

THE RETURN OF UNREGISTERED MOVABLE CULTURAL PROPERTY OF THE COLONIAL PHILIPPINES: PERSPECTIVES IN INTERNATIONAL LAW*

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ABSTRACT

The Philippines, an archipelago in Southeast Asia, is known for enduring over three hundred years of colonial rule from three different masters—Spain, the United States, and Japan—from the 15th to 20th Centuries. Over the course of colonial rule, a significant number of historical objects and cultural materials have been removed from the Philippines and are currently on display in various museums around the world. Now, after decades of being considered an independent State, numerous historical and cultural materials still remain in the possession of foreign entities. The extent and number of cultural objects, to this day, remains undocumented, and remedies under local and international laws for their return have yet to be explored. This Note examines the domestic and international laws that may provide for perspectives that can facilitate the repatriation of cultural property obtained from the Philippines during colonial rule.

“Our national cultural heritage is the only way we can sustain our identity in the face of globalization and the unprecedented speed of scale. I ask for your help, your commitment to ensure that our cultural heritage gets consideration, the protection and indeed the affection that we as a people owe our heritage.”

—Senator Edgardo J. Angara¹

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I. INTRODUCTION

The Philippines, an archipelago located in Southeast Asia, is known for its rich prehistoric and colonial history.² With a strategic location between mainland Asia and Oceania, early settlers of its islands were accustomed to the inter-island circulation of objects through barter, and eventually, free trade, upon the development of the concept of currency as a medium of exchange.³ It experienced Spanish colonial rule from the 16th to 19th Centuries until it was ceded to the United States through the Treaty of Paris in 1898.⁴ Under American administration, the Philippines experienced benevolent assimilation.⁵ While under American rule, Japanese forces occupied the Philippines from 1941 to 1945.⁶ It was only in 1946 that the Americans relinquished their sovereignty over the Philippines and recognized the latter's full independence through the signing of the Treaty of Manila on July 4, 1946.⁷

During more than three hundred years of foreign control, many objects of historic, anthropological and cultural significance have been removed from the Philippines over the course of colonization. These objects have been in the possession of foreign entities even beyond the recognition of Philippine Independence.⁸ Now that the Philippines is a democratic and republican State under the Constitution,⁹ many objects of national, historic and cultural significance, such as paintings,¹⁰ historic

¹ Co-sponsorship speech for Rep. Act No. 10066 or the National Cultural Heritage Act of 2009. *See* S. Journal 1395-1397, 14th Cong., 2nd Sess. (Jan. 26, 2009).

² ANGEL P. BAUTISTA, *PROTECTING FILIPINO HERITAGE: LAWS AND INITIATIVES FOR THE PRESERVATION OF CULTURAL PROPERTY IN THE PHILIPPINES* 1 (2013).

³ *See* JOHN FOREMAN, *THE PHILIPPINE ISLANDS: A POLITICAL, GEOGRAPHICAL, ETHNOGRAPHICAL, SOCIAL AND COMMERCIAL HISTORY OF THE PHILIPPINE ARCHIPELAGO AND ITS POLITICAL DEPENDENCIES, EMBRACING THE WHOLE PERIOD OF SPANISH RULE*. (1899).

⁴ *See* Paolo E. Colleta, *McKinley, the Peace Negotiations, and the Acquisition of the Philippines*, 30 PAC. HIST. REV. 341-350 (1961).

⁵ *See* STUART CREIGHTON MILLER, *BENEVOLENT ASSIMILATION: THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899-1903* (1982).

⁶ *See* IKEHATA SETSUHO & RICARDO JOSE, *THE PHILIPPINES UNDER JAPAN: OCCUPATION POLICY AND REACTION* (1999).

⁷ *Treaty of General Relations Between the United States of America and the Republic of the Philippines, July 4, 1946, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%207/v7.pdf>.*

⁸ E. P. Patan e, *Porcelain Pamana, in* *FILIPINO HERITAGE: THE MAKING OF A NATION* 800-801 (1977).

⁹ CONST. art. II,   1.

¹⁰ *See, e.g.,* Cheche V. Moral, *Long-lost Luna, found in Argentina, goes up for auction in Manila*, PHIL. DAILY INQUIRER, Sept. 6, 2015, *available at*

documents,¹¹ and other movable artifacts¹² continue to be illicitly transported across borders by anonymous syndicates through undocumented means.¹³ Other countries with similar colonial histories such as Indonesia,¹⁴ Libya,¹⁵ Congo,¹⁶ Hungary,¹⁷ and Iceland¹⁸ have instituted bilateral agreements for the successful repatriation of colonial cultural property following state succession. Meanwhile, in 2018, French President Emmanuel Macron declared that France will return to their respective origins all artifacts that were taken from Africa during French colonization.¹⁹ The past decade has also seen private institutions voluntarily returning cultural objects that were illegally removed from their states of origin. In May 2018, the Berlin Ethnological Museum returned ancient wooden masks to indigenous Alaskans.²⁰ Private company Hobby Lobby also returned more than 5,000 cultural artifacts to Iraq in 2017, and the Metropolitan Museum of Art in New York returned in 2013 10th Century sandstone statues taken from Cambodia during the Khmer Rouge.²¹

Despite being aware of having thousands of cultural materials obtained during the period of colonization and a clamor for their return,

<http://lifestyle.inquirer.net/206702/long-lost-luna-found-in-argentina-goes-up-for-auction-in-manila/>.

¹¹ See Aries Rufo, *Court set to decide on National Library pilferage of historical documents*, ABS-CBN NEWS, May 26, 2008, available at <http://news.abs-cbn.com/nation/05/26/08/court-set-decide-national-library-pilferage-historical-documents>.

¹² Sandy Araneta, *Stolen artifacts proof of flourishing trade*, PHIL. STAR, Aug. 21, 2002, available at <https://www.philstar.com/headlines/2002/08/21/172877/stolen-artifacts-proof-flourishing-trade>.

¹³ National Museum of the Philippines, National System of Protection of Cultural Properties, presentation delivered at the 2017 Regional Summit of the Museums of the North, Baguio Museum, Baguio City, Cordillera Administrative Region (Oct. 5, 2017).

¹⁴ ANDRZEJ JUKABOWSKI, STATE SUCCESSION AND CULTURAL PROPERTY 125 (2015).

¹⁵ *Id.* at 139-141.

¹⁶ *Id.* at 127.

¹⁷ *Id.* at 123.

¹⁸ See JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* (2013).

¹⁹ Annalisa Quinn, *After a Promise to Return African Artifacts, France Moves Towards a Plan*, NEW YORK TIMES, Mar. 6, 2018, available at <https://www.nytimes.com/2018/03/06/arts/design/france-restitution-african-artifacts.html>.

²⁰ Associated Press, *German Museum Returns Looted Art to Indigenous Alaskans*, PHIL. DAILY INQUIRER, May 18, 2018, available at <http://lifestyle.inquirer.net/294701/german-museum-returns-looted-art-to-indigenous-alaskans/>.

²¹ Husna Haq, *After Centuries of Cultural Theft, Why More Nations are Returning Cultural Artifacts*, CHRISTIAN SCIENCE MONITOR, Mar. 13, 2018, available at <https://www.csmonitor.com/World/Progress-Watch/2018/0313/After-centuries-of-cultural-theft-why-more-nations-are-returning-looted-artifacts>.

there have been minimal attempts by the Philippine government to seek the repatriation of such materials. Although domestic and international mechanisms are in place to ensure the national and international protection of cultural property, there is minimal literature that focuses on where the Philippines stands in relation to the facilitation of repatriation claims for colonial Philippine artifacts.

For the purpose of providing new insights on how the Philippines can instill an advocacy for the return of cultural materials taken from the colonial era, as other countries with similar colonial histories have started, this Note has the following objectives:

- (1) To provide an analysis of existing Philippine legislation that deals with the repatriation of cultural property obtained by aliens from the Philippines during colonial rule;
- (2) To present perspectives in international law that can bolster the Philippines' potential claims for repatriation of cultural property; and
- (3) To recommend legislative measures by which repatriation claims can be facilitated.

Chapter II provides for the circumstances that motivated the writing of this Note. First is a presentation of instances where cultural materials were returned voluntarily to the Philippines; second is a list of cultural items which are currently in the process of negotiations for their return; and third is a compilation of published accounts that describe the abundance of Philippine artifacts removed from the Philippines during the colonial period, and are currently on display at various museums around the world, showing potential claims for repatriation. These instances permit a glimpse of the countless cultural objects which are not realized and enjoyed by Filipinos. This, read alongside news articles which reveal that other countries with similar situations have launched successful campaigns for the return of their respective cultural materials, shows that there might still be hope for the return of such cultural objects to the Philippines.

Chapter III provides a preliminary discussion on the framework for cultural heritage protection. This discussion introduces three frameworks that provide for the basic principles in protecting heritage: (1) protection in times of armed conflict; (2) protection from illicit trafficking; and (3) and repatriation as a means of preserving the symbolism of cultural materials.

This must precede the discussion on the repatriation of cultural materials because understanding the framework for protecting cultural heritage is indispensable to the appreciation of the concept of returning objects of cultural significance.

Chapter IV discusses the conceptual framework of repatriation in the sphere of international law. It introduces the law of succession of States in decolonization, and presents its recurring practice requiring colonizing States to return public property, including cultural materials and archives, to the succeeding State upon the former's renunciation of sovereignty upon the latter. This practice has paved a way for newly formed States to establish their distinct national identity.

Chapter V presents perspectives of repatriation in international law. It asserts that repatriation is a component of the right to self-determination, as enshrined in the Universal Declaration of Human Rights ("UDHR"), and implemented by the International Covenant on Civil and Political Rights ("ICCPR"), of which the Philippines is a state party. It also shows that repatriation is doubly important to the right of indigenous peoples to access indigenous cultural objects to be able to realize their identity, as postulated in the United National Declaration on the Rights of Indigenous Peoples ("UNDRIP"), to which the Philippines is also a State-party.

Chapter VI presents the status of cultural repatriation in Philippine law. It discusses the framework of cultural heritage protection anchored in the Constitution, the history of legislation for heritage protection in the Philippines, and the law that specifically provides for the repatriation of registered cultural property.

Chapter VII applies the aforementioned facts and theories and provides an analysis of the status of repatriation claims in the Philippines, and proposals for more effective ways of how to facilitate future repatriation claims. Chapters VIII and IX present the conclusion and recommendations of this Note.

II. THE STATUS OF REPATRIATION CLAIMS IN THE PHILIPPINES

Being a country with rich colonial history, it is undeniable that countless cultural properties originating from the Philippines were removed from the country during the colonial period, which started from the 16th Century, and lasted until the mid-20th Century. During that period, thousands of movable cultural objects were taken from the Philippines, and

are currently on display in various museums abroad. Since gaining political independence in 1946, there have been minimal efforts exerted²² to explore any claims on ownership of those cultural objects, following the successful repatriation claims that other succession states have initiated.

A. Successful Cases of Voluntary Repatriation

In the past, as reported by the National Museum,²³ foreign entities, through the assistance of the Department of Foreign Affairs (“DFA”), foreign museums, and other foreign entities have voluntarily turned-over movable cultural properties obtained from the Philippines. Four separate incidents of voluntary return were cited: the return to the Philippines of the Maradika, the Qur’an of Bayang, Lanao del Sur in 1980, the return of the Meycauayan Bells in 2012, the return of the La Union Bells in 2016, and the return of human remains of Kankanei from the Burke Museum in 2017.

1. *The Maradika of Bayang, Lanao*

In 1980, after negotiations with the National Museum, the Maradika (*Qur’an*) of Bayang, Lanao del Sur was returned to the Philippines after years of being on display in a museum in the United States of America. Declared a National Cultural Treasure in 2015,²⁴ the Maradika enjoys the highest status accorded to cultural properties of the Philippines, and affords a high level of protection from the government. The Maradika of Bayang was inherited by descendants of Saidna, who is considered the earliest people from Lanao to have completed a pilgrimage to Mecca (*haji*). It was considered an important object for the community.²⁵

²² Interview with Angel P. Bautista, Acting Director III, Cultural Properties and Regulation Division, National Museum of the Philippines, on Mar. 13, 2018 at the National Museum of the Philippines; Interview with Mr. John Delan Robillos, Vice Head, Sub-Commission on Cultural Heritage, National Commission for Culture and the Arts (“NCCA”) on Mar. 8, 2018 at the NCCA; Interview with Ambassador Jose Maria Cariño, Chairperson-Alternate of the Technical Cooperation Council of the Philippines on Feb. 23, 2018 at the Department of Foreign Affairs; and Interview with Atty. Arthur Hernan, Legal Affairs Office, National Commission for Indigenous Peoples on January 29, 2018.

²³ Interview with Mr. Angel P. Bautista, M.S., Acting Director III, Cultural Properties and Regulation Division, National Museum of the Philippines, on March 13, 2018 at the National Museum of the Philippines.

²⁴ See *supra* note 13; ABS-CBN News, *National Museum Names Cultural Treasures*, Dec. 24, 2015, ABS-CBN NEWS, available at <http://news.abs-cbn.com/lifestyle/12/24/15/national-museum-names-cultural-treasures>.

²⁵ Midori Kawashima and Tirmizy Abdullah, *The Qur’an and Islamic Manuscripts of Mindanao*, in 10 MONOGRAPH SERIES 71-98 (2012).

