

*Legal Development of the Protection of Cultural Property: From the Event of
Armed Conflict to the Illicit Trafficking*

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Abstract

Cultural property becomes one of the most important evidences which can reify the past and proclaim a cultural lineage connecting between the present generations of the society and their ancestors; hence, it is hardly surprising that the importance of cultural property is worthy to be protected. However, it is found that, before the twentieth century, the protection of cultural property had seldom been recognized via legal perspective because the cultural property was not regarded by laws and was only viewed as a trophy for the victors of war. Until the mid-twentieth century, the establishment of the United Nations became a turning point to play a key role in protecting the cultural property from the devastation and spoliation in a war due to an outcome of the UN Charter stipulating that the use of force is prohibited. Although the cultural property can be legally protected from the plunder in the war, the cultural property has been instead threatened with a new form of plunder known as the illicit trafficking. In this regard, this legal research mainly aims to historically discuss the dynamic force of normative change and development of the protection of cultural property in order to prove how the legal protection of cultural property has been periodically evolved from the past to present.

Keywords: legal development, protection of cultural property, illicit trafficking

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Introduction

Cultural property or cultural object becomes one of the most important and substantial evidences which can reify the past and can also proclaim a cultural lineage connecting between the present generations of the society and their ancestors (Roussin, 2003, p.709). Cultural property does not only include access to the past, cultural traditions and cultural identity, but it is also profitable in economic value (Taylor, 2006, p.236). This is hardly surprising that, currently, cultural property has been rapidly threatened by the illicit trafficking because the cultural property has become highly valuable product that is often traded in a black market; for instance, in 2000, it was found that the illicit trafficking of cultural property was estimated to be higher to 6 billion US dollar per year (UNESCO, 2011). In order to fight against this problem, global community attempted to jointly seek for international cooperation in providing some protective measures of cultural property. As a result of many recent international conferences, the United Nations Educational, Scientific and Cultural Organization (UNESCO), recognized as a main global organization playing important roles in protecting cultural property has established the ultimate goal for member nations to prevent and eliminate the illicit trafficking.

In terms of international legal regime, the UNESCO adopted two key legally binding instruments: (1) the Convention for the Protection of Cultural Property in the Event of Armed Conflict (the 1954 Hague Convention), and (2) the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 UNESCO Convention). In 1995, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the 1995 UNIDROIT Convention) has been also adopted as an outcome of international cooperation between the UNESCO and the International Institute for the Unification of Private Law (UNIDROIT) in order to be a complementary instrument to the 1970 UNESCO Convention. These international laws have been widely ratified and implemented by many nations to prevent and eliminate the illicit trafficking of cultural property. In this regard, this legal research mainly aims to historically discuss the dynamic force of normative change and development of the protection of cultural property in order to prove how the legal protection of cultural property has been periodically evolved from the past to present. Moreover, the terms “cultural property” or “cultural object” in this research shall only refer to a tangible and movable substance that may be physically plundered or stolen.

From the Early Periods to the Modern

The importance of cultural property was firstly recognized under the situation of international armed conflict (Vrdoljak, 2007, p.380). Looking back to the past, it was found that a war did not only devastate lives or places, but cultural objects were also demolished and plundered from their original place. The victors of war believed that the spoliation of cultural property from defeated enemies took them to the glory and the victors were also legitimate to plunder and steal all precious objects of the defeated enemies in accordance with a phrase “the victor goes the spoils” (Cunning, 2003, p.212). This right to booty or plunder, consequently, became one of goals of all events of armed conflict in this periods and this sentiment had also remained very popular and widespread during the early periods.

The Greeks and Romans adhered to the law of victor that legally permits the victor to destroy and possess everything such as persons, slaves, and properties in a city or town where was vanquished (Toman, 2006, p.3). Even, in the most famous epic poem written by Homer, the Iliad, it was narrated that when the Greek military were successful to invade Troy, numerous cultural objects of Troy were devastated and plundered (Duboff & King, 2000, p.26). Although the right to booty was widely claimed in both Greek and Roman civilization, this law was not agreed by some philosophers such as Polybius, Pericles, Homer, and Xenophon. For example, the prominent Greek historian, Polybius, condemned the Roman warfare that “I hope that future conquerors will learn from these thoughts not to plunder the cities subjugated by them, and not to make the misfortunes of other peoples the adornments of their own country” (Fishman, 2010, pp.348-349). Unfortunately, this statement of Polybius had not been recognized until the late nineteenth century.

