ *See supra* notes 1-3.

in the Kunaicho of Japan, by an Agreement on the Return of Historical Archives between Japan and Korea.

Bilateral agreements not only target the restitution of specific cultural property, but can also comprehensively handle overall matters related to the restitution of cultural property between two countries. There are many agreements which exemplify what can be covered by a bilateral agreement. In the Belgo-Zairian Cultural Agreement, concluded in 1970, Belgium agreed to return to Zaire⁷¹ all the ethnological and artistic cultural properties acquired during the colonial period.⁷² The Treaty on the Return of Stolen Cultural Property, established in 1970 between the U.S. and Mexico, concluded in 1970⁷³ stipulates that, e.g., when the Mexican government requests the U.S. government to return stolen cultural property, the U.S. government shall recover and return it to the Mexican government.⁷⁴ Similarly, in 1997 the U.S. and Canada concluded an agreement prohibiting the import and export of objects of archaeological and ethnological value⁷⁵ in accordance with the UNESCO Convention.

Bilateral agreements are effective in preventing illicit trade of cultural property between neighboring states. Because of the wide perception that multilateral conventions have little effect on the restitution of cultural property, the adoption of bilateral agreements is increasing.

⁷¹ Known as “Democratic Republic of the Congo” since 1997.

⁷² Huguette van Geluwe, *Belgium’s Contribution to the Zairian Cultural Heritage*, 31 MUSEUM 32, 35 (1979); Treaty of Cooperation Between the United States of American and the United Mexican States Providing for the Recovery and Return of stolen Archaeological, Historical and Cultural Properties, July 17, 1970, 22 U.S.T. 494, T.I.A.S. No. 7088.

⁷³ Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, 22 U.S.T. 494, T.I.A.S. No. 7088.

⁷⁴ Regarding the meaning of this Treaty, see Michael S. Blass, *Legal Restrictions on American Access to Foreign Cultural Property*, 46 FORDHAM L. REV. 1177, 1193-1194 (1978).

⁷⁵ Agreement between the Government of Canada and the Government of the Unites States Concerning the Imposition of Import Restrictions on Certain Categories of Archeological and Ethnological Material, April 10, 1997, CA1 EA 97T08 EXF.

2. Exkurs: Agreement on Cultural Property Between the Republic of Korea and Japan

A typical example of a bilateral agreement on the restitution of cultural property signed by Korea is the *Agreement on the Art Objects and Cultural Co-operation between Japan and the Republic of Korea*⁷⁶ in 1965. After Korea's emancipation from Japanese colonization in 1945, Korea and Japan held seven rounds of bilateral talks from 1951 to 1965, culminating in the *Treaty on Basic Relations Between Japan and the Republic of Korea*,⁷⁷ which stipulated normalization of their relations.⁷⁸ Based on that Treaty, the Agreement on Cultural Property Between Korea and Japan, which has a preamble, 4 articles of text, and an annex, was also signed.

Among the contents of this Agreement, the significant article related to the restitution of cultural property is Article 2: "The Government of Japan shall, in accordance with the procedure to be agreed upon between the two Governments, turn over to the Government of the Republic of Korea the art objects enumerated in the Annex within six months after the entry into force of the present Agreement."⁷⁹ Article 2 mentions the subject, object, procedure, and time of the turnover of cultural property.⁸⁰

⁷⁶ Agreement on the Art Objects and Cultural Co-operation between Japan and the Republic of Korea, June 22, 1965[hereinafter Agreement on Cultural Property Between Korea and Japan], translated in "The World and Japan" Database Project at the University of Tokyo, available at <http://www.ioc.utokyo.ac.jp/~worldjpn/documents/texts/JPKR/19650622.TNE.html>, (last visited May. 4, 2016).

⁷⁷ Treaty on Basic Relations between Japan and the Republic of Korea, June 22, 1965, translated in "The World and Japan" Database Project at the University of Tokyo, available at <http://www.ioc.utokyo.ac.jp/~worldjpn/documents/texts/docs/19650622.T1E.html>, (last visited May. 4, 2016).

⁷⁸ See Geoffrey R. Scott, *Spoilation, Cultural property, and Japan*, 29 U. PA. J. INT'L L. 803, 854-57 (2008) (discussing the background and proceeding of this Treaty).

⁷⁹ Agreement on Cultural Property Between Korea and Japan, *supra* note 76.