In May 1902, at the tail-end of the Filipino-American War, the Maranao people in Bayang, Lanao del Sur and the armed forces of the United States clashed in the Battle of Bayang. The Battle left around 400 Maranao people dead as the Americans took control of the area.²⁶ It became common knowledge that the Maradika was taken by the Americans, since its whereabouts were not known to the Maranao people for a long time.²⁷

Later on, in 1904, it was discovered that the Maradika had been brought to the Field Museum of Natural History in Chicago, USA, by Dr. Ralph S. Porter, a chief surgeon assigned in Mindanao. The inscription on the Maradika while it was displayed in the Field Museum read: “Handmade copy of Koran belonged to the Sultan of Bayang & captured with his fort by the 2th Inf. May 2-1902.”²⁸

Upon its return to the Philippines, the original plan to display it at the Aga Khan Museum of the Mindanao State University in Marawi City, Lanao del Sur, did not push through because of bad weather during its scheduled airlift. Instead, then First Lady Imelda Marcos ordered it to be brought to Malacañang Palace for display. In 2014, it was transferred to the National Museum, where it is currently displayed at the Bangsamoro collection. The Director of the Cultural Properties Regulation Division of the National Museum, Mr. Angel Bautista, said that it was fortunate that the Maradika was not displayed in Marawi, since it may have been lost or destroyed in the recent war in the area.²⁹

2. *The Bells of Meycauayan, Bulacan*

In 2011, the Sisters of Mercy in Omaha, Nebraska found two church bells 3.5 inches wide, with an inscription attached reading: “Taken from the Church at Meycauayan, Luczon Islands [sic] after bombardment by Utah Battery, March 29, 1899. By P.O. Thomas, Co. A Battalion of Engineers.”³⁰ The bells were found among properties that were in possession of the Sisters of Mercy Convent in Red Bluff, California. Further details about the taking and the previous turnovers are not certain. The bells were then turned over to the Philippine Consul General to Chicago on

²⁶ *Id.*

²⁷ MIDORI KAWASHIMA, CONSERVATION OF THE ISLAMIC MANUSCRIPTS OF MINDANAO: THE CASE OF THE QUR’AN OF BAYANG 99-110 (2011).

²⁸ *Id.*

²⁹ See *supra* note 23.

³⁰ Tina G. Santos, *Church bells taken by Americans turned over to the National Museum*, Mar. 9, 2012, PHIL. DAILY INQUIRER, available at <http://globalnation.inquirer.net/27721/2-church-bells-taken-by-americans-turned-over-to-national-museum>.

October 8, 2011. Upon their return to the Philippines in March, 2012, the Bells were deposited at the Diocese of Malolos, Bulacan, through the Department of Foreign Affairs and the National Museum.³¹

3. The Bell of Bauang, La Union

In May 2016, the United States Military Academy (“USMA”) in West Point, New York, USA returned one church bell weighing 378.3 kilograms to the Saints Peter and Paul Church in Bauang, La Union. This bell was said to have been removed from this 430-year-old town during the start of the Philippine-American War in 1901. The return was facilitated upon the request of the Church in Bauang, with the assistance of a retired US War Veteran who discovered the bell’s presence at the USMA.³²

4. Human Remains from the Cordillera Administrative Region

Lastly, on July 9, 2017, the Burke Museum, through its representatives, turned-over human remains of two individuals from the Cordillera Administrative Region (“CAR”), composed of a skull cap belonging to a Nabaloi (Ibaloi), and a mandible (lower jaw bone) from an Ifugao. These remains were some of the artifacts collected by Eugene H. Kolb during his tenure as a constabulary officer in Mountain Province from 1911 to 1916. In 1947, Mr. Kolb loaned 130 cultural objects to the Burke Museum, described as an “Ethnological Collection from the Ifugao, Mountain Province, Philippines and elsewhere.” In 2011, the collection was declared as abandoned property, and was accessioned into the Museum’s permanent collection. The Burke Museum announced its intent to repatriate the two human remains to the Philippines on their website last June 16, 2017.³³

The repatriation of the human remains stemmed from the Burke Museum’s current collections policy of not actively collecting human remains, and not displaying or studying human remains without the informed consent of the descendant communities. After being informed by

³¹ See *supra* note 23.

³² Yolanda Sotelo, *Church bell’s 115-yr journey ends at its home*, May 24, 2016, PHIL. DAILY INQUIRER, available at <https://newsinfo.inquirer.net/787205/church-bells-115-yr-journey-ends-at-its-home>.

³³ National Museum of the Philippines, *The NM receives human remains repatriated from the Burke Museum of Natural History in Culture*, July 9, 2017, NATIONAL MUSEUM OF THE PHILIPPINES FACEBOOK PAGE, <https://www.facebook.com/nationalmuseumofthephilippines/posts/the-nm-receives-human-remains-repatriated-from-the-burke-museum-of-natural-histo/1600293576661621/>.

the Burke Museum of the intention of repatriating the human remains, the National Museum, through its Director, Mr. Jeremy Barns, sent a formal letter that indicated the National Museum's intention of claiming the human remains. The two human remains were then brought to the Philippines by representatives from the Burke Museum and accepted by the National Museum, while the 128 other cultural objects remain in the custody of the Burke Museum.³⁴

4. Illicitly-trafficked Cultural Materials from Australia

Going further, in 2010, Australian Customs seized a shipment of underwater archaeological objects from the Philippines. The shipment bore the registration under the National Museum of the Philippines, but did not have the corresponding Export Permit needed, pursuant to Australian Heritage Law. Through a memorandum of understanding with the Australian Department of Environment, Water, Heritage and the Arts, the Philippines, facilitated by the National Museum, in coordination with the Bureau of Export Trade Promotion, the Department of Foreign Affairs, and the Philippine Trade Centre in Australia; 154 archaeological objects were returned to the Philippines.³⁵

5. The Balangiga Bells of Samar

In December 2018, the United States Air Force delivered three Bells originating from Balangiga, Eastern Samar that were removed by US forces during the Philippine-American War in 1901. This came more than a year after President Rodrigo Duterte expressly called for the repatriation of the Balangiga Bells, saying, "Give us back those Balangiga bells. They are ours. They belong to the Philippines. They are part of our national heritage. *Isauli naman ninyo. Masakit 'yan sa amin* (Return them. This is painful for us)," in his 2017 State of the Nation address.³⁶

The Balangiga Bells were taken by American troops after the Balangiga Massacre in Samar, a province in the Visayas, Philippines in the early 1900s during the Filipino-American War.³⁷ Two of the bells were on

³⁴ Email correspondence with Glenys Ong, Native American Graves Protection and Repatriation Act ("NAGRPA") Collections Assistant at the Burke Museum of Natural History and Culture, Aug. 31, 2017.

³⁵ See *supra* notes 13, 23.

³⁶ Paterno Esmaguél III, *Give us Back Balangiga Bells, Duterte Tells US*, July 24, 2017, RAPPLER, available at <https://www.rappler.com/nation/176576-sona-2017-philippines-duterte-us-balangiga-bells>.

³⁷ See SHARON DELMENDRO, THE STAR-ENTANGLED BANNER: ONE HUNDRED

display in an American military base in Cheyenne, Wyoming, while another was displayed in a museum in South Korea. Calls for the return of the Balangiga Bells had resounded for decades, and was said to have restored Philippine dignity.³⁸

The return was facilitated through the National Defense Authorization Act of 2018, which expressly prohibited the transfer to other countries of veterans' memorial objects, under which the Balangiga Bells were classified.³⁹ The amendment specifically mentioned the return of the Balangiga Bells to the Philippines notwithstanding the moratorium created for other veterans' memorial objects still in the possession of the United States.

The Balangiga bells have finally returned, with both sides hailing the momentous occasion: on the part of the US, it is a testament of its friendship and partnership with its former colony, while for the Philippines, it is a long-awaited cue to "heal the wounds" left by the incident.⁴⁰

B. Ongoing Efforts to Recover Cultural Property

Of the cases of successful repatriation of cultural property discussed, the movable cultural properties were all removed from the Philippines from 1899 to 1916 during the American occupation. The Meycauan Bells, the La Union Bell, the Balangiga Bells and the Maradika were removed from the country during the Filipino-American War, while the human remains were obtained during the first decade of American colonial administration. It must be noted that the respective repatriation processes of these objects were done voluntarily by the State that was currently in possession of the cultural properties before they were returned to the Philippines. The Philippine government did not initiate any of the claims for repatriation. Thus, although the Philippines has welcomed the

YEARS OF AMERICA IN THE PHILIPPINES (2005).

³⁸ Alexis Romero, *Balangiga Bells' return would restore Philippines' dignity*, July 30, 2017, PHIL. STAR, available at <https://www.philstar.com/headlines/2017/07/30/1723196/balangiga-bells-return-would-restore-philippines-dignity-palace>.

³⁹ *US defense chief backs return of Balangiga bells to PH*, Aug. 11, 2018, ABS-CBN NEWS, available at <https://news.abs-cbn.com/news/08/11/18/us-defense-chief-backs-return-of-balangiga-bells-to-ph>.

⁴⁰ Rambo Talabong, *Balangiga Bells back in the Philippines*, Dec. 11, 2018, RAPPLER, available at <https://www.rappler.com/nation/218657-balangiga-bells-return-philippines-december-11-2018>.

repatriation of cultural properties that were willingly returned, Philippine efforts to initiate the recovery of cultural property have yet to be explored.

1. Illicitly-Trafficked Mummy from Benguet

At present, the National Museum has confirmed reports of a Philippine mummy that was illicitly exported from Benguet to Europe in the 1980s. The mummy was identified as having originated in the Philippines because of its distinct tattoo markings. The National Museum is currently coordinating with various international organizations to locate and repatriate this mummy, which is considered a National Cultural Treasure. Further details as to the exact status of the operation cannot be revealed as of this Note's writing.⁴¹

2. Current Clamor for the Return of Cultural Property

The clamor for the return of other cultural materials taken during the Philippine colonial period has escalated to the extent that it has been raised by legislators. In their respective sponsorship speeches discussing the legislative intent of the then-Senate Bill No. 3014, which later on became Republic Act No. 10066 or the National Cultural Heritage Law ("NCHL") of 2009, several senators brought up the many cultural objects that were taken during the Spanish and American colonial periods and have yet to be returned to the Philippines.

In his co-sponsorship speech, the late Senator Edgardo Angara observed that he saw many Philippine artifacts obtained from underwater sites from Southern Palawan in the Newberry Museum in Chicago. He lamented that collections of Philippine flora and fauna are not found in the Philippines but are on display at the Field Museum, also in Chicago. He also mentioned that many works of National Artists are not protected by law and are therefore subject to indiscriminate trade.⁴²

Senator Richard Gordon mentioned that cannons from Grande Island were taken by American forces and transported to the Smithsonian Institute, despite the calls for their return by the people of Olongapo. He also mentioned that during one of his trips to Paris, he was disappointed that French museums were exhibiting treasures salvaged from Philippine

⁴¹ See *supra* notes 13, 23.

⁴² S. Journal. 14th Cong. 2nd Sess. 1397-1399 (Jan. 26, 2009).

seas, and lamented that the Philippines, aside from the lack of funds to retrieve the said treasures, have no interest in doing so.⁴³

In another Senate hearing, Senator Jamby Madrigal mentioned that the Golden Tara, an artifact of a Hindu deity from Agusan was unknowingly transported to the Field Museum. Senator Edgardo Angara expressed hope that the Philippine government would be able to call for the return of such historical items. In the same hearing, Senator Aquilino Pimentel also recognized that many important artifacts were brought out by the Philippines' foreign colonizers: Spain, the United States, and Japan, and that they must be recovered. After mentioning that there were ongoing government efforts to recover the Balangiga Bells, he proposed that the law empower the National Commission on Culture and the Arts ("NCCA") to create an agency to focus on the recovery of artifacts that were removed by the Spanish and Japanese colonizers. These are manifestations that Philippine lawmakers are in fact aware of the prolific number of Philippine artifacts that were removed from the country during periods of colonization, and that the NCHL was intended by the Legislature to afford protection and appropriate remedies for the recovery of cultural artifacts that were illegally removed from the Philippines, including those from the colonial period.⁴⁴

A former Director of the National Museum of the Philippines has also expressed the desire to "own" manuscripts on display in museums abroad. Corazon S. Alvina, in a prefatory remark published in the book, *A CONTINUING PROJECT: HATS, G-STRINGS, GIRDLES, ORNAMENTS: SELECTIONS FROM THE PHILIPPINE ETHNOGRAPHIC COLLECTION NATIONAL MUSEUM OF ETHNOLOGY, MUSEUM VOLKENKUNDE, LEIDEN, THE NETHERLANDS*, a book published pursuant to a project of the Embassy of the Kingdom of the Netherlands to the Philippines, the National Museum of the Philippines, and the Ayala Museum to create an inventory of Philippine objects in the Volkenkunde Museum in the Netherlands, she wrote: "This catalogue offers a chance for a re/evaluation and valuation of Philippine material culture in the care of others. It could also be an opportunity to 'own' them as documents and remembrances of our past to inspire (more) work."⁴⁵ Although this project provided access to Filipinos to these Filipino artifacts, there was no mention of efforts to request their return.

⁴³ *Id.* at 1399-1400.

⁴⁴ S. Journal. 14th Cong. 2nd Sess. 1430-1431 (Jan. 27, 2009).

⁴⁵ *See* DORUS KOP JANSEN, *A CONTINUING PROJECT: HATS, G-STRINGS, GIRDLES, ORNAMENTS: SELECTIONS FROM THE PHILIPPINE ETHNOGRAPHIC COLLECTION NATIONAL MUSEUM OF ETHNOLOGY, MUSEUM VOLKENKUNDE, LEIDEN* (2009).

C. Potential Claims for Recovery: Artifacts on Display around the World

During the period of Spanish colonization from the mid-1500s, the early inhabitants of the Philippines experienced disturbances in their traditional ways of living. There were reports of looted indigenous graves, and various takings of indigenous anthropological materials such as weapons, tools and other objects that were of interest to the Spanish colonizers. Today, many objects from the Philippines that originated from its indigenous peoples that date to as early as the 1600s to 1700s are stored and on display in numerous museums⁴⁶ in many Spanish cities, such as the *Museo Arqueológico Nacional* (National Museum of Archaeology) in Madrid, and the *Museo Oriental* in Valladolid.⁴⁷

At the time of Spanish colonization, it was noted that European visitors to the Philippines, whether residents, merchants, travelers or diplomats, because of the lack of regulation to export or import cultural materials, either sent or brought home with them Philippine cultural materials, such as ivory, gold, silver, furniture, paintings, instruments, and other specimens of natural science.⁴⁸ In 1860, German ethnologist Feodor Jagor collected porcelain from Guiuan, Samar, and obtained burial jars from Camarines. These items are now on display at the Berlin Ethnographic Museum in Germany.⁴⁹

The first archaeological excavation conducted in the Philippines was facilitated by French archaeologist Alfred Marche in 1881. With his team, he obtained earthenware, semi-stoneware, glazed burial jars, carved wooden coffins, ornaments of metal, shell and glass, carved wooden images, wooden

⁴⁶ An advanced search of the keyword “Filipinas” as place of origin in an online database of Spanish collections shows that more than 1,400 artifacts that originated from the Philippines are displayed in museums in Spain. A breakdown shows that 925 artifacts are located in the National Museum of Anthropology, 522 are located in the Museum of America in Spain, and others located in the National Archaeological Museum, the Museum of Valladolid and the Costume Museum, Ethnological Research Center. *See* Ceres Colecciones en Red, *Digital Network of Museum Collections*, SPANISH MINISTRY OF CULTURE AND SPORTS WEBSITE, at <http://ceres.mcu.es/pages/Main> (last accessed May 23, 2018).