In the Middle Age, this period remained full of the events of armed conflict and the concept of right to booty was also claimed like the Greeks and Romans. Particularly, in the Crusade Wars, the Germanic armies and the Crusaders plundered and demolished castles, towns, villages, and even churches where they invaded (Toman, 2006, p.4). Simultaneously, the Christian Church began to develop the concept of “just war” based on the just law theory through scholars’ literatures. The just law theory refuses to separate between ethics and politics (Elshtain, 2001, p.3); moreover, its objective desires to make a balance between evil and good and to separate neither between civilians and soldiers, nor between civilian property and military property (O’Keefe, 2006, pp.5-6). According to Hugo Grotius (1925), he applied the concept of just law theory to the just war and introduced that the devastation of all types of enemy’s property was permissible in time of war. Although this notion seemingly supports people to lawfully harm an enemy both his life and property, the just war must be restricted to be based on the defensive condition since a war could be morally justified when the war was only made to enrich the good, to punish evil-doers, and to secure peace (Rychlak, 2004, p.5). Thus, each party in the Crusade Wars attempted to claim that the wars were recognized to be just wars most theorists undertook that the killing enemies and looting their properties in the just wars could be morally justified (Coverdale, 2004, p.224). In regard to the Middle Age, it becomes obvious that the protection of cultural property from the plunder and devastation was not distinctly recognized and promoted.

At the early period of the colonization, the plunder of cultural property from many colonized territories became more popular and practically systematic. Many regions where were wealthy in several cultural objects such as Africa, Asia, and South America were penetrated and colonized by the Westerns; consequently, a movement of cultural objects from those regions were scattered for the benefit of Western collections. For example, indigenous civilizations in South and Central America including the Aztecs in Mexico, the Mayas in Central America, and the Incas in Peru were entirely ruined, plundered, and enslaved when the Spanish and Portuguese military landed the regions and then invaded the native civilizations in order to seek for monetary gold and properties to present their own kings and queens (Poulos, 2000, pp.9-10). Through the period of the colonization, many cultural objects were more plundered from numerous colonized civilizations. Although the plunder of cultural properties of those colonized civilizations might be realized as a component of the

colonial process (Vrdoljak, 2012, p.204), it is undeniable that this colonial trend had never been different from a concept of “the victors goes the spoils” in previous periods. The spoliation of cultural property had still remained licit and had not been prevented or restituted.

Legal protection of cultural property was initially built up at the period of the French Revolution. After the Paris uprising in 1792, the French Legislative Assembly, later as the National Convention, enacted respective decrees which legally command to destruct all vestiges of despotism; however, it was found that cultural objects which might be beneficial to French arts were excepted from the destruction due to the request by the Commission on Monuments (O’Keefe, 2006, p.14). The effort of the Commission became true when the first national legislation having core objectives of protecting and preserving cultural property was approved and then enacted as a decree of 16 September 1792 which calls for the preservation of masterpieces of arts. It is noted that this is the first time in France and World that the protection of cultural property is recognized into a modern legal process. Also, the protection of cultural property was strengthened by the concept of Jean-Jacques Rousseau, the well-known political philosopher. Rousseau (1968) presented his concept of a distinction between public and private property. A public property of enemy party especially used for the conduct of war could be demolished and seized whereas another public property including private property that was not used for military service such as church, school, library, or private collection should be protected (Toman, 2006, p.5). This reflects that the Rousseau’s concept could definitely change a traditional attitude to the status of pillaged cultural property in the Middle Age which was not separated between civilian and military property of enemy.

Legal protection of cultural property was progressively developed through the United States Civil War. In 1863, the laws of land warfare were codified and published in title “Instructions for the Government of Armies of the United States in the Field”, known as the Lieber Code. Although Article 31 of the Lieber Code provides that a victorious army is entitled to appropriate all public money and to seize public movable property, this appropriation and seizure shall be merely applied to public movable property of defeated parties, not to private movable property. Article 35 of the Lieber Code imposes the responsibility for all parties in the war to protect and secure many kinds of cultural property, such as classical works of art, libraries, scientific collections, or precious instruments, from any avoidable injury. It is noted that the Lieber Code has recognized the Rousseau’s concept of the distinction between public and private property. The Lieber Code was also resulted from the legal effort of the protection of cultural property during the war even though the Code was internally applied to the United States armed conflict which cannot be applied to the international context.