⁸⁰ *Id.*

The subject of the turnover is the Japanese government, and the subject of the takeover is the Korean government. The objects of transfer are cultural properties enumerated in the Annex. The Annex specifies a list of cultural properties totaling 1,432 pieces, including: ceramic ware, archaeological relics, stone-made art objects, books, and articles related to the postal service and telecommunications. The procedure of turnover complies with a mutual agreement between Korea and Japan.⁸¹ The time of turnover is stipulated as within six months of the entry into force of the Agreement.

However, this Agreement has the following problems: First, because the cultural properties exported to Japan during the colonial period were illegally exported, the action to be taken should be expressed as ‘recovery (回收)’ or ‘restitution (返還),’ but it is instead neutrally expressed as ‘turnover (引き渡).’ This fails to make clear the illicitness of the original export of the cultural property to Japan. Second, this Agreement limits the cultural properties for turnover to the 1,432 pieces of cultural property enumerated in the Annex.

After the Agreement on Cultural Property Between Korea and Japan was signed in 1965, the 1970 UNESCO Convention and the 1995 UNIDROIT Convention were concluded. There is a need to review the correspondence between the Agreement on Cultural Property Between Korea and Japan and the two Conventions. Although both Korea and Japan signed the 1970 UNESCO Convention, neither of them signed the 1995 UNIDROIT Convention. I here review the relationships among those three treaties as if both Korea and Japan had signed the 1995 UNIDROIT Convention.

The Agreement on Cultural Property Between Korea and Japan is a bilateral agreement, and the 1970 UNESCO Convention and the 1995 UNIDROIT Convention are multilateral conventions. Therefore, the Agreement on Cultural Property Between Korea and Japan is special law (*lex specialis*), and the 1970 UNESCO Convention and the 1995 UNIDROIT Convention are general law (*lex generalis*). According to the principle of *Lex specialis derogat legi generali*,⁸² the

⁸¹ *Id.* at art 2.

⁸² Latin maxim meaning “Special law repeals general laws.”

Agreement on Cultural Property Between Korea and Japan should be applied over both Conventions. In terms of enforcement date, the Agreement on Cultural Property Between Korea and Japan corresponds to prior law, and the 1970 UNESCO Convention and the 1995 UNIDROIT Convention correspond to posterior law. Thus, according to the principle that *Lex posterior derogat legi priori*,⁸³ the 1970 UNESCO Convention and the 1995 UNIDROIT Convention should be applied over the Agreement. Although those ideas seem contradictory, they are actually not. If only the cultural properties in the Annex to the Agreement on Cultural Property Between Korea and Japan are targeted, this Agreement will take precedence as *lex specialis*. However, if cultural properties illegally exported to Japan other than those enumerated in the Annex are included, then the 1970 UNESCO Convention and the 1995 UNIDROIT Convention take precedence as *lex posterior*.

IV. NEW JUDICIAL PRINCIPLES

A. International Conventions, National Laws and Domestic Courts

As of 2015, 129 states have signed the 1970 UNESCO Convention, and only 37 states have signed the 1995 UNIDROIT Convention.⁸⁴ The difference between those two numbers is caused by a considerable difference in normative aspect rather than the gap between the enforcement dates of these two conventions.

Under the 1970 UNESCO Convention, the subjects of its rights and obligations are the governments of signatory states, which should meet its requirements. In contrast, under the 1995 UNIDROIT Convention, not only signatory states, but also organizations and individuals, obtain rights or obligations for restitution of cultural properties. In other words, the 1970 UNESCO Convention has the nature of public and administrative law⁸⁵, whereas the 1995 UNIDROIT Convention has the nature of private law centered on the restitution relationship between the current

⁸³ Latin maxim meaning “Posterior law abrogates prior laws.”

⁸⁴ See *supra* notes 10 and 11.