⁴⁷ *See* Museo Oriental Valladolid, *Filipinas*, MUSEO ORIENTAL VALLADOLID WEBSITE, at <http://museo-oriental.es/ukfilipinas.asp?curr3=t> (last accessed May 23, 2018).

⁴⁸ *See supra* note 46.

⁴⁹ E. Patanñe, *Porcelain Pamana*, in *FILIPINO HERITAGE: THE MAKING OF A NATION* 800-01 (1977).

and metal implements, and other materials. These artifacts were brought to the *Musée de l'Homme* in Paris, and the Museum of Madrid.⁵⁰

In 1886, the National Museum of Ethnology in Leiden, the Netherlands acquired for 5,000 French francs what was coined as the “first impressive Philippine collection” this museum had acquired.⁵¹ This collection consisted of ethnological materials such as costumes and embroidery on silk and pineapple fiber of the inhabitants of Manila, a quantity of weapons and other materials used by the Igorot of the Valley of Benguet, weapons, headdresses and ornaments from tribes originating from Malaysia, and others living along shores of the Gulf of Davao. These were obtained from a certain Bréjard, who was a French Consul in Manila for five years.⁵² The method of how the collection was obtained by Bréjard, however, is unknown: “Unfortunately, we do not know how Bréjard operated to obtain his collection. Were the items painstakingly collected on field trips initiated by himself or did he use intermediaries?”⁵³

Another collection on Philippine materials currently on display in the National Museum of Ethnology in Leiden, and in the Ethnographic Museum of Dresden in Germany was obtained from Alexander Schadenberg, a German chemist who worked in Manila for intermittent periods from 1876 to 1889, visiting Mindanao and Northern Luzon, among other places in the Philippines. From 1891 to 1895, he shipped 117 Philippine items to the Museum in Leiden.⁵⁴ Adriaan van der Valk, a Dutch tobacco appraiser and purchaser who settled in Tuguegarao and Isabela, also collected from the Philippines certain spears, a cape and wooden sculpture of an *anito* and sold them to the to the Leiden Museum through his sister after his death.⁵⁵ Later on, his friend Meerkamp van Embden, an honorary consul of the Netherlands in Manila, also contributed 43 objects from Luzon and Mindanao to the same Museum.⁵⁶ In these examples, the manner by which the Philippine artifacts were collected by foreign citizens was again not described. The terms “collection” and “collected” have no implications that such items were acquired through sale or donation.

⁵⁰ *Id.*

⁵¹ Jansen, *supra* note 45, at 17.

⁵² *Id.* at 18.

⁵³ *Id.*

⁵⁴ *Id.* at 19.

⁵⁵ *Id.* at 20.

⁵⁶ *Id.* at 21.

In the 1900s, at the time of America's "benevolent assimilation," several American anthropologists toured the Philippines as part of expeditions to Southeast Asia and obtained numerous amounts of cultural materials from all over the Philippines.⁵⁷ Between 1907 to 1910, American anthropologists Fay Cooper-Cole collected over 5,000 objects from various areas in the Philippines. Many of these objects are now on display or stored at the Field Museum of Natural History in Chicago, which contains over 10,000 objects obtained from anthropological expeditions to the Philippines while it was under American colonial rule.⁵⁸ This is one of the largest Philippine collections in the Western Hemisphere.⁵⁹

From 1922 to 1925, Dr. Carl E. Guthe, an American anthropologist, also conducted archaeological excavations in the Central Visayas, the artifacts from which are in the possession of the Museum of Anthropology at the University of Michigan in Ann Arbor.⁶⁰ Other renowned anthropologists who have collected cultural materials from the Philippines include Roy Barton, whose collections are now stored and displayed at the Phoebe A. Hearst Museum of Anthropology in Berkeley, California,⁶¹ and Henry Otley Beyer, considered the "Father of Philippine Anthropology," who deposited his collections of prehistoric and pre-Hispanic artifacts from half a century of study not in foreign museums, but at the National Museum of the Philippines and the Department of Anthropology at the University of the Philippines, Diliman.⁶²

D. Looking Ahead

By no means is this compilation of Philippine artifacts currently on display abroad an exhaustive list. Many movable objects of cultural and historical significance to the Philippines have remained undocumented since the Philippines has gained the status of an independent State. Many such

⁵⁷ See CAMILLE CALLISON, LOREINE ROY & GRETCHEN ALINE LECHEMINANT, *INDIGENOUS NOTIONS OF OWNERSHIP AND LIBRARIES, ARCHIVES AND MUSEUMS* (2016).

⁵⁸ *Uncovering history: 10,000 PH artifacts in Chicago museum*, RAPPLER, Mar. 25, 2014, available at <https://www.rappler.com/move-ph/balikbayan/53799-10000-kwentos-historical-artifacts>.

⁵⁹ The Field Museum, *Collection: Philippine Heritage Collection*, FIELD MUSEUM WEBSITE, available at <http://philippines.fieldmuseum.org/heritage/narrative/4172> (last accessed on May 23, 2018).

⁶⁰ See Patanġe, *supra* note 49.

⁶¹ Phoebe A. Hearst Museum of Anthropology, Asia & Middle East, Hearst Museum of Anthropology Website, available at <https://hearstmuseum.berkeley.edu/collection/asia/> (last accessed May 23, 2018).

⁶² Speech of Dr. Eusebio Dizon, Conference of the Asia Pacific Organization of the International Council of Museums, Manila. Nov. 11-13, 1997.

artifacts remain in storerooms of museums, and even in foreigners' private collections. One of the reasons cited for the lack of initiative in filing claims for the repatriation of cultural properties obtained during the colonial period is the belief that there is no remedy under local or international law for the filing of such claims, as cited by the informants of the National Museum, NCIP, and NCCA. Assuming that there are remedies, the filing of such claims is not a priority of the State because the costs are expected to be high. Another reason cited is not the unavailability of remedies under both international and domestic laws, but the lack of proper implementation and institutional models for the facilitation of such claims.

III. PRELIMINARY DISCUSSION: AN INTRODUCTION TO THE PROTECTION OF CULTURAL MATERIALS

The repatriation of objects of cultural significance involves the interplay of various elements such as objects, the significance of such objects as cultural materials, their current possessors, their origin, the manner of their acquisition, and the claim for their return. Vital to the discussion on repatriation of cultural objects is the understanding of the concept of cultural heritage, and the need to mandate its protection. Being aware of the theoretical framework underscoring the value of cultural heritage will shed light on the concept of repatriation and the significance of returning objects of cultural importance, so much so that repatriation claims have been a consistent advocacy for numerous organizations, indigenous groups, and states around the world.

A. Objects of Cultural Significance: A Manifestation of Cultural Heritage

Humans tend to attach cultural and historical value to certain objects. This has been a recurring practice for distinct populations since time immemorial. With the emergence of an international community, such objects have been regarded as the embodiments of the identity of states. The value attached to such objects is crucial to nation-building that there is a necessity to codify the means to ensure their protection. An introduction to the framework of "cultural heritage" as a topic in legislation must first be introduced before presenting the specific international and domestic laws on cultural heritage.

In material culture, cultural heritage is defined as a way by which human life is manifested through a representation of a particular view of

life.⁶³ Cultural heritage provides a “tangible link” to the past. It is also considered to describe objects inherited from past generations that relate to a society’s cultural development.⁶⁴ Cultural heritage includes movable objects such as archaeological resources and works of art, and immovable objects such as buildings, monuments and sites.⁶⁵ Aside from objects and tangible property, cultural heritage also includes an intangible aspect, such as language music, drama, dance, oral traditions, and other rituals.⁶⁶

Because of the broad scope of the concept of cultural heritage, no single definition of cultural heritage exists. In fact, a range of issues and conflicts pertaining to the protection and repatriation of cultural properties can be attributed to the various definitions of cultural heritage across the globe.⁶⁷

However, the importance of cultural heritage worldwide has prompted the need for a workable definition in order to create legislation for its protection.⁶⁸ For this reason, and for purposes of legislation, “cultural heritage” must be defined in each instrument, and must be interpreted internally, without being referred to a set of general principles.⁶⁹

1. “Cultural Heritage” versus “Cultural Property” in Legislation

The emerging field of cultural heritage law has brought about countless debates on how “cultural heritage” must be defined both in international and domestic law. The legal definition of this concept is crucial in delineating the extent to which domestic and international law can afford protection. One such difficulty that many authors have pinpointed is the use of the terms “cultural heritage” and “cultural property.”⁷⁰

⁶³ Lyndell Prott & Patrick O’Keefe, ‘Cultural Heritage’ or ‘Cultural Property’?, 1 INT’L J. CULTURAL PROP. 307 (1992).

⁶⁴ Kanchana Wangco, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT’L L. 183, 188 (2003).

⁶⁵ I LYNDELL PROTT & PATRICK O’KEEFE, LAW AND THE CULTURAL HERITAGE: DISCOVERY AND EXCAVATION 7 (1989).

⁶⁶ Elizabeth A. Klesmith, *Nigeria and Mali: The Case for Repatriation and Protection of Cultural Heritage in Post-Colonial Africa*, 4 NOTRE DAME J. INT’L & COMP. L. 45, 49 (2014).

⁶⁷ *Id.*

⁶⁸ Janet Blake, *On Defining the Cultural Heritage*, 49 INT’L & COMP. L. Q. 61, 62-5 (2000).

⁶⁹ See PROTT & O’KEEFE, *supra* note 65, at 8.

⁷⁰ See Prott & O’Keefe, *supra* note 63; PROTT & O’KEEFE, *id.* at 307; Roger O’Keefe, *The meaning of ‘cultural property’ under the 1954 Hague Convention*, 46 NETHERLANDS INT’L L. REV. 26 (1999); Blake, *supra* note 68, at 61.

Professor Manlio Frigo has discussed that various international instruments make use of the concept of “cultural property,” and not “cultural heritage,” such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and the 1970 United Nations Educational, Scientific and Cultural Organization (“UNESCO”) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. On the other hand, other instruments expressly refer to “cultural heritage,” such as the 1969 European Convention on the Protection of the Archaeological heritage, and the 1985 Convention for the Protection of the Architectural Heritage of Europe.⁷¹ Furthermore, in domestic law, Professors Lyndell Prott and Patrick O’Keefe have pointed out that more modern legislation is beginning to incorporate both terms, with the more frequent reference being to “cultural heritage.”⁷²

From the usage of the words “cultural heritage” and “cultural property” in the above international instruments, it can be inferred that the concept of “cultural heritage” covers a broader scope than that of “cultural property.” The intangible aspect of cultural heritage, such as dance, folklore and other non-material cultural elements are terms that “cultural property” cannot represent.⁷³ Thus, the term “intangible cultural heritage” was introduced in Article 2 of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage to afford protection to the non-material aspect of “cultural heritage.” The importance of differentiating both concepts is for the purpose of delineating the specific parameters of international and domestic instruments that afford protection to cultural heritage.

In the legal context, there are opposing views as to the use of both concepts. Professor Frigo has concluded that the concepts of “cultural heritage” and “cultural property” may be regarded as equivalents in either international or domestic law, given that both concepts must rely on non-legal disciplines, such as history and art, in order to determine their content.⁷⁴ On the other hand, Professors Prott and O’Keefe are of the opinion that the concept of “cultural heritage” is the term that

⁷¹ Manlio Frigo, *Cultural Property v. Cultural Heritage: A “Battle of Concepts” in international law?*, 86 INT’L REV. RED CROSS 367, 368 (2004), available at <https://www.icrc.org/en/international-review/article/cultural-property-v-cultural-heritage-battle-concepts-international-law>.

⁷² See Prott & O’Keefe, *supra* note 63, at 318-19.

⁷³ See Frigo, *supra* note 71, at 369.

⁷⁴ *Id.*

anthropologists, historians, and archaeologists recognize. Meanwhile, in the legal context, they have stressed that such concept must be discussed as the term “cultural property.”⁷⁵

This Note adopts the view of Professors Prott and O’Keefe. In legislation, there is a need to distinguish “cultural heritage” as a concept identified in historical and cultural contexts, and “cultural property” as a legal term referred to in relation to ordinary property. In the discussion for repatriation, objects of cultural significance that were removed from the Philippines by colonial powers during a period of colonization will be discussed in the legal context as movable “cultural property.”

2. The Protection of Cultural Property vis-à-vis Ordinary Property

The use of the term “property” to describe a thing connotes its ability to be owned, possessed, or at least controlled.⁷⁶ In property law, recognition of the rights of property owners or possessors is established and protected against the whole world, or adverse parties at the very least. In Section 2 of the NCHL, the fundamental policy for cultural property is the protection of heritage for the enjoyment of present and future generations. This entails the physical protection of cultural property not only for the benefit of the owners, but also for the access of persons other than the owner. In fact, cultural property laws may even restrict the rights of a possessor, regardless of it being an individual possessor, a juridical person, a community or even the State.⁷⁷ The special protection of cultural property as compared to ordinary property takes its roots in the 1907 Hague Regulations⁷⁸ and the 1919 Commission on Responsibility, which first identified the wanton destruction of religious, charitable, educational and historic buildings and monuments as a war crime.⁷⁹ Another distinction between protected properties of historical and cultural significance and ordinary property can be found in the Rome Statute of the International Criminal Court, which defines as two separate war crimes the destruction of

⁷⁵ See Prott & O’Keefe, *supra* note 63, at 319.

⁷⁶ Roger W. Mastalir, *A Proposal for Protecting the Cultural and Property Aspects of Cultural Property under International Law*, 16 FORDHAM INT’L L.J. 1033, 1037 (1992).

⁷⁷ See Prott & O’Keefe, *supra* note 63, at 309.