Nevertheless, the concepts under the Lieber Code were recognized as a basis for the adoption of the Declaration of the Conference of Brussels, which becomes the first international instrument including the protection of cultural property. With the assistance of the Emperor Czar Alexander II of Russia, the representatives from fifteen European countries were invited to participate in the international conference, held in Brussels on 27 July 1874 in order to jointly examine and discuss the draft of an international agreement concerning the laws and customs of war submitted to them by the Russian Government. Unfortunately, this Brussels Conference could not

produce any legally binding instrument because the draft was not successful to convince all representatives to agree and ratify it. The Brussels Conference instead decided to adopt the International Declaration Concerning the Laws and Customs of War, called as the Brussels Declaration of 1874. Although the Brussels Declaration is in form of a non-legally binding instrument, some provisions under this Declaration can play important roles in producing a legal foundation on cultural property protection (Goldrich, 1999, p.126).

The Early Twentieth Century

Approaching the twentieth century, the historical development of international legal regime concerning the protection of cultural property was substantially formed into international legally binding agreements even though those international agreements still remained involved in the event of armed conflict. Importantly, the key point in this period is the First World War as a big event which resulted in the devastation and spoliation of a lot of cultural objects belonging to both parties. Nonetheless, it is found that the plunder and devastation of cultural property in this period became prohibitive as a war crime.

In 1899, the Convention II with Respect to the Laws and Customs of War on Land (the Hague II or Hague 1899) was adopted as a productive outcome of international conference held in Hague, Netherlands. This 1899 Hague Convention mainly aimed to revise concepts under the 1874 Brussels Declaration (Schindler & Toman, 1988, pp.69-93). Therefore, legal provisions under the 1899 Hague Convention seem very similar to the Brussels Declaration and the Lieber Code. However, in 1907, the 1899 Hague Convention was replaced by Convention IV Respecting the Laws and Customs of War on Land (the Hague IV or Hague 1907) because the conference desired to promote and reinforce the effectiveness of the 1899 Hague Convention and this 1907 Hague Convention did not improve or modify a core theme of the former Hague Convention. In terms of the protection of cultural property in the war, Article 27 of the Hague IV provides that, in sieges and bombardments, all necessary steps must be taken to spare and protect buildings dedicated to religion, art, science, or charitable purposes, historic monuments. Article 56 also imposes that a property dedicated to religion, charity and education, the arts and sciences shall be treated as private property and the plunder or destruction of the historic monuments or works of art and science shall be prohibited. According to the Hague II and Hague IV, both immovable and movable property can be obviously protected and both Conventions became the pilot instruments which raised legal awareness of how cultural property should be protected during the war.

During the First World War, between 1914 and 1918, the Hague II and Hague IV were given the great opportunity to prove their own performance. After Germany was aggressive to threaten many European nations in 1914, several cultural and artistic places were devastated and plundered such as the Library of Louvain and Louvain University in Belgium and Rheims Cathedral in France (Poulos, 2000, p.18). Unfortunately, the Hague II and Hague IV became failed to protect those cultural places and objects from the German invasion (Techera, 2007, p.5). At the end of the First World War in 1918, it was found that the bombardment of Rheims Cathedral in France, burning of the Library of Louvain in Belgium, and the spoliation of many museums and churches could reflect the futility of the Hague Conventions and also

prove how many loopholes under the Hague Conventions that a belligerent was intentional to elude their application and did not really act in good faith (Keane, 2004, p.6; Nahlik, 1976, p.1075). On the other hand, the restitution for damage and the return of looted cultural objects were promoted at the end of the war. One of the Treaties of Peace concluded between the Allies and Germany was signed at Versailles on 28 June 1919. This 1919 Treaty of Versailles did not only enforce Germany as a defeated party in the war to return the looted cultural objects to original owners, but it also commands Germany to recover and compensate for damages caused by the devastation.

It is noted that, from the early periods to the First World War, the concept of legal protection of cultural property had been always embedded in the laws of war both nationally and internationally. It had not appeared that there was any legally binding instrument that was directly relevant to the protection of cultural property in peaceful time. Until 1935, the creation of the Treaty for the Protection of Artistic and Scientific Institutions and Historic Monuments, known as the 1935 Roerich Pact became a new perspective on the protection of cultural property because the Roerich Pact is recognized as the first multilateral agreement which only aims to concern the sole protection of cultural property and, innovatively, the Treaty can be applied in time of peace and armed conflict. (Edwards, 1991, p.940).