⁸⁵ RASCHÈR, *supra* note 59, at 65.

possessor and original owner.⁸⁶ In determining whether cultural property is illicitly acquired or not, the 1970 UNESCO Convention stipulates that the national laws of contracting states should be applied,⁸⁷ whereas the 1995 UNIDROIT Convention directly specifies ‘theft’ and ‘illicit export’ as the object of regulation.⁸⁸ The two conventions also show a great difference in the binding force of their provisions. Since the 1970 UNESCO Convention is not self-executing, it secures no executive power against non-implementation. On the contrary, the 1995 UNIDROIT Convention is self-executing and a competent court in a signatory state can directly apply the Convention’s provisions as governing law.⁸⁹

This difference works as an important factor when each state decides to join the convention. The 1970 UNESCO Convention concerns mainly the intent of signatory states’ administrative actions for protecting cultural property, and so it is not difficult to implement. Besides, because the Convention is not self-executing, signatory states do not have to worry about normative binding power or feel a great burden in signing this Convention. However, since the 1995 UNIDROIT Convention has direct effects on not only the governments of signatory states, but also common individuals, it can collide with domestic legal systems such as civil law. Thus, states have shown reluctance to sign the 1995 UNIDROIT Convention until the relations between its provisions and those of national laws have been properly established.⁹⁰ Thus, notwithstanding the international convention to prevent illicit traffic in cultural property, national laws still play an important role in tackling disputes over the restitution of cultural property.

⁸⁶ Zsuzsanna Veres, *The Fight Against Illicit Trafficking of Cultural Property: The 1970 UNESCO Convention and the 1995 UNIDROIT Convention*, 12 SANTA CLARA J. INT’L L. 91, 100 (2014).

⁸⁷ 1970 UNESCO Convention, *supra* note 10, art. 3. See PATRICK J. O’KEEFE, *supra* note 46, at 41 (providing interpretation of this Article).

⁸⁸ 1995 UNIDROIT Convention, *supra* note 11, art. 2, 3, and 5.

⁸⁹ RASCHÈR, *supra* note 59, at 70; see also BETTINA THORN, INTERNATIONALER KULTURGÜTERSCHUTZ NACH DER UNIDROIT-KONVENTION 97 (2005).

⁹⁰ Michael L. Durta, *Sir, How Much is that Ming Vase in the Window?: Protecting Cultural Relics in the People’s Republic of China*, 5 ASIAN-PACIFIC L. & POL’Y J. 62, 76-77 (2004).

Suppose a cultural property owned by a private museum in country A has been illegally exported to country B. If both country A and country B are signatory states to the 1995 UNIDROIT Convention, the original owner of country A can file a lawsuit in a court in country B to demand the restitution of cultural property against the current possessor. In this case, the court decides on the restitution of the cultural property based on the 1995 UNIDROIT Convention.⁹¹ If neither country A nor country B is a signatory to the 1995 UNIDROIT Convention, a court would decide on the restitution of the cultural property according to domestic norms. In that case, the civil law and cultural property protection law of the country concerned are most central to domestic norms. Civil law and cultural property protection law differ among countries. For instance, under the Korean legal system, Korean civil law and cultural property protection law are written in a code. Under the Anglo-American legal system, civil law consists primarily of judicial precedent. The definition of cultural property also varies by country, as do the contents or scope of laws regulating cultural property.

The principles of trial are not currently specifically established to handle disputes about the restitution of cultural property. Thus, each country's court is likely to handle a lawsuit filed for the restitution of cultural property in the same way it handles a dispute over the restitution of other objects. However, as reviewed above, cultural property is *res extra commercium*,⁹² and thus it is not desirable to handle lawsuits about cultural property in that way. Considering the peculiarities of cultural properties, courts should apply special legal doctrines to a case of restitution of a cultural property. For a given cultural property, a new principle should apply in choosing the governing law relevant to the dispute, and the burden of proof should shift to the defendant.

B. New Principle for Choice of Governing Law

When a cultural property has been exported from a country and situated in the territory of another country, and a person claiming

⁹¹ To apply the 1995 UNIDROIT Convention to this case, a cultural property had to be stolen or exported after both states became parties to the Convention. 1995 UNIDROIT Convention, *supra* note 11, at art. 10.

⁹² See *supra* notes 31-36.

ownership of the cultural property has filed a lawsuit in a court, the court must choose which state's law governs.⁹³ The substantial legal issues in the ownership of an exported cultural property are summarized as follows: First, if a cultural property was illegally exported and distributed, and a third party has acquired the cultural property without perceiving this inherent illegality, the court must decide whether to recognize good faith acquisition for the third party. Second, in cases where a third party has acquired the property outside a transaction process and fails to meet the requirements for good faith acquisition, the court must decide whether to recognize the ownership based on the acquisitive prescription and whether the right to demand restitution is extinguished according to the extinctive prescription.