⁷⁸ Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, October 18, 1907, available at <http://www.refworld.org/docid/4374cae64.html> (last accessed May 23, 2018).

⁷⁹ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT’L L. 95, 115 (1920).

civilian property⁸⁰ and the destruction of property dedicated to religious, historic, education and scientific use.⁸¹

Furthermore, there is a need to distinguish cultural property from ordinary property because the former possesses characteristics that are essential for the formation of an identity of a nation.⁸² Thus, the ownership of cultural property, in many cases, cannot be vested in one person alone.⁸³ A single person may be the custodian of cultural property, but the question of ownership lies in its creator, which is, in many cases, an ethnic group.⁸⁴

B. The Protection of Cultural Property in the International Sphere

The notion of affording special protection against the destruction of cultural property eventually resulted in the codification of various domestic legislation that systemized methods for its protection. Various frameworks for the protection of cultural property have emerged in international law that covers both movable and immovable cultural property. International instruments have been in force that uphold the protection of cultural property from armed conflicts and illicit trafficking through repatriation.

1. Protection from Intentional Destruction in Armed Conflict

In international humanitarian law, Article 8(2)(e)(iv) of the Rome Statute punishes the act of “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.”⁸⁵ This rule takes its roots in the 1954 Hague Convention, which paved the way for such practice to become a custom in international armed conflicts. Today, such practice is considered as customary even in times of non-international armed conflicts.⁸⁶ The rules of customary international law obligate States to take special care in military

⁸⁰ Rome Statute of the International Criminal Court [hereinafter “Rome Statute”], July 17, 1998, available at http://legal.un.org/icc/statute/99_corr/cstatute.htm. See art. 8(2)(e)(xii).

⁸¹ Rome Statute, art. 8(2)(e)(iv).

⁸² See Mastalir, *supra* note 76, at 1035.

⁸³ *Id.*

⁸⁴ *Id.* at 1033.

⁸⁵ Rome Statute, art. 8(2)(e)(iv).

⁸⁶ Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. OF THE RED CROSS, 175 (2005).

operations to avoid seizure, destruction or willful damage⁸⁷ to buildings dedicated to religion art, science, education and charitable purposes.⁸⁸ Likewise, property of great importance to cultural heritage of every people must not be the object of attack, unless required by military necessity.⁸⁹ In occupied territory, an occupying power is obligated to prevent the illicit export of cultural property, and must return illicitly exported property to the authorities of the occupied territory.⁹⁰ Numerous States⁹¹ have also enacted domestic laws that criminalize the attack of cultural properties, to further support the status of this principle as an international norm.

Notwithstanding the establishment of these international obligations to spare cultural properties from destruction, there is still no absolute guarantee that cultural properties will not be damaged by armed attacks. During the first Gulf War from 1990-1991, Iraq, a State crucial to the advancement of ancient civilizations, with its abundant cultural property, was not spared from destruction during armed conflict. Despite the efforts of the United States to avoid damage to cultural sites, archaeological sites in Ur of the Chaldees were collaterally damaged by aerial attacks. This resulted in the loss of innumerable cultural properties, including untranslated cuneiform writing engraved on cultural property.⁹²

⁸⁷ International Committee of the Red Cross, *Rule 40. Respect for Cultural Property*, INTERNATIONAL COMMITTEE OF THE RED CROSS WEBSITE, at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter12_rule40 (last accessed May 23, 2018).

⁸⁸ International Committee of the Red Cross, *Rule 38. Attacks against Cultural Property*, INTERNATIONAL COMMITTEE OF THE RED CROSS WEBSITE, at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter12_rule38#Fn_84AA3472_00003 (last accessed May 23, 2018).

⁸⁹ International Committee of the Red Cross, *Rule 39. Use of Cultural Property for Military Purposes*, INTERNATIONAL COMMITTEE OF THE RED CROSS WEBSITE, at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter12_rule39 (last accessed May 23, 2018).

⁹⁰ International Committee of the Red Cross, *Rule 41. Export and Return of Cultural Property in Occupied Territory*, INTERNATIONAL COMMITTEE OF THE RED CROSS, at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter12_rule41. (last accessed May 23, 2018).

⁹¹ Argentina, Australia, Azerbaijan, Bosnia & Herzegovina, Bulgaria, Canada, Chile, China, Colombia, Congo, Croatia, Dominican Republic, Estonia, Germany, Italy, Kyrgyzstan, Mali, Mexico, Netherlands, New Zealand, Nicaragua, Paraguay, Peru, Poland, Romania, Russian Federation, Slovenia, Spain, United Kingdom, United States, Uruguay, Bolivarian Republic of Venezuela and Yugoslavia. See International Committee of the Red Cross, *supra* note 88 n.3.

⁹² Marion Forsyth, *Casualties of War: The Destruction of Iraq's Cultural heritage as a Result of U.S. Action During and After the 1991 Gulf War*, 14 DE PAUL J. TECH. & INTELL. PROP. L. 73, 79 (2004).

Twelve years later, Iraq had to endure another massive loss of cultural property. In 2003, during the US invasion of Iraq, the latter's National Museum and other archaeological sites were looted as a result of civil disorder in the country upon the entry of American soldiers, and the disintegration of the Hussein regime.⁹³ The aftermath of the annihilation of Iraq's irreplaceable cultural properties on both periods of armed conflict has increased the clamor for the protection of cultural heritage around the world, and the creation of other international instruments to ensure their protection.⁹⁴

In 2001, the world witnessed for the first time the intentional destruction of cultural heritage sites by a militant group. The Taliban army destroyed the Buddhas at Bamiyan, at the foot of the Hindu Kush mountains in Afghanistan with the objective of eradicating any cultural manifestation foreign to Taliban ideology.⁹⁵ As a specific response to the destructive acts of the Taliban, the UNESCO released the "Declaration Concerning the Intentional Destruction of Cultural Heritage." Although this Declaration does not intend to be binding on states, it manifests that the destruction of cultural heritage has adverse consequences on human dignity and human rights,⁹⁶ and urges states to become parties to treaties that protect cultural heritage.⁹⁷ In doing so, states must bear responsibility for either intentional destruction of cultural heritage sites or failing to prevent such destruction, to the extent provided by international law.⁹⁸

Despite existing international law mechanisms that have imposed lofty penalties for the intentional destruction of cultural heritage structures, the willful annihilation of the same persists. In 2012, a militant movement associated with Al Qaeda called the *Ansar Dine* intentionally destroyed several mausoleums declared as UNESCO World Heritage Sites in Timbuktu, Mali.⁹⁹ In 2015, the so-called Islamic State in Iraq and Syria ("ISIS"), an Islamic militant group that has gained control of Iraqi and

⁹³ Matthew D. Thurlow, *Protecting Cultural Property in Iraq: How American Military Policy Comports with International Law*, 8 YALE HUM. RTS. & DEV. L.J., 153, 176 (2005).

⁹⁴ *Id.* at 164.

⁹⁵ Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR J. INT'L L., 619 (2003).

⁹⁶ UNESCO, Records of the 32nd General Conference, Doc. 32 C/Resolutions (Vol. 1) (Sept. 29 to Oct. 17, 2003).

⁹⁷ *Id.* at III 4.

⁹⁸ *Id.* at VI.

⁹⁹ International Criminal Court, *Al Mahdi Case*, INTERNATIONAL CRIMINAL COURT WEBSITE, at <https://www.icc-cpi.int/mali/al-mahdi> (last accessed May 23, 2018).

Syrian territory,¹⁰⁰ intentionally destroyed cultural sites, such as the Temple of Baalshamin and several other historic structures located in the ruins of Palmyra in Syria, Nimrud, Khorsabad, Jonah's Tomb and Hatra to attain their ultimate goal of cultural cleansing.¹⁰¹ Clearly, the existing mechanisms under international law are not enough to effectively protect cultural heritage, especially against armed attack.¹⁰²

In 2016, the International Criminal Court ("ICC"), for the first time,¹⁰³ convicted an individual for the intentional destruction of cultural heritage sites in non-international armed conflict under Article (8)(2)(e)(iv) of the Rome Statute. The ICC found Ahmad Faqi Al Mahdi, a member of the *Ansare Dine*, guilty of the intentional destruction of cultural heritage sites under Article 8(2)(e)(iv) of the Rome Statute.

In its Ruling, the ICC Chamber presided by Judge Raul Pangalangan noted that Al Mahdi was not charged with the general crime of destruction of civilian property, noting in particular that "cultural objects in non-international armed conflicts are protected as such, not generically as civilian objects, only in Article 8(2)(e)(iv), which makes no distinction between attacks made in the conduct of hostilities or afterwards."¹⁰⁴ The Chamber declared that the intentional attack on the World Heritage Sites is of a particular gravity, since it affected not only the direct victims of the crimes, such as the inhabitants of Timbuktu, but also the people of Mali and the international community:

[D]estroying the mausoleums, to which the people of Timbuktu had an emotional attachment, was a war activity aimed at breaking the soul of the people of Timbuktu. In general, the population of Mali, who considered Timbuktu as a source of pride, were indignant to see these acts take place. Moreover, [...] the entire international community, in the belief that heritage is part of cultural life, is suffering as a result of the destruction of the protected sites.¹⁰⁵

¹⁰⁰ Faisal Irshaid, *ISIS, ISIL, IS or Death? One group, many names*, BBC NEWS, Dec. 2, 2015, at <https://www.bbc.com/news/world-middle-east-27994277> (last accessed May 23, 2018).

¹⁰¹ Caitlin V. Hill, *Killing a Culture: The International Destruction of Cultural Heritage in Iraq and Syria under International Law*, 45 GA. J. INT'L & COMP. L. 191 (2016).

¹⁰² *Id.* at 220.

¹⁰³ Prosecutor v. Ahmad Al Faqi Al Mahdi, Judgment, ICC-01/12-01/15 (Sept. 27, 2016).

¹⁰⁴ *Id.* at 16.

¹⁰⁵ *Id.* at 80.

Al Mahdi was sentenced to nine to eleven years of imprisonment.¹⁰⁶

2. *Protection from Illicit Trafficking*

Different types of cultural property are afforded different types of protection. As discussed above, practical applications of international law, specifically in international humanitarian law, have afforded protection to immovable cultural properties such as buildings, archaeological sites and monuments. On the other hand, it is worth noting that a different framework for protection is afforded to movable cultural property. The main difference between movable cultural property and immovable cultural property is the ability of the former to be transported from place to place. The ability of cultural objects to be transferred gave rise to the issue of illicit trafficking.

In 1970, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property introduced legal means to combat the import, export and transfer of ownership of cultural property misappropriated during armed conflict, including belligerent occupation.¹⁰⁷ Article 11 declares that exporting and transferring the ownership of cultural property obtained under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be considered illicit.¹⁰⁸ It is through this Convention that the concept of repatriation was introduced into the international community, and the discussion that there was a remedy for the return of movable cultural properties that were taken by conquering forces during armed conflicts was kept ablaze in the sphere of international law.

In 1995, the International Institute for the Unification of Private Law (“UNIDROIT”) created the 1995 UNIDROIT Convention on Stolen or Illicitly Exported Cultural Objects, upon the prodding of UNESCO and The Hague Conference on Private International Law.¹⁰⁹ This Convention deals with both stolen and illegally exported cultural property. Through this Convention, the return of any stolen cultural object may be demanded as long as specific conditions are met.

¹⁰⁶ *Id.* at 106.

¹⁰⁷ Roger O’Keefe, *Protection of Cultural Property*, in *THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT* 509 (Clapham & Gaeta eds., 2014).

¹⁰⁸ 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property [hereinafter “1970 UNESCO Convention”], art. 11.

¹⁰⁹ Lyndel Prout, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects—Ten Years On*, 14 *UNIFORM L. REV.* 215 (2009).

These two international conventions provide states-parties with basis to demand the restitution of stolen artifacts, and at the same time a means for controlling the transfer of ownership of stolen or illicitly exported artifacts. Thus, the control of the inter-state movement of movable cultural property is a general means by which movable cultural property is afforded protection in international law.

3. Repatriation as a Means to Protect Cultural Heritage

It has been suggested that once states are capable of protecting cultural property from armed conflict and from illicit trafficking, the next concern that they can address is the repatriation of colonial cultural property.¹¹⁰ In the case of repatriation, the premise of returning cultural property to their origins in certain situations connotes another round of movement for movable cultural properties. The means by which repatriation is protective of cultural property transcends physical protection. The premise of protecting cultural property through repatriation is anchored on the preservation of the historical and cultural significance that they represent, and the national unity that they may impart.

a. The Significance of Repatriation

The discussion as to whether cultural artifacts obtained by non-source states during colonial periods must be returned to their countries of origin has been ongoing since the period of war and conquest. Arguments in favor of repatriation include the development of national unity and the accessibility of cultural property to citizens of the country of origin. On the other hand, the questions of the ability to conserve and preserve cultural property, the damage that the return of the same might cause, and the legality of the transfer are some of the arguments that go against repatriation.

i. The Development of National Unity

Cultural heritage is manifested through tangible objects, including artifacts that may be unique to certain states and civilizations. The removal of cultural property from source countries turns them into mere commodities by their current possessors.¹¹¹ Without being in the right

¹¹⁰ See Mastalir, *supra* note 76, at 1035.

¹¹¹ PATRICK O' KEEFE. TRADE IN ANTIQUITIES: REDUCING DESTRUCTION AND THEFT 7 (1997)

context, the purpose for which cultural property is even considered as such, over ordinary property, cannot be fully realized. For former colonies like the Philippines, the development of national identity can be achieved successfully through the association with a study of cultural objects created by their indigenous populations.¹¹²

ii. Accessibility to the Artifacts in the Country of Origin

The repatriation of cultural property to states of origin will restore its accessibility to its constituents. Accessibility of such movable cultural property in the possession of other states will give source-nations first priority in studying such items. The lack of access to movable cultural property that may currently be in private collections or in storerooms of museums may be the reason for sluggish developments in extracting new information for developments in education, and even in the formulation of policy.¹¹³ In the Philippines, many Islamic manuscripts, which had previously been conserved as family heirlooms, were captured by American soldiers and were either taken away or destroyed during the Filipino-American War.¹¹⁴ The removal of movable cultural property from previously undiscovered archaeological sites in Nineveh, Mesopotamia (now part of modern-day Iraq) made such items more accessible to Europeans in the 19th Century, depriving current citizens of the State of origin from even being aware of their existence.¹¹⁵ Truly, without the proper access to movable cultural property, a State cannot fully realize the tangible link that such objects can achieve.

b. The Disadvantages of Repatriation

Colonial powers which obtained movable cultural property from their colonies are oftentimes more equipped for their conservation and preservation. Thus, many authors have suggested that it is for the best interest of movable cultural properties that they remain in the possession of museums abroad.

i. Insufficient Resources for the Preservation of Objects from the Country of Origin

¹¹² See Klesmith, *supra* note 66.

