

# CULTURAL PROPERTY IN PAPUA NEW GUINEA: A COMMENT ON LEGAL PROTECTION

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## INTRODUCTION

Papua New Guinean cultural property must be given adequate legal protection to prevent exploitation from within and outside Papua New Guinea. Cultural property legislation was first introduced by the colonial administration through the *Papuan Antiquities Ordinance 1913* followed by the *New Guinea Antiquities Ordinance 1922*.<sup>1</sup> In 1953 both Ordinances were amalgamated into the *Antiquities Ordinance 1953* then in 1965 the *National Cultural Property (Preservation) Ordinance 1965* was passed. At the time of PNG's independence in 1975 the 1965 Ordinance was adopted, and the current *National Cultural Property (Preservation) Act 1965* came into effect.<sup>2</sup> When PNG entered early nationhood the preservation of cultural property was viewed as important to a Papua New Guinean's identity while on a national level asserting a sovereign identity as a newly independent state.<sup>3</sup>

However, despite the long presence of cultural property legislation in PNG there have been issues with the unlawful exportation of national cultural property and the illicit removal of artefacts. This paper discusses cultural property relating to artefacts and intangible cultural heritage relating to traditional knowledge. Under the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 'cultural property' is defined as

Property which on religious or secular grounds is specifically designed by each State as being of importance for archaeology, prehistory, history, literature, art or science which belongs to the following categories

- (a) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
- (b) objects of ethnological interest.<sup>4</sup>

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<sup>1</sup> Barry Craig, 'National Cultural Property in Papua New Guinea- Implications for policy and action' (1992) 30 (2) *Anthropological Society of South Australia Inc*, 1529, 1529; Mark Busse, 'The National Cultural Property (Preservation) Act' in Mark Busse and Kathy Whimp (eds), *Protection of intellectual, biological & cultural property in Papua New Guinea* (ANU Press, 2013) 81, 83-8.

<sup>2</sup> See *ibid*.

<sup>3</sup> Ana Filipa Vrdoljak, *International Law, Museums, and the Return of Cultural Objects* (Cambridge University Press, 1<sup>st</sup> ed, 2006) 220.

<sup>4</sup> Opened for signature 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972) art 1 ('1970 UNESCO Convention').

Under the 2003 UNESCO Intangible Cultural Heritage Convention, ‘intangible cultural heritage’ means

the practices, representations, expressions, knowledge, skills- as well as the instruments, objects, artefacts and cultural spaces associated therewith- that communities, groups and in some cases, individuals recognize as part of their cultural heritage. Intangible cultural heritage is contained in oral traditions and expressions, performing arts, social practices, rituals and festive events, knowledge and practices concerning nature and the universe and traditional craftsmanship.<sup>5</sup>

National cultural property and proclaimed national cultural property are two categories in the *National Cultural Property Act 1965*. Under section 4 of the Act the ‘declaration of national cultural property’ is when

The Head of State acting on advice given after receiving a report from the Commission may by notice in the National Gazette, declare any collection, object or thing or any collection, object or thing of a specified class to be national cultural property.

Under section 5 of the Act ‘proclaimed cultural property’ is when

The Head of State acting on advice given after receiving a report from the Commission may by notice in the National Gazette, declare any national cultural property to be proclaimed cultural property.

‘Undeclared cultural property’ refers to cultural property that is not protected under the Act. This comment argues that undeclared cultural property that has a national interest is protected whereas proclaimed, declared and undeclared cultural property remain unregulated. From a Papua New Guinean perspective intangible cultural property is indivisible from tangible cultural property. Therefore, both artefacts and traditional knowledge will be addressed in this paper. It is important that cultural property is protected in a way that is culturally feasible in a PNG context.

## INTERNATIONAL FRAMEWORK

The Jolika Collection located at the De Young Museum in San Francisco contains 3000 cultural objects from PNG collected by Marcia and John Friede.<sup>6</sup> Among the collection there are six cultural objects, all from the Sepik region, that were identified as proclaimed national cultural property.<sup>7</sup> These objects were exported illegally before they were acquired by the Friedes who purchased them for the Jolika collection and donated them to the De Young Museum.<sup>8</sup> An

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<sup>5</sup> Opened for signature 17 October 2003, UNTS 2368, (entered into force 20 April 2006) art 2. (*ICH Convention*).

<sup>6</sup> Jesse Hamlin, ‘How de Young is handling New Guinea art question’, SFGATE, (online, 4 May 2006) <<https://www.sfgate.com/entertainment/article/How-de-Young-is-handling-New-Guinea-art-question-2497834.php>> (Accessed 5 April 2022).