Representatively, the case of *Winkworth vs. Christie, Manson & Woods Ltd.*⁹⁴ was a case of whether to recognize good faith acquisition. The case of *Koerfer vs. Goldschmidt*⁹⁵ was a case of whether acquisitive prescription was completed. The case of *Greek Orthodox Patriarchate of Jerusalem vs. Christie's, Inc.*⁹⁶ was a case of whether or not the extinctive prescription was completed. The requirements and exercise processes for good faith acquisition, acquisitive prescription, and extinctive prescription vary by country. So, in legal relationships with foreign elements, which country's law will be chosen as the governing law is a decisive factor affecting lawsuit results.

The courts where the above-mentioned lawsuits were filed chose the governing law according to the principle of *lex rei sitae*. More specifically, those cases were decided according to the laws of the countries where the cultural properties were situated at the time a juristic act to acquire it was performed or a juristic fact to create its legal ownership was completed. When a court decides on a right about an object, especially a movable object, it is not inherently wrong to choose, as a governing law, the local law of the country

⁹³ MICHAEL ANTON, INTERNATIONALES KULTURGÜTERPRIVAT- UND ZIVILVERFAHRENSRECHT 426 (2010).

⁹⁴ *Winkworth v. Christie, Manson & Woods Ltd.*, 1 All E.R. 1121 (1980).

⁹⁵ *Koerfer gegen Goldschmidt*, BGE 94 II 297 (Swiss Federal Court, Dec. 13, 1968).

⁹⁶ *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, 1999 WL 673347 (S.D.N.Y. 1999).

where the act of altering a right is performed or a fact of creating a right is completed. In fact, that choice is a general principle of private international law.⁹⁷ Also, if a court decides the dispute according to the principle of *lex rei sitae*, the local law of that time is applied to a transaction or acquisition performed within the territory where the object is situated. Another result is that, insofar as the court of a third country respects the sovereignty of the country where the object is situated, the court observes international comity.⁹⁸

Although the principle of *lex rei sitae* is generalized in that way, its application to cultural properties as if they were ordinary objects can hardly deflect criticism for mechanically applying the law without any thought of the nature of cultural properties. Suppose that a cultural property owned by person □ of country A was stolen and exported to country B and there purchased at an antique shop by person □, who does not know how it came to the shop. If person □ filed a lawsuit in a court of country B against person □ demanding the restitution of the property, the court in country B should decide which country's law is governing. In this case, if the court in country B chooses according to the principle of *lex rei sitae*, the law of country B where the object is currently situated will become the governing law. If country B's law recognizes good faith acquisition, person □ will be able to maintain ownership through good faith acquisition.

Furthermore, suppose that person □ now sells this object to person □ in country C, and person □ currently has possession. If person □ has filed a lawsuit in a court of country C against person □ demanding the restitution of the property, the court of country C must also decide which country's law is governing. This time, if, according to the principle of *lex rei sitae*, the court of country C decides whether or not person □ has properly acquired ownership of the object, it will judge whether or not person □ meets the requirements of good faith acquisition. In that case, the governing law would be the law of country B where the object was situated when person □'s good faith acquisition was completed. Also, if the court of country C judges that person □ fails to meet the

⁹⁷ Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J.L. & ARTS 111, 115 (2008).

⁹⁸ *Id.* at 115.

requirements of good faith acquisition but person □ is likely to meet them, it can choose and apply, as a governing law, the law of country C where the object was situated when person □'s good faith acquisition was completed.

That is the mechanism for the choice of a governing law according to the principle of *lex rei sitae* currently applied. However, it can be justified only on the condition that the cultural property in question is viewed as an object of transaction. In other words, that procedure is only justifiable if the features of *res extra commercium* are completely excluded from the cultural property, and it is considered a normal object. However, cultural property is an object *sui generis* that has inalienability as part of its basic nature; therefore, it is inappropriate to treat cultural properties like normal objects. Moreover, the legal regulations protecting cultural properties vary by country. Suppose that a cultural property is illegally exported from country A to country B. If country A's law prohibits the distribution or good faith acquisition of a cultural property, but country B's law recognizes good faith acquisition, the ownership of the cultural property can be easily changed or laundered in country B by illegally exporting the cultural property from country A to country B and there involving an innocent third party for completion of good faith acquisition. Afterwards, the illegal cultural property can be legally distributed. In this hypothetical, country A's law for cultural property protection becomes meaningless. Thus, the principle of *lex rei sitae* is likely to be abused as means of ownership laundering for cultural properties, which require a principle of governing law different from that of normal objects.