¹¹³ III LYNDALL PROTT & PATRICK O'KEEFE, LAW AND THE CULTURAL HERITAGE: MOVEMENT 16 (1989).

¹¹⁴ See *supra* note 25.

¹¹⁵ See Prott & O'Keefe, *supra* note 113, at 14.

Cultural internationalism presupposes that cultural property is significant to the development of the culture of all mankind. Thus, it is vital that cultural property must be displayed in locations that are capable of ensuring proper preservation, even at the expense of the country of origin, in which such materials were created, and where they may bear the most cultural significance.¹¹⁶ Many countries with colonial histories do not have the resources to maximize the preservation of centuries-old artifacts. The British Museum, possessor of the Parthenon Marbles (or Elgin marbles) obtained from Greece in the 1800s, has argued that the removal of the marbles was a rescue operation against further loss and vandalization.¹¹⁷

ii. Damage to Objects in Transit

Another disadvantage of repatriation is the possible destruction of cultural property while being transported. Even if all efforts necessary for the preservation of cultural property are exerted during transit, delicate objects such as paintings, manuscripts, and other handmade artifacts may deteriorate even at the slightest movement. More movement means more damage, and in some instances, even complete loss.¹¹⁸ The dilemma as to whether movable cultural property should be repatriated based on the risk of damage is a valid argument. Such is also the dilemma of the Parthenon Marbles currently displayed in the British Museum. The return of the marbles to Greece may result in more destruction during disassembly and transportation; further, they would face the hazard of pollution in Greece.¹¹⁹

IV. A THEORETICAL FRAMEWORK FOR THE REPATRIATION OF CULTURAL PROPERTY

An examination of world history reveals that the concept of repatriation of cultural materials can be traced to as early as the Classical Age, when the removal of cultural property in colonial situations was condemned for the first time, after ancient societies condoned the practice by victorious armies of keeping war plunder. This was the substantial reason for Cicero's prosecution of the Roman governor Verres in 70 B.C.¹²⁰ This discussion was again brought to the fore in the 16th century, when Francisco de Vitoria introduced arguments that challenged the deprivation of South

¹¹⁶ See Klesmith, *supra* note 64, at 52.

¹¹⁷ See Greenfield, *supra* note 18, at 61.

¹¹⁸ See PROTTE & O'KEEFE, *supra* note 113, at 13.

¹¹⁹ See Greenfield, *supra* note 18, at 71.

¹²⁰ See PROTTE & O'KEEFE, *supra* note 113, at 803.

American indigenous peoples of their property upon colonial rule.¹²¹ In international law, claims for the repatriation of cultural objects were introduced in the 1960s to the United Nations, as part of the decolonization process. The success of these claims was only felt during the 1980s and 1990s, after persistent claims of indigenous peoples from Australia, Canada, New Zealand, and the United States.¹²²

In the 1970s, a precedent was created in the case of Hungary, when, upon its independence from Austrian rule in 1849, cultural properties located in Austria were returned to it.¹²³ However, this precedent was not applied to already decolonized states. By this time, the 1970 UNESCO Convention was made non-retroactive.¹²⁴

A glimmer of hope for existing claims for repatriation came in 1973, when the U.N. General Assembly passed Resolution No. 3187, entitled “Restitution of works of art to countries victims of expropriation,” which referred to the “Declaration on the Granting of Independence to Colonial Countries and Peoples” in its preamble.¹²⁵ This Resolution deplored the wholesale removal, virtually without payment, of *objets d’art* from one country to another, frequently as a result of colonial or foreign occupation. It further stated that the restitution of such works would make good the serious damage suffered by countries as a result of such removal.

The discussion on the issues involving repatriation was further kept alive in 1976, when UNESCO convened experts in Venice to discuss the matter further. The committee discussed in detail the limits in space and time for claims of restitution and what cultural properties should be covered, and recommended a campaign to educate the public to understand the need for restitution and return.¹²⁶ By 1978, the Director-General of UNESCO, Amadou Mahtar-M’Bow, issued a “Plea for the Return of the Irreplaceable Cultural Heritage to those who Created It.” This text called for the return of at least the art treasures which best represented their culture, which they feel are the most vital and whose absence causes them great anguish.¹²⁷

¹²¹ *Id.*

¹²² *Id.* at 805-806.

¹²³ See Greenfield, *supra* note 18.

¹²⁴ See PROTTE & O’KEEFE, *supra* note 113.

¹²⁵ United Nations General Assembly Resol. No. 1514, Restitution of works of art to countries victims of expropriation (1973), available at http://www.unesco.org/culture/laws/pdf/UNGA_resolution3187.pdf.

¹²⁶ UNESCO Final Report of the Committee of Experts to Study the Question of the Restitution of Works of Art, UNESCO Doc. SHC-76/ CONF 615/3 (1976).

¹²⁷ See PROTTE & O’KEEFE, *supra* note 113.

A. The Law of State Succession and the Return of Cultural Treasures

As the number of colonial powers diminished following the conclusion of World War II, the international community was introduced to new trends in international law. One such principle that emerged was the law of succession of states, and the practice of colonial powers returning the former colony's archives and other objects of cultural significance upon the grant of sovereignty by the former to the latter.

In international law, state succession is briefly defined as "the replacement of one state by another in the responsibility for the international relations of territory."¹²⁸ It occurs after a factual change in sovereign authority over a particular territory.¹²⁹ This scenario contemplates the formation of a new state when a colonized territory is granted independence by the colonizing state, thus forming an independent state. The Peace of Westphalia that concluded the Thirty Years' War in 1648 is credited as a historical milestone that introduced the concept of succession of states.¹³⁰ During this time, as a result of the peace treaty practice, colonizing states sanctioned for the first time, the return of archives and public movable properties belonging or relating to ceded territories. From this time on, the practice of turning over archives and movable public properties to newly ceded states, or what is more commonly known as succession of states, became common practice.¹³¹

The numerous treaties between successor states and colonizing states that provided for the ceding not only of sovereignty to the former, but also of archives and movable property, paved the way for the drafting of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts by the International Law Commission. This practice also paved the way for the international community to put importance into the settlement of property controversies arising from war conduct. An early example of this is the 1659 Treaty of Pyrenees, which can be credited for the resolution of several French-Spanish conflicts. The

¹²⁸ Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983), art. 2 (1)(a), *available at* http://legal.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf.

¹²⁹ VII MALCOLM SHAW, INTERNATIONAL LAW 695 (2014), *available at* <http://euglobe.ru/wp-content/uploads/2017/01/Malcolm-N.-Shaw-International-Law-6th-edition-2008.pdf>.

¹³⁰ *See* Jukabowski, *supra* note 14, at 31.

¹³¹ *Id.* at 32.

formula for property settlement controversies in the context of succession of states was introduced in Article CXII of this Treaty.¹³²

It was at the 1815 Congress of Vienna that the general rule of returning cultural treasures after a period of colonization was institutionalized. This came after the era of Napoleon Bonaparte, when the practice permitted the appropriation of war booty during times of armed conflict and occupation.¹³³ The practice of returning cultural materials to newly ceded territories continued on during the aftermath of the First World War, as can be gleaned from the general principle of liberation and the practice of restoration of patrimony of a number of European states under enemy occupation during the Paris Peace Conference.¹³⁴ In fact, all peace treaties that put an end to the First World War provided for the restitution of movable cultural property removed during the war from occupied and ceded territory.¹³⁵ It was then that the world saw the demise of colonization, as newly ceded States formed strong and autonomous governments that denounced imperialism.¹³⁶

The conclusion of the Second World War further fortified the independence of states as colonial systems diminished. In 1945, the principle of self-determination was introduced to the world as a modern concept of international law.¹³⁷ In 1960, the UN Declaration on the Granting of Independence to Colonial Countries and Peoples¹³⁸ was a key international instrument that institutionalized the suspension of colonialism. It was during this time that the international community adhered to the concept of *uti possidetis juris*, a principle that ensured newly independent states would respect the boundaries delineated by their colonizing powers while they were colonial territories. This principle was upheld in the case of *Temple of Preah Vihear*¹³⁹ decided by the International Court of Justice, where it ruled that the Temple of Preah Vihear was located within the territory of Cambodia, and that Thailand was obligated to restore to Cambodia the cultural properties removed therein.

B. Nationalism and the Restitution of Cultural Objects

¹³² *Id.*

¹³³ *Id.* at 37.

¹³⁴ *Id.* at 58.

¹³⁵ *Id.* at 63.

¹³⁶ *Id.* at 118.

¹³⁷ *Id.* at 119.

¹³⁸ See United Nations General Assembly Resol. No. 1514 (1973). Restitution of works of art to countries victims of expropriation.

¹³⁹ *Temple of Phreah Vihear (Camb. v. Thai.)*, Merits, 1962 I.C.J. 6 (June 15).

The interpretation of cultural property may be in two perspectives: *first*, through the framework of being tangible objects of artistic, archaeological, ethnological or historic interest, and *second*, through the framework of it being part of a national cultural heritage. The first perspective considers cultural property as a vital component of human culture, regardless of its present location and ownership, while the second perspective injects into the framework a concept of nationalism into such cultural property, likewise regardless of its present location or present ownership. It is this perspective that favors the repatriation of cultural property. All domestic and international laws that protect cultural property in times of war support the first perspective, while laws that permit the export and import of cultural property and promote the repatriation of cultural property to their state of origin reflect the second perspective.¹⁴⁰

For the past fifty years, numerous states have incorporated repatriation as a form of protection of cultural property into their domestic laws and regulations, and even bilateral, regional and multilateral treaties.¹⁴¹ The United Nations and other international organizations, such as the International Committee of the Red Cross, have released instruments to safeguard and repatriate cultural objects, and to prevent the destruction of cultural property in times of war.¹⁴²

There are several types of cultural property that are subject to repatriation claims around the globe. These can be categorized into three major categories: (1) stolen objects; (2) objects acquired from illicit trade; and (3) objects claimed historically by colonizing or dominating powers.¹⁴³ The first category deals with cultural properties with a readily identifiable owner and is therefore governed by principles of private international law.¹⁴⁴ The second and third categories, on the other hand, deal with cultural property whose owners are not readily identifiable, since these objects are said to belong not to one specific person, but to an identifiable group of people or an ethnic group, or even a culture. In these two categories, public

¹⁴⁰ See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986).

¹⁴¹ See PROTTE & O'KEEFE, *supra* note 113.

¹⁴² See Klesmith, *supra* note 64.

¹⁴³ See Karen Goepfert, *Note: The Decapitation of Ramesis II*, 13 B.U. INT'L L. J. 503 (1995).

¹⁴⁴ See Craig Forrest, *Strengthening the International Regime for the Prevention of the Illicit Trade in Cultural Heritage*, 4 MELB. J. INT'L L. 9 (2003).

international law is a necessary tool in the safeguarding of cultural heritage.¹⁴⁵

V. PERSPECTIVES OF REPATRIATION IN INTERNATIONAL LAW

Today, the claims for repatriation of cultural property have been accelerating at a steady pace. The UNESCO has provided a list of successful repatriation claims following the fervent clamor of former colonies to recover them from possessing states.¹⁴⁶ All such claims have been facilitated either through voluntary return by state-possessors or private museums, or by international treaties that have been products of years of negotiations. Ultimately, previous successful repatriation claims really depended on the will of both states involved in repatriation claims. International law provides several emerging perspectives to fortify the basis for claims for the repatriation of cultural materials.

A. The Principle of Self-Determination and Decolonization

The Universal Declaration of Human Rights (“UDHR”) is a non-binding international instrument that is considered the international bill of human rights. The UDHR contains several provisions on culture, which recognize that cultural rights are indispensable to a person’s dignity and the free development of his personality,¹⁴⁷ and that everyone has the right to freely participate in the cultural life of the community.¹⁴⁸

One of the UDHR’s implementing instruments is the International Covenant on Civil and Political Rights (“ICCPR”), a binding multilateral treaty formulated in 1966. Here, the principle of self-determination was recognized as a right of all peoples. By virtue of this right, all peoples may freely determine their political status, freely pursue their economic, social and cultural development, and freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law. According to the study of Aureliu Cristescu, Special

¹⁴⁵ See Klesmith, *supra* note 64.

¹⁴⁶ UNESCO, *Recent examples of successful operation of cultural property restitutions in the world*, UNESCO WEBSITE, at <http://www.unesco.org/new/en/culture/themes/restitution-of-cultural-property/successful-restitutions-in-the-world> (last accessed May 23, 2018).

¹⁴⁷ United Nations General Assembly Resol. No. 217(A), Dec. 10, 1948, art. 22, available at [https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217\(III\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III)).

¹⁴⁸ UDHR, art. 27.

Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, self-determination is a prerequisite for the implementation and preservation of the right to cultural life and of all other human rights and fundamental freedoms.¹⁴⁹

Although this right did not explicitly provide for the right to cultural resources, several developments to the interpretation and scope of the right to self-determination were introduced following the Cold War. Post-colonial states also organized themselves into the Non-Aligned Movement, which kept the campaign for claims over cultural resources removed from successor states before gaining independence.¹⁵⁰ These developments led to new interpretations of the right of self-determination to be an ongoing process that included the right of every independent people to regain, enjoy and enrich their cultural heritage.¹⁵¹

B. The Right to Self-Determination and the Anti-Colonial Struggle

In the decades following the Second World War, the United Nations General Assembly, through the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and several resolutions, has explicitly recognized the struggle of former colonies to exercise their right to self-determination.¹⁵² In particular, the 1973 Resolution on the Restitution of Works of Art to Countries Victims of Expropriation deplored the removal of “‘*objects d’art*’ from one country to another, frequently as a result of colonial or foreign occupation,” and recognized the special obligations of “those countries which had access to such valuable objects only as a result of colonial or foreign occupation.”¹⁵³ In 1976, the UN

¹⁴⁹ Aureliu Cristescu, *The Right to Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments*, E/CN.4/Sub.2/I. 625, 111:641 (1981), available at <https://www.cetim.ch/legacy/en/documents/cristescu-rap-ang.pdf>.