<sup>7</sup> Christina Hellmich, ‘Carving the story: Recovering histories of Sepik art in the Jolika Collection’ (2018) 146 *Journal de la Société des Oceanistes* 97-105 <<https://journals.openedition.org/jso/8570?lang=en>> (Accessed 5 April 2022).

<sup>8</sup> Ibid 98.

officer from the National Museum, at the expense of the Friedes, visited the De Young Museum and confirmed after examining the objects that they were proclaimed national cultural property.<sup>9</sup> The PNG Ambassador to the United States at the time, Ambassador Paki, stated that the six proclaimed national cultural objects should remain in the US, whereas Australian anthropologist Barry Craig argued that the objects should be repatriated on moral grounds.<sup>10</sup> After much scrutiny, in 2010 it was agreed through a collaboration with the PNG government officials and the De Young Museum that the six proclaimed national cultural property items would be held in trust for the PNG government at the De Young Museum.<sup>11</sup> This reveals the efforts that the PNG government will make to protect proclaimed national cultural property on an international level when there is a national interest.

A similar incident to the Jolika collection involved two sacred carved crocodiles from the Karawari region in the Sepik that were proclaimed national cultural property. These carvings were first proclaimed in 1936 but up to 1965 they have been missing and their whereabouts remain unknown to the present day.<sup>12</sup> According to Barry Craig's research these carvings were either purchased by the Basel Museum or one of the carvings was purchased by a dealer for a museum in Basel.<sup>13</sup> This was due to the lack of resources allocated by the PNG government to enforce the *National Cultural Property Act 1965*.<sup>14</sup> Due to the poverty and isolation of Papua New Guinean rural communities, such as the Karawari people, art dealers are sometimes able to purchase such cultural objects at relatively low prices. The lucrative nature of PNG art sales on the international market, makes it appealing for some dealers to illegally export cultural objects.<sup>15</sup> The National Museum is unable to acquire these objects when they have competition from buyers overseas who are willing to offer a higher price.<sup>16</sup>

PNG is bound to a treaty after it has been presented to Parliament for at least ten sitting days.<sup>17</sup> No treaty forms part of the municipal law of PNG unless it is given the status of municipal law under a Constitutional Law or an Act of Parliament.<sup>18</sup> To date, PNG has not ratified the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. The main principles of the 1970 Convention are prevention through the establishment of inventories (Article 5), the application of controls and approval of traders and the establishment of export certificates (Article 6). It also provides provisions for the restitution of stolen objects whereby State Parties are required to take appropriate measures to seize and return stolen and imported cultural property (Article 7). Furthermore, it requires international cooperation between State Parties in any operation (Article 9). The PNG Department of Justice did not support the ratification of the 1970

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<sup>9</sup> Ibid 99.

<sup>10</sup> Lee Romney, 'The De Young dilemma', Los Angeles Times (online, 3 June 2006) <<https://www.latimes.com/archives/la-xpm-2006-jun-03-et-deyoung3-story.html>> (Accessed 30 April 2022).

<sup>11</sup> Hellmich, above n 7, 98.

<sup>12</sup> Barry Craig, *Samting Bilong Tumbuna: The Collection, Documentation and Preservation of the Material Cultural Heritage of Papua New Guinea* (PhD Thesis, Flinders University of South Australia, 1996).

<sup>13</sup> Ibid 153.

<sup>14</sup> Craig, above n 1, 1553-1538.

<sup>15</sup> Busse, above n 1, 92.

<sup>16</sup> Ibid.

<sup>17</sup> Constitution of the Independent State of Papua New Guinea 1975 ('*Constitution of PNG*') s 117.

<sup>18</sup> Ibid s117 (7).

Convention on the grounds that the *National Cultural Property Act 1965* did not meet the relevant requirements of the convention and, therefore, PNG would not be able to uphold the provisions.<sup>19</sup>