To this end, the principle of *lex originis* has been suggested as an alternative.⁹⁹ In cases where the principle of *lex originis* is adopted as a governing law applicable to legal disputes about cultural properties, the problem becomes deciding what should be viewed as

⁹⁹ German scholar Prof. Erik Jayme has already proposed connecting the factor "Heimatrecht" (law of home-country) and the developed *lex originis* rule in international disputes over cultural property. Erik Jayme, *Internationales Kulturgüterschutz: Lex originis oder lex rei sitae – Tagung in Heidelberg*, IPRAX 1990 at 347; see also Erik Jayme, *Neue Anknüpfungsmaximen für den Kulturgüterschutz im internationalen Privatrecht*, in DOLZER ET AL., RECHTSFRAGEN DES INTERNATIONALEN KULTURGÜTERSCHUTZES 5 (1994).

the ‘origin’ of a cultural property to determine the ‘connecting factors.’ Because cultural properties are historical products unlike other objects, it is difficult to uniformly define their origin, which requires consideration of multiple criteria,¹⁰⁰ such as: religious value, national identity, place where the cultural property was produced, place where the cultural property is situated, place where the cultural property was installed, place where the cultural property was found, place where the cultural property was inherited, and place where the cultural property was designated as *res extra commercium*.

In summation, a court having jurisdiction over cultural property disputes should judge what connecting factors should be established and which country’s law should be adopted as a governing law. In this regard, two values can conflict: transaction safety and cultural property protection. In other words, the court must decide whether to place a high value on protecting a good faith purchaser of a cultural property or to privilege the original owner of a cultural property. A court that emphasizes the former will generally determine governing law according to the conventional principle of *lex rei sitae*, whereas a court that regards the latter as more important will adopt the alternative principle of *lex originis* as governing law. In short, the principle of *lex rei sitae* is generally appropriate as governing law for normal objects, whereas the principle of *lex originis* is appropriate for cultural property.¹⁰¹

C. Shifting the Burden of Proof

Who bears the burden of proof in a civil suit greatly affects the results. In the period of Roman law, the general principal for the burden of proof was not stably established. However the principle “*Necessitas probandi incumbit ei qui agit*”¹⁰² was in common use. Afterwards, with the development of the law of evidence, a contemporary principle of the burden of proof was established by

¹⁰⁰ WEIDNER, *supra* note 31, at 194-201; ANTON, *supra* note 93, at 851-91.

¹⁰¹ Fincham, *supra* note 97, at 146; Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT’L L. 1177 (2005).

¹⁰² Latin maxim meaning “The burden of proof is on the one who declares, not on one who denies.”

German scholar Leo Rosenberg: Each party to proceedings must assert and prove the existence of the conditions for application of the rule on which s/he relies.¹⁰³ According to this principle, if an object has been transferred from its owner to another person without legal ground and is currently kept by the other person, the owner should prove ownership of the object.

But what if the object is a cultural property? Current civil procedure laws have no specific regulations in that regard. If the principle of the burden of proof is equally applied to a cultural property, the person who asserts ownership of the cultural property currently possessed by another person must prove ownership of the object and that the other person possesses it illegally. However, that principle is inappropriate to cultural properties because they have basically the nature of inalienability, unlike normal objects. If a cultural property designated as *res extra commercium* by a national law is transferred to other place, it does not exist under normal conditions. So in that case, the person who currently possesses the cultural property should be required to prove he has duly acquired it. If he fails to prove his legitimacy in possessing the cultural property, the property should be returned to the original owner.

It could cause confusion to the current property system to shift the burden of proof for all cultural properties in restitution lawsuits. Accordingly, the burden of proof should be shifted only for cultural properties that meet certain requirements. Such cultural properties can be reviewed in terms of two aspects. The first is category, such as cultural properties that represent royal authority and religious cultural properties that belonged to churches or temples. It should be difficult to assume that a state or churches or temples sold or donated such cultural properties to other persons. An individual person who possesses those kinds of cultural property should be required prove that s/he acquired it legitimately. The second aspect concerns the time of acquisition. If a cultural property was exported without a legitimate source of right in a time of war or colonization, it cannot be easily accepted that the current possessor of the cultural

¹⁰³ “Jede Partei hat die Voraussetzungen der ihr günstigen Norm (= derjenigen Norm, deren Rechtswirkung ihr zugute kommt) zu behaupten und zu beweisen.” *in* LEO ROSENBERG, DIE BEWEISLAST 98-99 (1965).

property acquired it legitimately. Therefore, in that case, the current possessor should be required to prove that s/he acquired it legitimately. However, it is necessary to set a time limit for that shift in the burden of proof to recent wars or colonial periods with reasonable current influence.