¹⁵⁰ *Id.* at 294; see Jukabowski, *supra* note 14, at 148.

¹⁵¹ ANA FILIPA VRDOLJAK, *INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS* 204 (2006), available at http://assets.cambridge.org/052184/1429/frontmatter/0521841429_frontmatter.pdf; United Nations General Assembly Resol. No. 3148 (XXVIII), *Preservation and Further Development of Cultural Values* (1973), available at <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/282/20/IMG/NR028220.pdf?OpenElement>.

¹⁵² See United Nations General Assembly Resols. on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: 2189 (XXI; 1966); 2326 (XXII; 1967); 2465 (XXIII; 1968); 2548 (XXIV; 1969); 2708 (XXV; 1970); 2878 (XXVI) (1971); 2908 (XXVII) (1972); 3163 (XXVIII) (1973); and 3328 (XXIX) (1974).

¹⁵³ United Nations General Assembly Resol. No. 3187 (XXVIII; 1973). *Restitution of Works of Art to Countries Victims of Expropriation*, available at http://www.unesco.org/culture/laws/pdf/UNGA_resolution3187.pdf.

General Assembly considered the following initiatives for the exercise of the right to self-determination:

1. The restitution of cultural objects removed prior to independence;
2. Technical and financial assistance for the preservation and development of the cultures and their physical manifestations; and
3. The regulation of the illicit export, import and transfer of cultural objects.¹⁵⁴

C. The Right of Indigenous Peoples to the Repatriation of Indigenous Materials

Another instrument that can be explored that may provide remedies for the repatriation of indigenous cultural property is the UN Declaration of the Rights of Indigenous Peoples (“UNDRIP”). Article 12(1) defines the “right of repatriation” for “human remains” and the right to the “use and control of ceremonial objects.”¹⁵⁵ This Declaration also requires states to “enable the access and/or repatriation of ceremonial objects and human remains in their possession.”¹⁵⁶ Although the UNDRIP is generally not legally binding on states, this declaration of principles shows that the international community recognizes the rights of indigenous peoples to access indigenous cultural property as a means of self-determination. As of today, however, there exists no tailored law for international indigenous cultural property repatriation claims. Nonetheless, international law on cultural heritage is slowly influencing domestic legislation on the matter of repatriation.¹⁵⁷

VI. PERSPECTIVES OF REPATRIATION IN PHILIPPINE LAW

In the Philippines, the NCHL, including its Implementing Rules and Regulations (“IRR”), provides for a registration requirement for cultural

¹⁵⁴ United Nations General Assembly Report of the Governing Council of the United Nations Environment Programme, Doc. A/31/111, 57- 64 (1976); UN Conference on an International Code of Conduct on the Transfer of Technology, Doc. A/33/157. 56 (1978).

¹⁵⁵ United Nations General Assembly Resol. No. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/61/L.67 (2007), *available at* <https://undocs.org/A/RES/61/295>.

¹⁵⁶ UNDRIP, art. 12(2).

¹⁵⁷ KAROLINA KUPRECHT, INDIGENOUS PEOPLES’ CULTURAL PROPERTY CLAIMS 124 (2014).

property situated in the Philippines. This law contemplates that registration is a requirement for objects to be considered cultural property and to be afforded protection by this law. Thus, provisions for the facilitation of repatriation claims under this law only apply to registered cultural property. In order to better understand the intent of this law, the framework for the protection of cultural heritage in the Philippines must first be examined.

A. Cultural Heritage Protection under the 1987 Constitution

Under the 1987 Constitution, the State shall give priority to the arts and culture, among others, to foster patriotism and nationalism, and to promote total human liberation and development.¹⁵⁸ The provisions on Arts and Culture in Article XIV further specify that the State shall foster the preservation, enrichment and dynamic evolution of a Filipino national culture,¹⁵⁹ conserve, promote and popularize the nation's historical and cultural heritage resources,¹⁶⁰ recognize, respect and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions,¹⁶¹ and encourage and support researches and studies on the arts and culture.¹⁶² These specific provisions are expressions and manifestations of the State's desire to articulate its own cultural identity after decades of colonial rule.¹⁶³

At the national level, the Cultural Properties Regulation Division (“CPRD”) of the National Museum is clothed with adequate police power to ensure the protection and preservation of cultural properties, tangible and intangible, movable and immovable, in the Philippines. This power was granted by virtue of Republic Act No. (“R.A.”) 4846, as amended by Presidential Decree No. 374, which created this Division.¹⁶⁴ Furthermore, with the passage of the NCHL, the NCCA and the National Museum, through the CPRD are also empowered to recover and retrieve cultural properties which are under the custody of foreign nationals or entities.¹⁶⁵

¹⁵⁸ CONST. art. II, § 17.

¹⁵⁹ Art. XIV, § 14.

¹⁶⁰ § 15.

¹⁶¹ § 17.

¹⁶² § 18 (2).

¹⁶³ JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 55 (2003).

¹⁶⁴ Rep. Act No. 4846 (1966). The Cultural Properties Preservation and Protection Act, *as amended by* Pres Dec. No. 374 (1972).

¹⁶⁵ Rep Act No. 10066 (2010), § 29. (“The Commission is empowered to recover or retrieve cultural property which are under the custody of foreign nationals or entities and to bring these properties back to Philippine custody.”)

B. History of Philippine Legislation on Heritage Protection

Historically, the first law on heritage protection dealt with movable cultural property in the Philippines. Enacted in 1931, Act No. 3874 defined “antiques” as “such objects as are more than one hundred years old.”¹⁶⁶ This law imposed a fine on violators not exceeding PHP 2,000.00, along with the confiscation of the object.¹⁶⁷

Because of the growing interest in archaeological materials as observed through widespread treasure hunting and commercial excavations, R.A. No. 4846, also known as the Cultural Properties Preservation and Protection Act was passed on June 18, 1966. Congressional records show that lawmakers deemed Act No. 3874 to be obsolete, as compared to the laws that protected cultural heritage in Japan, India, Syria, Mexico, Germany and France, among others.¹⁶⁸ At this time, the international organizations were formulating agreements on the protection, repatriation and regulation of international movement of cultural properties, while at the same time, the Philippines was becoming a well-known source of antiques and artifacts.¹⁶⁹ Thus, the repeal of the previous law was anchored on the premise of controlling the movement of certain artifacts within the Philippines and beyond.

Thirty-five years later, Congress adopted a new definition of cultural properties through R.A. No. 10066 or the NHCL of 2009, which defines “cultural property” as “all products of human creativity by which a people and a nation reveal their identity, including churches, mosques and other places of religious worship, schools and natural history specimens and sites, whether public or privately-owned, movable or immovable, and tangible or intangible.”¹⁷⁰ This definition broadened the scope of cultural property to include “all products of human creativity” instead of providing for an enumeration of objects in the previous definition. The 2009 law contemplates that in order for property to be considered as “cultural property,” the following elements must concur: *first*, it must be a product of human creativity, whether tangible or intangible; and *second*, it must reveal a people’s and a nation’s identity.

¹⁶⁶ Act No. 3874 (1931), § 1. An Act Prohibiting the Exportation of Antiques of the Philippine Islands.

¹⁶⁷ § 2.

¹⁶⁸ H. Journal 68, 6th Cong. 220 (1966). Explanatory Note.

¹⁶⁹ *Id.*

¹⁷⁰ Rep. Act No. 10066 (2010), § 3(o).

C. Cultural Agencies Responsible for the Protection of Cultural Property

The NCHL grants the power to monitor, assess and develop cultural properties to six government agencies. For intangible cultural properties, the Cultural Center of the Philippines (“CCP”) is responsible for performing arts,¹⁷¹ and the *Komisyon sa Wikang Filipino* is responsible for the dissemination, development and promotion of the Filipino national language.¹⁷²

For tangible cultural property, the National Archives of the Philippines (“NAP”) is responsible for significant archival materials,¹⁷³ the National Library (“NLP”) is responsible for rare and significant contemporary Philippine books, manuscripts and newspapers,¹⁷⁴ the National Historical Commission of the Philippines (“NHCP”) is responsible for significant movable and immovable cultural property that pertains to Philippine history and heroes and for the conservation of historical artifacts,¹⁷⁵ and the National Museum (“NM”) is responsible for significant movable and immovable cultural and natural property pertaining to fine arts, archaeology, anthropology, botany, geology, zoology and astronomy.¹⁷⁶

D. The Registration of Cultural Property

To effectively document cultural properties in the Philippines, the National Cultural Heritage Act of 2009 mandates the registration of all cultural properties in the country deemed important to cultural heritage in the Philippine Registry of Cultural Property (“PRECUP”).¹⁷⁷ Private collectors and owners of cultural property,¹⁷⁸ as well as government agencies and instrumentalities, government-owned or controlled corporations and their subsidiaries, including public and private educational institutions,¹⁷⁹ are required to register and report their ownership and/or possession of cultural properties to the pertinent cultural agency concerned.

¹⁷¹ § 31(a).

¹⁷² § 31(f).

¹⁷³ § 3(b).

¹⁷⁴ § 3(c).

¹⁷⁵ § 3(d).

¹⁷⁶ § 3(2).

¹⁷⁷ § 14.

¹⁷⁸ § 14(e).

¹⁷⁹ § 14(d).

Cultural agencies such as the NCCA, NM, NHCP and NAP are in turn required to maintain individual inventories of cultural properties under their jurisdiction.¹⁸⁰ Likewise, local government units, through their cultural offices, are also required to maintain the same, and must coordinate with the respective cultural agencies concerned in the making of entries and the monitoring of various cultural properties in their inventory.¹⁸¹

E. The Protection of Movable Cultural Property

The subject matter of repatriation claims is movable cultural property. Following the current definition of “cultural property,” it can be gleaned that there is no law that expressly defines “movable cultural property” *per se*. Absent an express definition, the Civil Code provision¹⁸² on movable property can supplement the concept of movable cultural property in the NCHL. Thus, read together, movable cultural property, under Philippine laws, can be understood as “all things which can be transported from place to place, without impairment of the real property to which they are fixed, that are products of human creativity, by which a people and a nation reveal their identity, whether public or privately owned,” for the purposes of this Note.

The NM, NHCP, NAP and NLP are the appropriate cultural agencies that deal with movable cultural property. Some examples of movable cultural properties in the Philippines may include, but are not limited to, anthropological, ethnographic, archaeological materials, and documents that reveal the identity of a certain people or nation.

An example of movable cultural property in the Philippines is the *Manunggul Jar*, which is an earthenware burial jar which features a “ship of the dead” on the cover, and a boat with two figures depicting the spirit of the dead ferried to the afterlife. This was dated as having been created in the Neolithic period, from 710-890 BC. It was retrieved at the Manunggul Cave in Quezon, Palawan. It is also considered as a National Cultural Treasure.¹⁸³

The NCHL further categorizes cultural property as:

1. National cultural treasures;
2. Important cultural property;

¹⁸⁰ § 14(a).

¹⁸¹ § 14(b).

¹⁸² CIVIL CODE, art. 416.

¹⁸³ See Bautista, *supra* note 2, at 1.

3. World heritage sites;
4. National historical shrines;
5. National historical monuments; and
6. National historical landmarks.¹⁸⁴

Under the law, the following presumptions apply to certain movable cultural properties in order to be considered “important cultural properties,” unless already declared by their appropriate cultural agency, for purposes of protecting a cultural property against exportation or modification:

1. Unless already declared by the NCCA: works by a *Manlilikha ng Bayan* (National Living Treasure) or works by a National Artist;
2. Unless already declared by the NM: archaeological and traditional ethnographic materials;
3. Unless declared by the NHCP: works of national heroes; and
4. Unless declared by the NAP: archival materials or documents dating at least 50 years old.¹⁸⁵

Through this definition and categorization, the law contemplates that there is a certain hierarchy of importance that is given to certain cultural properties, which varies, depending on certain factors such as who created them (*Manlilikha ng Bayan*, National Artists, and national heroes), age (at least 50 years old), and type or use (archaeological, traditional and ethnographic). Cultural agencies such as the NCCA, NM, NHCP and NAP are the competent authorities to determine the nature and classification of these movable cultural properties. The law also allows the private owners of these movable cultural properties to petition the appropriate cultural agency to remove such presumption of being an important cultural property.¹⁸⁶

F. The Regulation of Inter-State Movement of Cultural Property

The NCHL provides for measures on regulating the export, transit, import, and repatriation of registered cultural property. The law grants the exportation of registered cultural properties for the following purposes only:

1. The exportation of cultural property is for a temporary basis; and

¹⁸⁴ Rep. Act No. 10066 (2010), § 4.

¹⁸⁵ § 5.

¹⁸⁶ § 5(3).

2. The exportation of cultural property is necessary for scientific scrutiny or exhibit.¹⁸⁷

The following requirements must first be secured before the exportation of cultural property is permitted:¹⁸⁸

1. Authorization from the NCCA, through the appropriate cultural agencies; and
2. Application for export permit submitted 30 days before exportation from the Philippines.

The export permit must include the following:

1. The purpose of the temporary export;
2. The export date of the cultural property;
3. The repatriation date of the cultural property;
4. A description of the cultural property; and
5. The inventory of the cultural property in the PRECUP.¹⁸⁹

G. The Repatriation of Registered Cultural Property

Under the NCHL, should there be instances when registered cultural properties are illicitly exported from the Philippines, the Department of Foreign Affairs, upon recommendation of the appropriate cultural agency, shall claim the right of repatriation vis-à-vis all other contracting states.¹⁹⁰

For the protection of cultural and foreign affairs interests, as well as to secure cultural heritage, international treaties may also be concluded with contracting states that concern the importation and repatriation of cultural property, subject to the following conditions:

1. The scope of the agreement must be cultural property of significant importance to the cultural heritage of the contracting States;
2. The cultural property must be subject to the existing export policies for the purpose of protecting cultural heritage; and

¹⁸⁷ § 23(c).