PNG has also not ratified the 1995 UNIDROT *Convention on Stolen or Illegally Exported Cultural Objects*,<sup>20</sup> which supports the 1970 Convention by providing avenues on restitution and the return of cultural objects through private international law.<sup>21</sup> The 1995 Convention is a result of UNESCO requesting a new instrument, based on the 1970 Convention, that would include an updated response to the issue of illicit trafficking.<sup>22</sup> Under the 1970 Convention, when an object has been purchased by an individual or an institution on good faith, the source country has no other option but to repurchase it.<sup>23</sup> This was the case in 1974 when a mask from Tabar Island was bought from a French dealer by a New York collector.<sup>24</sup> The National Museum contacted the US authorities on the grounds that it violated the *National Cultural Property Act 1965* and the *Customs Act 1951*. The United States had ratified the 1970 Convention, which left the National Museum with no other option but to purchase the mask at the price that was paid by the collector.<sup>25</sup> As a result, the mask was forfeited to the collector. The 1995 Convention now allows for a State or institution to claim the cultural object whether or not it was stolen or illegally imported. The 1970 UNESCO Convention covers the preventative measures through legal and administrative actions and the recovery phase of the restitution of cultural objects that have been listed in the inventory.<sup>26</sup> On the other hand, the 1995 UNIDROT Convention concentrates on the recovery phase and places uniform rules and conditions on the restitution claims on stolen cultural objects and return claims on illicitly exported cultural objects.<sup>27</sup> In the 1920s, Frank Hurley an Australian photographer came to Papua and collected and photographed sacred cultural objects unbeknownst to the villagers.<sup>28</sup> Hurley was accused of threatening Papuans and stealing artefacts by the Territorial Administration.<sup>29</sup> Recently there have been calls from Lake Murray villagers for the return of their artefacts collected by Hurley that are housed in the Australian Museum.<sup>30</sup> The illegal exportation of cultural objects is an ongoing issue in PNG. This has been the case for both undeclared and declared national cultural property. The fact that PNG was not a signatory to

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<sup>19</sup> Craig, above n 1, 1551.

<sup>20</sup> Opened for signature 24 June 1995, (entered into force 1 July 1998) ('1995 Convention').

<sup>21</sup> UNIDROT, 'Overview- UNIDROT Convention on stolen or illegally exported cultural objects (Rome, 1995)', (2021) < <https://www.unidroit.org/instruments/cultural-property/1995-convention/overview/>>. (Accessed on 1 September 2022).

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Barry Craig, 'Repatriation of Papua New Guinea's Cultural Heritage' (March, 1992) Artlink 35.

<sup>25</sup> Ibid.

<sup>26</sup> UNESCO, 'UNESCO Information Note, UNESCO and UNIDROIT- Cooperation in the fight against illicit traffic in cultural property', Explanatory Report, (Web Page, 24 June 2005) ii) 1. a. <<https://www.unidroit.org/wp-content/uploads/2022/07/Compatibility-1970-and-1995-information-note.pdf>> (Accessed 1 September 2022).

<sup>27</sup> Ibid ii) 1. b.

<sup>28</sup> Robert Dixon and Christopher Lee (eds), *The Diaries of Frank Hurley 1912-1941* (Anthem Press, 2011) xxx.

<sup>29</sup> Ibid xiv.

<sup>30</sup> Catherine Graue, 'Papua New Guinean Lake Murray villagers seek repatriation of long lost artefacts from Australia' ABC News (online), (online at 30 January 2018) < <https://www.abc.net.au/news/2018-01-30/png-lake-murray-villagers-seek-repatriation-of-artefacts/9370478>>.

international agreements that concern cultural property has led to cultural objects being illegally exported abroad and being forfeited.<sup>31</sup>

PNG ratified the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage*<sup>32</sup> in September 2008.<sup>33</sup> The Convention aims;

- (a) to safeguard the intangible cultural heritage;
- (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;
- (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;
- (d) to provide for international cooperation and assistance.<sup>34</sup>

The Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture was developed to assist Pacific Island nations to address the exploitation, and inappropriate commercialization of traditional knowledge and expressions of culture.<sup>35</sup> The Model Law 2002 for the Protection of Traditional Knowledge and Expression of Culture is a product of the Pacific Regional Framework. The Model Law recognizes the statutory rights of traditional owners of traditional knowledge and provides a foundation for Pacific Island nations to enact legislation.<sup>36</sup> The Model Law seeks to complement intellectual property rights and contains traditional cultural rights and moral rights that are not based upon registration or formalities. PNG utilized the Pacific Islands Forum Traditional Knowledge Action Plan in 2009 to draft the Traditional Knowledge and Cultural Expression Bill which is the product of the Model Laws.<sup>37</sup> At the time of this paper being written the TKCE Bill was in the draft stages.<sup>38</sup>

## DOMESTIC FRAMEWORK

PNG has a pluralistic system of common law and customary law. The sources of law are derived from written law, common law, and customary law. The Constitution recognizes custom under Schedule 2.1 which states custom is adopted and will be applied and enforced with the underlying law. However, custom will not apply when it is inconsistent with

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<sup>31</sup> Lyndel V. Prott and P.J O'Keefe, *Law and the Cultural Heritage* (Butterworths, 1984) 70-71.