As a possible example for shifting the burden of proof, consider a special exhibition called the Ogura¹⁰⁴ collection in the Tokyo National Museum, Japan. It contains a helmet and armor worn by King Gojong, who reigned when Japan annexed Korea. That armor and helmet are those King Gojong put on in war and are the symbols of the supreme commander. Thus, they cannot have been transferred or donated to another person. They were quite likely to have been exported during the Japanese colonial period, and it is unlikely that they were sold or donated to Ogura. Thus, if the Korean government were to demand that the Tokyo Museum return them, the Tokyo Museum, as current possessor of the cultural properties, should be required prove that it acquired them legitimately.

V. CONCLUSION

These days, each state tries to protect its cultural properties and recover illicitly exported cultural properties. There is controversy over whether cultural properties are the exclusive property of each country (cultural nationalism) or the common heritage of humanity (cultural internationalism). However, it is obvious illicit trafficking of cultural properties should be prohibited and illicitly exported cultural properties should be returned to their country of origin. The 1970 UNESCO Convention and the 1995 UNIDROIT Convention are based on that perception. These international conventions are important because they are international standards to prevent the illicit export of cultural properties and enable the restitution of illicitly exported cultural properties. However, because the 1970 UNESCO

¹⁰⁴ Ogura Dakenoske (小倉 武之助: 1870–1964) was a Japanese businessman who collected a huge number of Korean cultural properties during the Japanese colonial era in Korea. He donated his collected Korean cultural properties to the Tokyo National Museum. Park Soo-mee, *Legacy Lost: Korea's Missing Treasures*, KOREA JOONGANG DAILY, Dec. 22, 2008, <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=2898892> (last accessed May 4, 2016).

Convention focused on administrative measures of the government to “prevent” the illicit trafficking of cultural properties and lacks self-executing power, it is limited to being a basic norm for the restitution of illicitly exported cultural properties. To reinforce those weak points, the 1995 UNIDROIT Convention was promulgated, but countries worried about recession in the art market are reluctant to sign. These two Conventions cannot be applied to restitution of cultural properties exported illicitly to other countries before signing the Convention because neither of them has retroactive effects. Therefore, countries involved in disputes over the restitution of cultural properties tend to solve them by concluding bilateral conventions. The 1965 Agreement on Cultural Property Between Korea and Japan has a significant meaning in that it was a comprehensive attempt made between Korea and Japan to handle the restitution of cultural properties exported during the Japanese colonial period.

Disputes over restitution of cultural properties that are not subject to multilateral or bilateral conventions can be solved through the decision of a court. However, no specific legal regulation under domestic laws is applicable to disputes over restitution of cultural properties, which means that legal principles applied to normal objects have been applied to disputes over cultural properties. However, cultural properties are basically *res extra commercium*, a concept that originated in Roman law and is acknowledged in each country’s cultural property protection law. Disputes over cultural properties require application of legal principles different from those used for normal objects. In other words, it is desirable for courts to apply the principle of *lex originis* instead of *lex rei sitae* in choosing governing law.¹⁰⁵ Furthermore, when proving the ownership of a cultural property, it is also desirable to make a defendant prove legitimate acquisition of cultural properties within certain categories. Applying that suggestion to lawsuits presents challenges.¹⁰⁶

¹⁰⁵ It is remarkable that Belgium adopted in the Codification of Private International Law of July 27, 2004, a modified *lex originis* rule regarding recovery of the illegally removed cultural patrimony. See Fincham, *supra* note 97 at 147.

¹⁰⁶ For example, these two problems might actually be difficult to solve: a concrete criterion for deciding on the country of origin of a cultural property and a concrete criterion to determine which cultural property can be accepted for shifting the burden of proof.

Nevertheless, if a court acknowledges the peculiarity of cultural properties and adopts that suggestion, international disputes over the restitution of illicitly exported cultural properties could be solved more smoothly.