¹⁸⁸ § 23.

¹⁸⁹ *Id.* at § 23(c).

¹⁹⁰ § 24.

3. The contracting States shall grant reciprocal rights.¹⁹¹

VII. APPLICATION AND ANALYSIS

At this point, the perspectives in international law that encourage the return of cultural property have two indications:

1. The practice of returning objects of cultural significance to succession states has been an existing practice for centuries; and
2. Many successor states have been successful in their claims for the repatriation of colonial cultural property.

With these developments, it can be gleaned that the Philippines has not been progressive with the facilitation of repatriation claims because of the following challenges:

1. The repatriation of cultural materials cannot be considered as customary international law;
2. There are complications in the history of the Philippines as a successor state;
3. The registration requirement in the NCHL limits its application; and
4. There is a lack of Philippine legislation to implement the right of self-determination through repatriation.

A. The Repatriation of Cultural Materials and Customary International Law

In order for the practice of repatriating cultural property to be binding under customary international law, it must have two elements: *first*, a wide, uniform and lasting practice of states, and *second*, *opinio juris sive necessitates*, or the behavior that implies that actions are carried out because of the belief that it is legally binding.¹⁹² In the context of the NCHL and the repatriation of cultural materials, customary international law can be seen through the growing state practice of entering into bilateral and multilateral treaties on the subject, as well as the increasing number of granted

¹⁹¹ § 24.

¹⁹² See Shaw, *supra* note 129.

repatriation requests by states,¹⁹³ and the increasing number of enacted UN General Assembly resolutions on the matter.

Although it has been argued that the practice of returning cultural property obtained during periods of colonization by occupying forces can be considered customary international law, repatriation claims have been widespread, the number of successful claims is increasing, and it is difficult to conclude that there is both uniform state practice and *opinio juris* that ripens to custom. The discussion on defining cultural property in the early parts of this Note shows that the difficulty in defining “cultural property” as a concept in itself can be one of the root causes why considering repatriation as custom is difficult. The history of colonial states also varies from case to case. Establishing a uniform state practice that can account for the method by which they attained independence from their respective colonizing states may attract complications for claims for repatriation.

As for *opinio juris*, successful claims for repatriation were the product of the meeting of the minds of stakeholders that resulted in treaties between the parties. The road to considering the practice of repatriation as customary international law may thus be in the initiatory phase, and may be considered as such with continued practice and developments.

*1. Towards a Uniform and Consistent Practice:
Steps in the Right Direction*

Although there have been many successful repatriation claims, there have also been many failed attempts, as seen in the case of the Parthenon Marbles and other artefacts originating from the Philippines as previously discussed. The threshold of “taking” cultural property during the colonial period has not yet been established in international law. However, this by no means implies that the practice of repatriating cultural property is not heading in the direction of being considered as customary international law. The question as to how to facilitate repatriation claims can be answered through Jos van Beurden’s model for negotiating repatriation claims based on previous examples:

1. *Phase 0: Facilitating factors.* This phase involves the media, advocacy organizations, and other factors that aid in facilitating an atmosphere conducive to negotiations. As seen through various examples such as the clamor in Indonesia and

¹⁹³ See Klesmith, *supra* note 66. See also UNESCO, *supra* note 146.

Nigeria for their respective colonizers to return removed cultural property, possessor-states voluntarily returned the cultural property in question even before negotiation.

2. *Phase 1: Inviting the other party.* In this phase, one party initiates and formally invites the other party to negotiations. As seen through the examples of Congo, Iceland and Indonesia, it is usually the claiming party that initiates negotiations.
3. *Phase 2: Preparation by the two parties.* Here, both parties delineate the specific cultural property that is involved in their claim for repatriation.
4. *Phase 3: Approach the other stakeholders.* This phase involves two states: the claiming state and the possessor-state. In previous examples involving Benin and Nigeria, legal experts and other experts in relevant fields, such as representatives from museums and cultural minorities for each State were involved in the negotiations. However, the true stakeholders for the negotiations are the states involved. Other representatives do not participate in the decision-making process, but merely offer advice and persuasive discourse.
5. *Phase 4: First round of decision-making.* In previous examples such as the discussions between the Netherlands and Indonesia, and Belgium and Congo, it has been observed that there is always more than one round of discussions before arriving at an agreement that results in the repatriation of cultural property.
6. *Phase 5: Deepening.* This phase involves the subsequent events after the previous phase, when both stakeholders are aware of the other's offers. In this phase, the need for more rounds of negotiations may be established, based on the formulated assumptions of each stakeholder, such as mistrust, economic interests, and other factors.
7. *Phase 6: Second and subsequent rounds of decision-making.* These rounds may come as necessary, depending on the history of each party. An example of negotiations that took more than ten years to arrive at the repatriation of cultural materials was between Indonesia and the Netherlands, and Belgium and Congo, because of complications in the history of colonization of each case.¹⁹⁴

2. *New Trends in Voluntary Repatriation*

¹⁹⁴ JOS VAN BEURDEN, TREASURES IN TRUSTED HANDS: NEGOTIATING THE FUTURE OF COLONIAL CULTURAL OBJECTS 195-97 (2017).

Nonetheless, the path for repatriation towards becoming customary international law may not be as far as it seems. Emerging trends in voluntary repatriation have been observed over the past decade. The Philippines has also been on the receiving end of various cultural materials that were voluntarily repatriated.¹⁹⁵

In 2015, the Museum Nusantara in Delft, the Netherlands offered to return 14,000 artifacts removed from Indonesia during its 350-year rule to the Indonesian government due to financial difficulties.¹⁹⁶ In the same year, the Honolulu Museum of Art initiated efforts to examine their inventory for illegally acquired cultural objects originating from India. The search resulted in the return of several collections.¹⁹⁷ In the following year, the United States marked the process of returning more than 200 cultural objects to India. This was a result of negotiations between then-US President Barrack Obama and Indian Prime Minister Narendra Modi.¹⁹⁸

In November 2017, French President Emmanuel Macron delivered a speech in Burkina Faso and declared that “African heritage can’t just be in European private collections and museums.”¹⁹⁹ This was in the context of the looting of artifacts from Benin in West Africa during the French conquest. In March 2018, in a meeting with Benin’s president Patrice Talon, Macron declared that all artifacts taken from Africa will be repatriated to their respective countries of origin. This came after Nigeria’s National Commission for Museums and Monuments called for France to unconditionally return all cultural items taken illegally from Nigeria and other parts of Africa in the 1980s. Macron subsequently appointed two experts to make plans for the repatriation of African artifacts held in French museums.²⁰⁰

¹⁹⁵ See discussion in ch. II (A).

¹⁹⁶ Bambang Muryanto, *Dutch museum to return 14,000 artifacts to RI*, JAKARTA POST, Oct. 20, 2015, available at <http://www.thejakartapost.com/news/2015/10/20/dutch-museum-return-14000-artifacts-ri.html> (last accessed May 24, 2018).

¹⁹⁷ Kate Allen, *Return of smuggled antiques wins museum praise*, THE STAR, Apr. 13, 2015, available at <https://www.thestar.com/news/world/2015/04/13/return-of-smuggled-antiquities-wins-museum-praise.html> (last accessed May 24, 2018).

¹⁹⁸ *US returns artifacts to India during PM Modi’s visit*, PRIME MINISTER NARENDRA MODI’S WEBSITE, June 7, 2016, available at <https://www.narendramodi.in/pm-modi-at-ceremoney-of-repatriation-of-cultural-property-484112> (last accessed May 24, 2018).

¹⁹⁹ See Quinn, *supra* note 19.

²⁰⁰ *Id.*

Not long after, in May 2018, the German Association of Museums and German Culture Minister Monika Grütters presented a code of conduct for museums on how to handle artifacts acquired during colonial conquest, which includes guidelines on responding to claims for restitution. The release came as a response to an uproar which involved provenance research into artifacts that were planned to go on display in an exhibit in Berlin.²⁰¹ With the continuation of these developments, and the replication by many other states, the repatriation of cultural property may attain the status of customary international law in the future.

The new perspectives in the perception of the repatriation of cultural properties show that there is a propensity for museums and states to eventually return artifacts that have either been proven to have been illegally obtained, or those that have been obtained during colonial periods. However, voluntary repatriation connotes that there are no available legal remedies of convincing, or even compelling, a party to returning cultural objects. Entering into negotiations is a sign of goodwill on the part of the returning state. Thus, the idea of having a natural obligation to return highly significant cultural objects is strongly gaining popularity.²⁰²

B. Challenges in Negotiation Proceedings

The current clamor for the return of cultural property removed during the colonial period has been recurring throughout the decades.²⁰³

1. *Complications in Philippine History and State Succession*

Under the principles of state succession, it had been common practice for successor states and their respective colonial powers to enter into treaties upon the granting of sovereignty by the latter to the former. In the context of Philippine history, it is important to note that the Philippines struggled for independence twice: first from Spain, and then from the United States.²⁰⁴ Although Emilio Aguinaldo, known as the first Philippine President, declared independence from Spain on June 12, 1898, such

²⁰¹ Catherine Hickley, *Germany presents code of conduct on handling colonial-era artifacts*, THE ART NEWSPAPER, May 16, 2018, available at <https://www.theartnewspaper.com/news/germany-presents-code-of-conduct-on-handling-colonial-era-artefacts>.

²⁰² Marie Cornu & Marc Andre Renold, *New Developments in the Restitution of Cultural Property: Alternative Means of Dispute Resolution*, 17 INT'L J. CULTURAL PROP., 1-31 (2010).

²⁰³ See discussion in ch. II (B) (3).

²⁰⁴ Reynaldo C. Ileto, *Philippine Wars and the Politics of Memory* 13 POSITIONS 214, 217 (2005).

declaration was not recognized by both Spain and the United States, because the former ceded the Philippines to the latter for USD 20 million through the Treaty of Paris on December 10, 1898. It was only on July 4, 1946 that the United States recognized Philippine independence, when the United States and the Philippines entered into a Treaty of General Relations.²⁰⁵ At this point, no provisions as to the allocation of cultural property were contained in such Treaty, unlike the previous examples discussed above. Thus, the applicability of the law of state succession to the Philippines as a successor state must be explored thoroughly.

The complications that hindered repatriation claims were also inherent in the history of Belgium and Congo (formerly Zaire).²⁰⁶ The process of decolonization of Congo initially did not provide for any arrangements for the repatriation of cultural property, as did other succession states. It was only years after gaining independence in 1960 that they instituted claims for repatriation from the Royal Museum of Central Africa in Belgium. However, political violence and issues on ownership of the museum and its collections caused a delay of ten years before the successful repatriation of hundreds of Congolese cultural items.²⁰⁷

Like the Philippines, other Southeast Asian states also experienced lengthy periods of colonization. However, the success of their respective repatriation claims can be attributed to the manner by which their respective colonizing States had granted them full sovereignty. For example, Indonesia, similar to the Philippines, endured three centuries of Dutch colonization. In 1949, the Netherlands formally transferred sovereignty to Indonesia. Upon the transfer, both states accepted draft agreements, including provisions on returning cultural objects originating from Indonesia and in the possession of the Dutch Government. Upon the finality of the agreements, both parties agreed that the Netherlands would return the Indonesian cultural materials in their custody, and even facilitate the return of cultural property in the custody of private collectors.²⁰⁸

It was only in 1974 that Indonesia formally asked for the return of movable cultural property. The first transfer took place only in 1977, when the Netherlands returned the Lombok treasures, which included the *Crown of*

²⁰⁵ Lowell B. Bautista, *The Historical Context and Legal Basis of the Philippine Treaty Limits*, 10 ASIA PACIFIC L. & POL. J. 1 (2008).

²⁰⁶ See Van Beurden, *supra* note 194, at 195-197. See also Jukabowski, *supra* note 14, at 127.

²⁰⁷ Van Beurden, *id.*

²⁰⁸ See Jukabowski, *supra* note 14, at 125.

Lombok, a dancer's headdress adorned with rubies, among others.²⁰⁹ Other transfers took place in 1978, when the famous Prajnaparamita statue, was returned to Indonesia, and is now presently displayed in the Pusat Museum.²¹⁰ Although the return of the cultural materials between the two parties proceeded very slowly, the bilateral agreement between both parties eventually crystallized and followed the principle of succession of states.

Other successful repatriation claims resulting from the practice of allocating cultural property to successor states include the Treaty of Tiranon, which was entered into by Austria and Hungary, upon Hungary's independence from Austria in 1920. This treaty included provisions that explicitly required the restitution of cultural property to areas which had once been integral parts of the state, and had later on, been separated to form new nations.²¹¹ The same principle was replicated in Africa, upon the dissolution of the French colonial empire in Algeria. In 1968, 300 pieces of movable cultural property, such as paintings and artworks were turned over to the Algiers Museum of Fine Arts.²¹²

2. *The Registration Requirement under the National Cultural Heritage Law*

Although senators clamored for the return of various cultural property obtained during the colonial period in the sponsorship speeches leading to the passage of the NCHL,²¹³ such law does not contemplate the protection of cultural property obtained during the colonial period by colonial powers. Instead, the law focuses on the protection of *registered* cultural property. Although the repatriation of cultural property is mentioned in Article VI thereof, it clearly states that it is only applicable to *registered* cultural property. The first paragraph of Section 24 reads thus:

Should the cultural property registered in the Philippine Registry of Cultural Property be illicitly exported from the country, the Department of Foreign Affairs shall, upon the recommendation of the appropriate cultural agency, claim the right of repatriation *vis-à-vis* all other contracting States. Any compensation and costs shall be carried by the Philippine government.

²⁰⁹ Peter H. Pott & M. Amir Sutaarga, *Arrangements concluded or in progress for the return of objects: The Netherlands-Indonesia?* 31 MUSEUM 38-42 (1979).

²¹⁰ *Id.*

²¹¹ *See* Goepfert, *supra* note 143. *See also* GREENFIELD, *supra* note 18.

²¹² *See* Jukabowski, *supra* note 14, at 123.

²¹³ *See* discussion in ch. II(B)(3).

Clearly, such provision cannot apply to cultural property removed from the Philippines during the colonial period, for there has been no opportunity for it to have been registered. The requirement that cultural property first be registered before it can be afforded protection under the law is one of the defective features of the NCHL.