<sup>32</sup> Opened for signature 17 October 2003, UNTS 2368, (entered into force 20 April 2006) ('*ICH Convention*')

<sup>33</sup> 'Papua New Guinea and the 2003 Convention', *UNESCO Intangible Cultural Heritage* (Web Page), <<https://ich.unesco.org/en/state/papua-new-guinea-PG>>. (Accessed 25 April 2022).

<sup>34</sup> ICH Convention, above n 5, art 1.

<sup>35</sup> Secretariat of the Pacific Community, 'Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture' (2002). <https://www.aph.gov.au/DocumentStore.ashx?id=0f16fc0e-b979-47b3-93e1-16ee74cc4b57&subId=662872> (Accessed 5 September 2022).

<sup>36</sup> Ibid 16.

<sup>37</sup> Secretariat of the Pacific Regional Environment Programme, 'Traditional Knowledge Implementation Action Plan Part I', 2009. <<https://www.sprep.org/attachments/VirLib/Global/traditional-knowledge-action-plan.pdf>> (Accessed 6 September 2022).

<sup>38</sup> EMTV Online, 'Traditional Knowledge Bill' (YouTube, 13 June 2022) <<https://www.youtube.com/watch?v=5nnKgdnAV9I>> (Accessed 25 September 2022).

constitutional law or the principles of humanity.<sup>39</sup> The *Underlying Law Act 2000* under s1 defines custom as

‘Customs and usages of the indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial’.

The *Customs Recognition Act 1963* recognizes custom and it may be pleaded in courts except when that would result in injustice or where it would affect the welfare of a child under the age of 16 years.<sup>40</sup> Custom may be taken into account in a case other than criminal law in matters that concern the customary ownership of land and customary ownership of rights over water.<sup>41</sup> The *Village Court Act 2000*<sup>42</sup> stipulates that a Village Court will apply custom as determined the *Customs Recognition Act 1963*.<sup>43</sup> If there is a conflict between two or more systems of custom, the court may adopt the system that satisfies the justice that the case requires.<sup>44</sup>

An Organic Law is a law made by the Parliament that becomes constitutional law. It is made for a matter that is authorized by the Constitution and will not be inconsistent with the Constitution.<sup>45</sup> It may be altered only by another Organic Law or by an alteration to the Constitution.<sup>46</sup> For the purposes of this paper the *Organic Law on Provincial Governments and Local-level Governments* No. 29 of 1998 establishes Provincial Governments and Local-level Governments and assigns legislative powers to both levels of government. Subject to the Constitution and this Organic Law, legislation on a provincial level can be made on town and urban planning, fishing, agriculture, rural health, trade and industry, forestry, and tourism, within the province.<sup>47</sup> Also, local level laws can be made on cemeteries, provision of water supply and electricity, dispute settlement, housing, census and village or community records and village communities.<sup>48</sup>

The *National Cultural Property Act 1965* is responsible for the protection of cultural property in PNG. Under this Act there are two categories of property, declared national cultural property and undeclared cultural property. The declaration of national cultural property is when the Head of State acting on advice given after receiving a report from the National Cultural Commission gives notice in the National Gazette and formally declares any national cultural property to be declared national cultural property.<sup>49</sup> National cultural property is defined as

Any property, movable or immovable, of particular importance to the cultural heritage of the country, and in particular (but without limiting the generality of the foregoing) includes–

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<sup>39</sup> Constitution of PNG Sch. 2.1 (2).

<sup>40</sup> Customs Recognition Act s 3 (1).

<sup>41</sup> Ibid s 5.

<sup>42</sup> Village Court Act s 57.

<sup>43</sup> s 2; s 3; s7.

<sup>44</sup> Ibid s 7.

<sup>45</sup> Constitution of PNG s 9.

<sup>46</sup> Ibid.

<sup>47</sup> Organic Law s 42 (1).

<sup>48</sup> Ibid s 44 (1).

<sup>49</sup> National Cultural Property Act s 4.