The 1935 Roerich Pact sets up two themes: (1) respected and (2) protected cultural property, which can be described in Article I. Article I provides that the historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents. Article III of the Roerich Pact also introduced a distinctive flag having red circle with a triple red sphere in the circle on a white background for marking the historic monuments and institutions in order to proclaim that those places were regarded as the protected places. It is noted that the Roerich Pact mainly prefers to protect immovable cultural property such as museums, monuments, and relevant institutions than movable cultural property. It does not clearly specify whether movable cultural property can be included in the scope of this Treaty. Thus, all movable cultural objects may fall outside the protective scope of the Roerich Pact (Alcala, 2015, p.249). However, it is probably that all movable cultural objects can be protected only when they are located inside the buildings as mentioned in Article I (Toman, 2006, p.18).

The Second World War and Creation of the United Nations

If the First World War was recognized as a big event of the devastation and plunder of cultural property, the Second World War also became a bigger one. The existing legal protection on cultural property had been challenged from huge ruin and plunder caused by the campaign of Adolf Hitler during the Second World War. After Adolf Hitler began his campaigns to create a universal Aryan Society, one of Hitler's Aryan Society campaigns was the cultural confiscation which needed to suppress cultural and artistic property that Hitler deemed degenerate (Myerowitz, 1996, p.1987). In 1939, when the Second World War was erupted, Paris became the main target of cultural destruction and plunder because Paris was recognized as a center of the art world (Tyler, 1999, p.449). It was found that the Nazis and Hitler's troops had looted one-third of the cultural property and art held in private possessions and many of those are still missing now; moreover, there were tens of thousands of works of art

which were destroyed, looted, confiscated, and hidden (Tyler, 1999, pp.447-449). Although, the legal measures provided under the 1907 Hague Convention were applicable to protect cultural property from the huge ruin and plunder, it was found that those measures were scarcely applied due to their weak implementation. This might raise a key question of whether or not any new international agreement directly concerning the protection of cultural property should be created instead of the 1907 Hague Convention.

Due to the failure towards the implementation of the 1907 Hague Convention, an idea of the protection of cultural property had been seriously revised among the global community at the end of the Second World War. The classical concept of “the victor goes the spoils” became no longer acceptable when the prohibition of warfare was broadly supported as a new trend of peaceful process provided under the creation of the United Nations in 1945. The Charter of the United Nations (the UN Charter) is the constitutive instrument of the United Nations which sets up the rights and obligations for member nations. The rule of the UN Charter is the most important turning point in changing perspective on the protection of cultural property because Article 2(4) of the UN Charter obviously provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. This Article implies that the warfare, which is a cause of the devastation and plunder of cultural property, has been now prohibited as an illegal action. This concept seems totally different from the past because, in the past, the war was not legally prohibited; therefore, the victor in the war often claimed his legitimacy to plunder and devastate cultural property of the defeated party. Likewise, from the ancient periods to the Second World War, the laws of war in international and national level had not refused the plunder and devastation of cultural property in time of war even though such plunder and devastation were only restricted to the property conducted for the military necessity.

From the experiences of the First and Second World War, an idea of educational and cultural reconstruction was promoted by visionary Americans such as James William Fullbright and Archibald MacLeish who strongly commenced to call for a conference with the thirty-four members of the United States representatives in order to discuss how a postwar educational and cultural organization was to be probably created (Wanner, 2015, p.9). Until November 1945, in London, the international conference proposed the institutional arrangement proposal for the creation of an educational and cultural organization which embodied a genuine culture of peace and prevent the eruption of another world war. Finally, many nations jointly established the United Nations Educational, Scientific and Cultural Organization (UNESCO) and also adopted the Constitution of UNESCO signed on 16 November 1945 and came into force on 4 November 1946.

The UNESCO was formally established in order to respond towards the confidence of all nations and to take a forward step over two world wars; furthermore, the UNESCO becomes a main organization and specialist working for the cultural and educational regime. This character has never occurred before because, in the past, cultural and educational regime was not more interested and the protection of cultural property depended on numerous instruments provided by various entities. The emergence of the UNESCO, therefore, can play an important role in centralizing the protection of

cultural property into the unique form. After the UNESCO was created in 1945, the legal development of the protection of cultural property seems rather stable and systematic because the UNESCO collected recent principles and experiences on the protection of cultural property to be a fundamental platform in drafting the most important international legally binding instrument presented under auspice of the Hague Conference in 1954.