The registration of cultural property assumes two things: *first*, that such property is accessible to the NM, NCCA and other cultural agencies that can facilitate their registration, and *second*, that the owners or lawful possessors of such cultural property are willing to have their cultural property registered. Thus, this law affords no protection for movable cultural property obtained by colonizing powers during the period of colonization.

This does not mean, though, that unregistered cultural property cannot be considered as “cultural property” in the sense that, ideally, cultural property is a manifestation of cultural heritage, which was defined earlier as the “tangible” link that manifests the culture and historical memory of the past. The registration requirements limit the protection that this law can potentially afford to all cultural property to those pieces whose owners and possessors are willing to register them. Private collectors who are aware of the cultural significance of their artifacts may be discouraged to register their cultural materials because of fear that their rights to the said objects may be limited. In the same way, only those who are aware of the registration requirement will be able to afford their cultural materials protection.

Nonetheless, a closer scrutiny of the law conveys that it also contemplates protection to non-registered cultural items. The second paragraph of Section 24 reads:

For the protection of cultural and foreign affairs interests and to secure cultural heritage, the Philippines may conclude international treaties with contracting States on the import and repatriation of cultural property subject to the following conditions:

- (a) The scope of the agreement must be cultural property of significant importance to the cultural heritage of the contracting States;
- (b) The cultural property must be subject to the existing export policies for the purpose of protecting cultural heritage; and
- (c) The contracting States shall grant reciprocal rights.

The use of the term “cultural heritage” instead of “cultural property” in this paragraph shows that this Section is applicable to cultural heritage, and not to registered cultural property, as contemplated in the previous paragraph. The law defines “cultural heritage” as “the totality of cultural property preserved and developed through time and passed on to posterity.”²¹⁴ This definition, through the use of the word “totality,” can be interpreted to include such cultural property that is not within the jurisdiction of the Philippines, and is not registered under this law.

The existence of this particular paragraph contemplates that the State is aware of the existence of Philippine cultural property with possessors beyond its jurisdiction. As discussed earlier, cultural heritage as a concept offers a much wider scope than that of cultural property. Although the law explicitly intends to protect registered cultural property, this specific portion of the law provides a remedy for materials of great significance to Philippine culture and history in its totality. Thus, read together with the discussion on cultural heritage, this law does in fact provide that international agreements shall be a remedy for movable cultural property removed from the Philippines by non-Filipinos during the period of colonization.

It must also be noted that the IRR of this law, although copied entirely from the law itself, separates the exact same paragraph and subparagraphs (a) to (c) into a new section: “Section 27.1. International agreements” in the IRR. This arrangement shows that those charged with its execution contemplate that it encourages international agreement with contracting states for the reasons stated above.

In no way, however, is the provision encouraging international agreements with other states an adequate recourse to ensure that such cultural property in the possession of foreign entities will be repatriated to the Philippines. International agreements with contracting states, if concluded, assume that the contracting state is willing to repatriate such cultural items. This is, again, a form of voluntary repatriation between the possessor-state and the Philippines, the origin of such artifacts. The Philippines may be on the initiating end of international agreements, but the fate of the agreement truly lies in the willingness of the contracting party to comply. Additional laws that specifically provide for the facilitation of repatriation claims of movable cultural property obtained from the Philippines by colonial powers during colonial periods will be a clear solution to the lack of protection of the same.

²¹⁴ Rep. Act No. 10066 (2010), § 3(f).

3. The Lack of Philippine Legislation to Implement the Right of Self-determination through Repatriation

The right to self-determination is part of the Philippines' state policy Article II, Section 7 of the 1987 Constitution. The Philippines is also a State party to the ICCPR, which it signed in 1966, ratified in 1986, and which entered into force in 1987.²¹⁵ It has been established under international law that the repatriation of cultural property can be considered as an exercise of the right to self-determination. Thus, should the Philippine government wish to pursue repatriation claims for the return of cultural property removed from the Philippines during colonization, it must enact specific laws for the particular purpose of repatriation.

Examining the NCHL in terms of purpose and scope, it can be concluded that it was intended to provide blanket protection for cultural property, but the means through which it proposes to do so does not guarantee that the different categories of cultural property will be protected in accordance to its category. Different types of cultural property need different methods of protection.²¹⁶ Thus, in international humanitarian law, immovable cultural property such as buildings and monuments are afforded protection by forbidding them to be targets of armed conflict. Movable property is afforded protection from illicit trafficking by imposing sanctions on their traffickers. Even intangible cultural property is afforded protection through patents and copyright grants. Thus, the law must be supplemented by additional forms of legislation that focus on specific types of cultural property.

Moreover, an examination of the legislative history of the NCHL reveals that the entire Article VI thereof entitled "Regulating the Export, Transit, Import and Repatriation of Cultural Property" was originally part of House Bill No. 165, entitled the "Cultural Property Transfer Act of 2007" introduced by then-Representative Juan Edgardo Angara. Of the 19 Sections in this Bill, only two provisions made it into the law, as those two provisions were the only ones consolidated into then House Bill No. 6733, before being signed as R.A. No. 10066.

²¹⁵ United Nations Treaty Collection, *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION WEBSITE, as of Apr. 26, 2019, available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtmsg_no=IV-4&src=IND#EndDec.

²¹⁶ See Kuprecht, *supra* note 157, at 1035.

The proposed Cultural Property Transfer Act of 2007 would have introduced provisions that were similar to the 1970 UNESCO Convention. This Bill also granted the Board of Trustees of the NM,²¹⁷ and not the DFA as the existing law mandates, the right of repatriation *vis-à-vis* other contracting states. It also provides for the suability of persons in possession of cultural property illicitly imported into the Philippines, and a loan guarantee clause for contracting states with museum items on loan to the Philippines.²¹⁸ Another salient feature is the “Conveyance of Cultural Property” clause, which prohibits cultural institutions from acquiring or exhibiting stolen and illicitly exported cultural property.²¹⁹ The pursuance of House Bill No. 165 could have provided for a better framework for the implementation of laws that prevent illicit trafficking in accordance with international law standards. As a result, the method for repatriation as provided for in the NCHL is limited to the urging of bilateral or multilateral treaties for the matter.

The Philippines can likewise learn from domestic legislation in the United States, such as the Native American Graves Protection and Repatriation Act²²⁰ enacted in 1990. This law requires the State to return human remains obtained from prehistoric, historic and current native American homelands to their respective indigenous communities.

Other domestic laws that provide for the specific protection of movable cultural heritage include the Protection of Movable Cultural Heritage Act of 1986 in Australia, Act 21 of March 21, 1966 concerning the protection of movable cultural heritage in Luxembourg, the 1978 Resolution on the Ministry of Education concerning Restriction on the Export of Movable Cultural Property in Finland, Decree No. 3 of 1977 on the removal and exhibiting abroad of objects of cultural value in Hungary, and the 1947 Proclamation of the Federal Council concerning actions for the recovery of goods taken in occupied territories during the war in Switzerland.

VIII. CONCLUSION

The facilitation of repatriation claims for cultural objects that were removed by colonizing states during the colonial period can flourish, should

²¹⁷ H. No. 165, 14th Cong., § 5(B) (2007).

²¹⁸ § 6.

²¹⁹ § 8.

²²⁰ 104 Stat. 3048 (1990).

the proper domestic measures be implemented, and the suitable frameworks through which a claim for repatriation anchors its basis be realized.

A. Cultural Agreements as Most Immediate Means for Repatriation

As provided in the discussion for successful cases of voluntary repatriation experienced in the Philippines,²²¹ and the discussion presenting successful repatriation claims by other succession states,²²² bilateral agreements are an effective way by which repatriation can be effectively facilitated. In fact, an examination of existing Philippine legislation reveals that the NCHL encourages international agreements as an avenue to facilitate repatriation claims for cultural property removed from the Philippines during the colonial period. However, the lack of interest to pursue repatriation claims is evident,²²³ or the initiative to enter into these agreements shows the lack of enforceability of such provision in the law. As seen in previous examples,²²⁴ heads of state play a crucial role in facilitating successful negotiations for repatriation of cultural objects, as seen through previous efforts initiated by former President Ramos in 1998,²²⁵ and in the final return of the Balangiga Bells, which was notably facilitated after President Duterte's strong appeal for their return in his 2017 State of the Nation address.

B. Treaties with Claims for Repatriation must Consider the Law of State Succession

The law of state succession as a principle in international law has been a recurring practice for successor states since the trend of decolonization flourished after the First World War.²²⁶ As a successor state,²²⁷ the Philippines may have included provisions on the return of cultural materials and archives in the Treaty of Manila in 1946. Since there

²²¹ See discussion in ch. II(A).

²²² See discussion in ch. IV, V.

²²³ Interview with Amb. Jose Maria Cariño, Chairperson-Alternate of the Technical Cooperation Council of the Philippines on Feb. 23, 2018 at the Department of Foreign Affairs. See *supra* note 22.

²²⁴ See discussion in ch. VII (2). See also *supra* notes 196, 19.

²²⁵ Fidel Ramos, *Return the Balangiga Bells*, MANILA BULLETIN, Aug. 2, 2009, available at <http://rpdev.org/ramos-archives/articles//view/return-the-balangiga-bells/166>; James Brooke, *U.S.-Philippines History Entwined in War Booty*, NEW YORK TIMES, Dec. 1, 1997, available at <https://www.nytimes.com/1997/12/01/us/us-philippines-history-entwined-in-war-booty.html>.

²²⁶ See discussion in ch. IV(A).

²²⁷ See discussion in ch. VII(B)(1).

were no such provisions on the matter, the Philippines can follow in the footsteps of other successor states with similar situations²²⁸ in the pursuit of the return of cultural treasures even years after the attainment of their sovereignty.

C. Future Legislation Anchored on Right to Self-determination

It must be noted that the NCHL, which provides protection and provisions for repatriation for registered cultural property²²⁹ cannot be applied to cultural objects that were already beyond Philippine jurisdiction at the time of its effectivity. It must also be noted that this law is rooted in the State policy to conserve, develop, promote and popularize the nation's historical and cultural heritage and resources, as well as artistic creations.²³⁰ In pursuit of facilitating effective repatriation claims for cultural property, there is a need for the creation of legislation specific for this purpose. As previously discussed, repatriation as a form of protection of cultural heritage transcends physical protection and aims to protect the integrity of the symbolism and tangible link to cultural identity and nationalism manifest.²³¹ Thus, when contemplating the repatriation of unregistered cultural materials that are still significant to the national identity of Filipinos, it is the right to self-determination under Article II, Section 7 of the Constitution that must be the framework for any legislation that involves the repatriation of cultural property. The repatriation of cultural property cannot be bundled with the protection of cultural property capable of registration under the NCHL because a different purpose of protection is contemplated for the former.²³² This is also applicable to future legislation that specifically concerns the rights of indigenous peoples, for under the UNDRIP, they are afforded additional rights, which include the right to access cultural materials.²³³

Ultimately, the success of claims for the repatriation of cultural property will only flourish if there is a consistent clamor and persistent action toward the matter. Following the emerging trends in repatriation,²³⁴ the Philippines may be welcoming home cultural objects from around the world after centuries of separation. Negotiations in other cases have lasted for decades, but it was persistence and determination, coupled with goodwill, that effected the return of cultural property.

²²⁸ See Jukabowski, *supra* note 14. See also Greenfield, *supra* note 18.

²²⁹ See discussion in ch. VII(B)(2).

²³⁰ Rep. Act No. 10066 (2010), § 2.

²³¹ See discussion in chs. III(A)(2), (B)(3).

²³² See discussion in chs. VII(B)(2)-(3).

²³³ See discussion in chs. V(C).

²³⁴ See discussion in chs. VII(2).

IX. RECOMMENDATIONS

Seeing that the NCHL encourages the Philippines to enter into international agreements for the recovery of cultural property, and that there has been a consistent clamor for the return of Philippine cultural property in the possession of foreign entities, the Philippine government must recognize the value that cultural property can contribute to nation-building. Thus, in order to realize the ultimate goal of considering the practice of repatriation, the following proposals are recommended for the future facilitation of successful repatriation claims.

A. Encourage Bilateral Agreements for the Repatriation of Cultural Property

Seeing that the Philippines has facilitated a successful bilateral treaty for the return of cultural objects²³⁵ and following the examples of other countries,²³⁶ the Department of Foreign Affairs must encourage ambassadors and envoys to initiate bilateral agreements that provide for the repatriation of cultural materials obtained during the colonial period. Recently, a cultural agreement between the Philippines and Cambodia for the protection of cultural materials against illicit trade was entered into.²³⁷ As of date, the Philippines has entered into around 40 bilateral cultural agreements with other countries, but none have provided for the repatriation of colonial cultural materials. There is a need for the Philippines to pursue the repatriation of these materials to be abreast with other former colonial countries who have initiated the same.

B. Encourage Participation in Multilateral Cultural Agreements

The same encouragement should be given to the participation in multilateral cultural agreements, such as the 1995 UNIDROIT Convention, which provides remedies for the return of stolen and illicitly transported cultural property.²³⁸ Being a state-party to these types of agreements will solidify the Philippines' stance towards the protection of movable cultural property from illicit trade, in accordance with the NCHL. Other multilateral

²³⁵ See discussion in ch. II (A)(4).

²³⁶ See discussion in ch. I.

²³⁷ Joyce Ann Rocamora, *PH, Cambodia ink pacts on culture, defense*, PHILIPPINE NEWS AGENCY, Dec. 6, 2017, available at <https://www.pna.gov.ph/articles/1018177>.

²³⁸ See discussion in ch. III (B) (2).

cultural agreements and conventions must be explored for the Philippines to be more aware of how the international community can afford protection to both registered and unregistered cultural property.

C. Explore Alternative Ways of Dispute Resolution

Apart from traditional ways such as bilateral and multilateral treaties, the Philippines must also explore alternative ways to settle issues with respect to repatriation claims. Marie Cornu and Marc-Andre Renold have proposed alternative means that can be explored such as conditional restitution, long-term and temporary loans, special ownership regimes such as joint ownership and trusts, the production of replicas, and the withdrawal of repatriation claims in exchange for financial compensation.²³⁹

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²³⁹ See Cornu & Renold, *supra* note 202, at 20-22.

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