- (a) any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of any of the peoples of the country, past or present; and
- (b) any mineral specimen or fossil or mammal remains of scientific or historic interest to the country; and
- (c) any other collection, object or thing, or any collection, object or thing of a class, declared to be national cultural property under Section 4; and
- (d) any collection of national cultural property;<sup>50</sup>

It can be argued that this definition is broad and too general to accommodate the diversity of cultural property in PNG although that can also be a strength which allows for a wider protective scope.<sup>51</sup> On the other hand, there are no restrictions in place for undeclared cultural property, which leaves it, and its related cultural knowledge, unregulated by law.<sup>52</sup> In 2010, a rare Biwat mask from the Sepik was withdrawn from an auction in Paris due to the media publicity on how the mask was acquired.<sup>53</sup> The National Museum had identified that at least two items from the Jolika Collection were illegally exported by an artefact buyer, Wayne Heathcote, who had initially acquired the Biwat mask and who has also been accused of the illegal exportation of national cultural property.<sup>54</sup> Another instance relates to artefacts held in the George Brown Collection at the University of Newcastle-upon-Tyne in the United Kingdom.<sup>55</sup> The University of Papua New Guinea's Vice Chancellor wrote to the British High Commissioner and expressed concern that the artefacts collected from PNG by George Brown would be sold without any consideration for a claim by PNG.<sup>56</sup> Sir Michael Somare who was Prime Minister of PNG at the time, wrote to the Prime Ministers of Australia and the UK requesting that they delay the sale so that PNG would have time to secure an interest in the material.<sup>57</sup> This attempt to intervene on a political level was too late, the George Brown Collection was sold to the National Museum of Ethnology in Japan two days before Somare wrote his letters requesting political intervention.<sup>58</sup> Another example is the matter between *Tukuliya v Director, PNG National Museum & Art Gallery*<sup>59</sup>. In this case, the appellants claimed that the respondents had in their care the appellants ancestral stone, the alleged Ambum Stone. The appellants claim for damages for the loss of their stone was dismissed.<sup>60</sup> In this case the alleged ancestral stone was deemed to be undeclared cultural property, but the matter was

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<sup>50</sup> Ibid s 1.

<sup>51</sup> Busse, above n 1, 88.

<sup>52</sup> Lawrence Kalinoe, 'Ascertaining the Nature of Indigenous Intellectual and Cultural Property and Traditional Knowledge and the Search for Legal Options in Regulating Access in Papua New Guinea' (2000) 27 (1) *Melanesian Law Journal* 1,11.

<sup>53</sup> Sinclair Solomon, 'Media reports force Sepik mask off auction shelf', *The National* (online, 20 June 2010) <<https://www.thenational.com.pg/media-reports-force-sepik-mask-off-auction-shelf>>.

<sup>54</sup> Sinclair Solomon, 'Sepik artifacts to sell for K4m', *The National* (online, 11 June 2020) <<https://www.thenational.com.pg/sepik-artifacts-to-sell-for-k4m/>>.

<sup>55</sup> Craig, above n 28, 35.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> [2018] PGSC 44; SC1697.

<sup>60</sup> Ibid para 2.

dismissed on legal technical grounds. The appellants had failed to comply with serving a claim against the state and had signed an indemnity agreement against all claims for damages against the respondents.<sup>61</sup> These matters concerning undeclared cultural property have shown that cultural property has been exploited and forfeited when it is unregulated by law.

On the other hand, the *Somare v Zurenoc*<sup>62</sup> decision shows that undeclared cultural property that is of national significance can be protected under the existing framework in certain circumstances. This matter involved the destruction and removal of cultural property outside the PNG Parliament house. The defendant had argued that a set of totemic poles and a row of nineteen masks that feature prominently at the main entrance and Grand Hall were not proclaimed national cultural property under the *National Cultural Property Act*; hence any protections under the Act were void.<sup>63</sup> However, it was held that despite no formal declaration as ‘national cultural property’ the totemic poles as a matter of fact are ‘national cultural property’ and are protected under the *National Cultural Property Act*.<sup>64</sup> Justice Cannings stated in paragraph 91 of the decision ‘based on the evidence of each of the plaintiffs and having regard to the history and installation of the cultural and constitutional significance of Parliament House, that the objects of cultural decoration the subject of these proceedings are national cultural property.’

This matter has demonstrated the breadth of the *National Cultural Property Act*, which can protect cultural property that may be initially deemed to fall within the category of undeclared cultural property. This legislation is able to respond to the diversity and complexity of cultural property in PNG. However, it can be argued that this is only when there is a national interest. The Parliament House and its cultural decoration are a symbol of our national unity and national identity.<sup>65</sup> This is supported by the *National Identity Act 1971* which fosters and encourages the growth of a feeling of national identity and unity in PNG by providing for a national flag, national emblem, national pledge, national anthem, and other matters relevant to national identity and unity. The Preamble of the Constitution protects and recognizes national identity. It states, "that we guard with our lives our national identity, integrity and self-respect". This supports the *Somare v Zurenoc* decision that undeclared cultural objects that are of national interest will be protected.