The 1954 Hague Convention

The huge devastation and plunder of cultural objects by the Nazis and Axis Powers during the Second World War and the failure in implementing of the 1907 Hague Convention could be recognized as a key checkpoint leading to a big change in modifying and creating a more effective legal instrument. Accordingly, after 1945, the UNESCO with supports from member nations attempted to seek for international conference to discuss and draft a new legally binding instrument. In 1954, the Netherland government invited all UNESCO member representatives to participate in the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict held in Hague and finally the product of this conference was the adoption of Convention for the Protection of Cultural Property in the Event of Armed Conflict (the 1954 Hague Convention). This Convention was adopted to respond the event of the Second World War and to address the insufficiencies and shortcomings of the 1907 Hague Convention; consequently, the 1954 Hague Convention aims to prove how it can provide stronger protection of cultural property. In this regard, the 1954 Hague Convention laid down two fundamental principles through its purposes: (1) the safeguard and protection of cultural property, and (2) the restitution of cultural property.

The 1954 Hague Convention shall be particularly applied in the event of armed conflict. It requires contracting party in occupation of the whole or part of the territory of another contracting party to take the most necessary measures to protect cultural property located in the occupied territory from any damage by military operations if the competent national authorities of the occupied state are incapable to take such protective measures. Additionally, it provides to cut off the illicit import and export of cultural property belonging to any state which has been invaded and occupied during the war. This shall be practically implemented in the fact when the event of armed conflict could be settled, this Convention shall require an invading state to return or retribute cultural property to the invaded and occupied state. However, although this Convention created some innovative provisions such as the protection of cultural property in occupied territory and the restitution or return of cultural property, it seems undeniable that a trend of peace has become a main stream of contemporary legal development; accordingly, the recognition of the protection of cultural property in the event of armed conflict has been gradually decreased and now replaced by the illicit trafficking of cultural property.

From the Event of Armed Conflict to the Illicit Trafficking

After the United Nations was established in 1945, the prohibition of use of force under the UN Charter becomes a key point in changing perspective on the protection of cultural property in the war that has been no longer recognized as a main problem. In contrast, global community has been facing a new problem for cultural property

that is in form of the illicit trafficking of cultural property. The trafficking of cultural property was booming since the Second World War because there have been enormous increases in the demand for cultural property and art, served for both its aesthetic fashion and its investment qualities (Taylor, 1977, p.134). Until the era of globalization, the world becomes a much smaller place and even the remotest places are open for discovering and travelling; likewise, people around the world may easily approach many films and photos which are taken from foreign countries and are also represented other lands and customs. With this globalization, the cultural barrier has no longer had and the interest in other people, other cultures, or even other cultural objects, which can be powerfully reflected in fashion and design used for the combination of foreign and exotic style elements, has been increasing among people, particularly in the Westerns (Askerud & Clement, 1997, p.9). This phenomenon has motivated many collectors and ordinary people to demand and to trade in cultural property.

However, the modern trade in cultural property has provoked the illicit channel for acquisition of cultural property due to the high value of cultural property. Also, this problem is related to two key stakeholders: (1) states of origin which are mostly rich in cultural objects and need to protect them and legally call for absolute return of those objects from the illicit export; (2) market states where the cultural objects of other nations are regularly consumed or collected. In order to prevent the illicit trafficking of cultural property, the UNESCO called for international cooperation among nations to adopt an international law. Finally, in 1970, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the 1970 UNESCO Convention) was adopted to require all state parties to design their own preventive measures for illicit trafficking of cultural property. Furthermore, this Convention provides the restitution that shall request a state party of origin to take appropriate steps to recover and return its own cultural property stolen or illegally exported; however, the requesting state shall pay suitable compensation to the requested state or to an innocent purchaser or a person who has valid ownership to that property.

In 1995, in order to reinforce and complement the 1970 UNESCO Convention, the international cooperation between the UNESCO and the International Institute for the Unification of Private Law (UNIDROIT) was promoted to create the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (the 1995 UNIDROIT Convention). This Convention requires all state parties to prevent and stop the illicit trafficking of cultural property in their own territory. Although most legal provisions are similar to the 1970 UNESCO Convention, the UNIDROIT Convention is slightly different from the UNESCO Convention in a key point of who is entitled to request for the return of stolen cultural property because the UNIDROIT Convention permits both individual and state to reach the court of requested state for requesting the recovery or restitution of their stolen cultural property.

Conclusion

It becomes clear that legal development of the protection of cultural property has been more dynamic from the early periods to the period of globalization and also the global community has never stopped looking for an appropriate protection of cultural property. After the United Nations and the UNESCO were created in 1945, the legal

development of the protection of cultural property seems very stable and systematic because the UNESCO collected recent principles and experiences on the protection of cultural property in the previous periods to be a conceptual framework in drafting the 1954 Hague Convention. Although the threat of cultural property has been changed to the illicit trafficking since the end of the Second World War, the legal effort of the protection of cultural property has been still recognized.

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