In *Somare v Zurenoc*, the court also found that the removal and destruction of cultural property breached the *Copyright and Neighbouring Rights Act 2000*.<sup>66</sup> It was held that the masks and totem poles were “protected works” under section s 4 (1) (a) (vii) as the works constituted:

(a) literary and artistic works of original intellectual creations in the literary and artistic domain, including in particular:

(vii) works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine art;

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<sup>61</sup> Ibid para 26.

<sup>62</sup> [2016] PGNC 124, N6308.

<sup>63</sup> Ibid para 10.

<sup>64</sup> Ibid para 98.

<sup>65</sup> Ibid 12.

<sup>66</sup> Ibid 113.



The court also found that copyright vested economic and moral rights in the authors who had created the protected artistic works.<sup>67</sup> Even though none of these rights had been afforded to those who had created the objects or even to their descendants, it was held that the destruction of the cultural objects was unlawful and had breached the *Copyright and Neighbouring Rights Act 2000*.<sup>68</sup> This legislation extends to communal group ownership and individual ownership.<sup>69</sup>

Another case the *Joel Aundambui v Post PNG Ltd* matter, involved Joel Aundambui who represented his clan from the Chambri Lakes. The plaintiffs claimed that their clay pottery was made by their people for generations and was photographed by the defendant Post PNG for some brochures and stamps without the authorization of the Aundambui people and doing so breached their copyright.<sup>70</sup> The court addressed that despite the Aundambui people not formerly registering their copyright under the Act, if the creation has some form of skill or labour then copyright becomes automatically to the original producers.<sup>71</sup> This matter was dismissed due to the time limitation, but the court found that the Aundambui people were the owners of the copyright in the pottery and Post PNG was fully liable. This reveals that the Copyright legislation and the interpretation by PNG courts is responsive to the protection of cultural property.

## TRADITIONAL KNOWLEDGE

Traditional knowledge has been passed down orally for generations as a form of ‘intangible heritage’. According to the *Intangible Cultural Heritage Convention* intangible cultural heritage means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.<sup>72</sup>

Traditional knowledge is recognized by the Constitution through custom.<sup>73</sup> The *Underlying Law Act*, *Customs Recognition Act*, *Land Dispute Settlement Act* and the *Village Court Act* recognize and apply traditional knowledge in land ownership claims.<sup>74</sup> PNG has several pieces of legislation that generally cover intangible cultural property. This falls under the *National Cultural Commission Act 1994*. Under Part 1, Clause 1 ‘cultural heritage’ is defined to mean all aspects of indigenous cultures both tangible and intangible. The *National Museum and Art Gallery Act 1992* through its administration of the *National Cultural Property Act* and the *War Surplus Act 1952* encompasses the spiritual and intangible aspects of material cultural objects.<sup>75</sup> Similarly, the *National Cultural Property Act* covers cultural objects but, in doing so, also

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid 112.

<sup>69</sup> [2014] PGNC 179; N5772.

<sup>70</sup> Ibid 2.

<sup>71</sup> Ibid 17.

<sup>72</sup> ‘Text of the Convention for the Safeguarding of the Intangible Cultural Heritage, *UNESCO Intangible Cultural Heritage* (Online) Article 2 <<https://ich.unesco.org/en/convention>> (Accessed 1 April 2022).

<sup>73</sup> Constitution of PNG Sch.2.1.

<sup>74</sup> Underlying Law Act s15.

<sup>75</sup> Hale Lahui, ‘State of Safeguarding PNG’s Intangible Cultural Heritage’ (Speech, Inter- Departmental Meeting on the Convention for the Safeguarding of the Intangible Cultural Heritage, 18-19 March 2008.

protects the intangible aspects that are attached to these cultural objects.<sup>76</sup> Initially the 1965 Act was made with a focus on only tangible cultural property but now it can be interpreted to also cover intangible cultural property.<sup>77</sup>

Presently, PNG does not have specific legislation in place that explicitly defines and protects traditional knowledge. The closest definition is found under the *Copyright and Neighboring Rights Act 2000* which contains the definition of ‘expression of folklore’. This is defined as

a group-oriented and tradition-based creation of groups or individuals reflecting the expectations of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means, including:

(a) folktales, folk poetry and folk riddles; and

(b) folk songs and instrumental folk music; and

(c) folk dances and folk plays; and

(d) production of folk arts in particular drawings, paintings, carvings, sculptures, pottery, terra cotta, mosaic, woodwork, metalware, jewellery, handicrafts, costumes and indigenous textiles;<sup>78</sup>

This Copyright legislation was enacted to honour PNG’s obligations as a state party to World Trade Organisation<sup>79</sup> (WTO), the Agreement on Trade-Related Aspects of Intellectual Property Rights<sup>80</sup> (TRIPS) and World Intellectual Property Organization<sup>81</sup> (WIPO). The Intellectual Property Office of PNG (IPOPNG) is responsible for the administration of IPR and IP legislations in PNG. IPOPNG is a division within the Investment Promotion Authority (IPA).

Before this *Copyright and Neighbouring Rights Act* was passed it was suggested that the new legislation should cover traditional knowledge.<sup>82</sup> However, it was considered impractical due to the characteristics of indigenous knowledge being incompatible with a western copyright protection.<sup>83</sup> It was argued that traditional knowledge is commonly created and owned therefore it belongs in the public domain.<sup>84</sup> The Traditional Knowledge and Cultural Expression Bill is currently in the drafting stages. The National Cultural Commission (NCC) is responsible for the TKCE Bill. The NCC is an institution that was established by the *National Cultural Commission Act 1994*. It is responsible for the protection, preservation, and promotion of culture in PNG.

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<sup>76</sup> Ibid 3.

<sup>77</sup> Nicholas Bainton et al, ‘Stepping Stones Across the Lihir Islands: Developing Cultural Heritage Management in the Context of a Gold-Mining Operation’ (2011) 18 *International Journal of Cultural Property* 81-110.

<sup>78</sup> Copyright and Neighboring Rights Act 2000 s2.

<sup>79</sup> PNG acceded to WTO in June 1996.

<sup>80</sup> PNG signed the TRIPS Agreement in 1996.

<sup>81</sup> PNG became a signatory to WIPO in June 1997.

<sup>82</sup> Jacob Simet, ‘Copyrighting traditional Tolai knowledge?’ in Kathy Whimp and Mark Busse (eds), *Protection of intellectual biological and cultural property in Papua New Guinea*, (Asia Pacific Press, 2000) 62.

<sup>83</sup> Ibid 63.

<sup>84</sup> Ibid.

## RECOMMENDATIONS

### 1970 UNESCO Convention and 1995 UNIDROT Convention

On the international front, once cultural property has left PNG borders our legal reach is frail. This can be attributed to PNG not having ratified all the relevant cultural property conventions.<sup>85</sup> If PNG is serious in its efforts to curb the illicit trade of cultural property, then PNG must become a proactive partner in the cultural heritage international space. This can be achieved through honoring the conventions, implementing domestic laws, and ensuring that there are partnerships with other member countries. There are no repatriation or restitution provisions in place in PNG. It will be beneficial for PNG to become a state party to the 1970 Convention and the 1995 Convention. UNESCO recommends that both conventions should be ratified at the same time to enhance the political drive at the domestic level to fight illicit trafficking of cultural property.<sup>86</sup>

### Undeclared Cultural Property

The category of undeclared cultural property is at a greater risk of being exploited than cultural property that has been declared or proclaimed. This is portrayed in the case of the destruction of the ancestral stone in the *Tukuliya v Director, PNG National Museum Art Gallery*. *Somare v Zurenoc* highlights that undeclared cultural property can be afforded legal protection if it holds national significance. It is important that provisions are put in place for undeclared cultural property as this category of cultural property is unregulated.<sup>87</sup> Provisions must define undeclared cultural property and provide measures to protect this category from illicit trade, illegal exportation, and destruction, particularly if such cultural property is deemed to be secret or sacred. PNG must consider composing a list of restricted cultural property that requires protection against exportation and trade.

### Declared Cultural Property

There have been issues with the administration and enforcement of the *National Cultural Property Act*.<sup>88</sup> Moving forward, PNG must also establish an inventory of proclaimed national cultural property and a list of stolen cultural objects that is accessible to the public especially for museums and collectors so that they are aware of their true nature before acquiring them. This will also be in line with section 12 of the *National Cultural Property Act* that stipulates a registry for proclaimed national cultural property must be maintained of all proclaimed cultural property whether it is held within or outside PNG. Given that there will be traditional knowledge embedded in cultural objects the inventory must encompass this notion by making

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<sup>85</sup> V. Prott, above n 31, 70-71.

<sup>86</sup> UNESCO Information Note, above n 26, 2.

<sup>87</sup> Kalinoe, above n 52, 11.

<sup>88</sup> Craig, above n 1, 1529-1552.

space for the intangible cultural property. The illicit trade of cultural property can be limited through maintaining an inventory.<sup>89</sup>

### **Protection for Local Communities**

In addition to turning to the international framework for solutions we can utilize our existing domestic legal options. The *Organic Law on the Provincial Governments and Local-level Governments 1998* gives law making powers to provincial governments and local level governments. The provincial legislature may make laws on culture and cultural centres<sup>90</sup>, museums and libraries<sup>91</sup>. The local level governments may make laws on the protection of traditional sites.<sup>92</sup> For example, the Kuk Early Agricultural Site utilized the *Organic Law on Provincial and Local Level Governments (1995/1997)* for its nomination and management as a World Heritage listed site.<sup>93</sup> The Kuk management plan made in partnership with the Kawelka customary landowners was preserved into an *Organic Law*.<sup>94</sup> The Organic Law empowers local communities to generate laws for themselves that are binding on a national level and will fundamentally protect their own cultural and natural resources. Local communities can turn to the *Organic Law* to protect their own cultural practices and cultural material on a national level if they so choose.<sup>95</sup>

### **Traditional Knowledge Legislation**

Following the tangible inventory raised above, intangible cultural property must also be registered and recorded in an inventory. This would be expected in the TKCE Bill provisions as the *Convention for the Safeguarding of the Intangible Cultural Heritage* requires state parties to create inventories by identifying and defining intangible cultural heritage.<sup>96</sup> This inventory would encompass the intangible cultural property that is not attached to cultural objects. The Convention gives room for state parties to draw up inventories that are suited to their own local needs. This would be best achieved through community consultation and partnership. A pluralistic approach is the way forward with protecting traditional knowledge

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<sup>89</sup> Manus Brinkman, 'Reflexions on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures' in Barbara T. Hoffman (ed), *Art and Cultural Heritage Law Policy and Practice* (Cambridge University Press, 2006), 64.

<sup>90</sup> The Organic Law on the Provincial Governments and Local-level Governments 1998 s42 (1) e.

<sup>91</sup> Ibid s42 (1) f.

<sup>92</sup> Ibid s44 (1) z.

<sup>93</sup> John Muke, Time Denham and Vagi Genorupa 'Nominating and managing a World Heritage Site in the highlands of Papua New Guinea' (2007) 39 (3) *The Archaeology of World Heritage*, 327. <<https://www.tandfonline.com/doi/pdf/10.1080/00438240701464947?needAccess=true>> (Accessed 10 April 2022).

<sup>94</sup> 'The Kuk Early Agricultural Site A Cultural Landscape', *A Nomination by the Government of PNG for Consideration as a World Heritage Site* (2007) 68. <<https://whc.unesco.org/en/list/887/documents/>> (Accessed 10 April 2022).

<sup>95</sup> Anna Smith and Cate Turk 'Customary systems of management and World Heritage in the Pacific Islands' in Sally Brockwell, Sue O'Connor & Denis Byrne (ed), *Transcending the Culture- Nature Divide in Cultural Heritage* (ANU Press, 2013). <[https://press-files.anu.edu.au/downloads/press/p223681/html/ch02-smith.xhtml?referer=&page=6#toc\\_marker-7](https://press-files.anu.edu.au/downloads/press/p223681/html/ch02-smith.xhtml?referer=&page=6#toc_marker-7)> (Accessed 20 April 2022).

<sup>96</sup> Intangible Cultural Heritage Convention (n. 21) 11-12.

and there must be widespread community consultation and engagement throughout the process.<sup>97</sup> It is important that the inventory is established and maintained and that it is inclusive and kept up to date. The inventory should also provide comprehensive cultural context with each listed component.<sup>98</sup> One of the challenges that may arise for PNG when knowledge could be sensitive or secret in nature is determining who would have access rights and how this knowledge should be accessed. Another challenge is determining which sub clans or clans must be represented and who among them would be able to provide this knowledge. This endeavor would be an immense task that would require funding from the national government, resources, and trained individuals to carry out ethnographic fieldwork to document traditional knowledge. The issues that may arise in such an endeavor include language and dialect barriers between the interviewers and interviewees, lack of awareness among many people regarding the concept of and necessity for, knowledge preservation, and accessibility of remote villages.<sup>99</sup>

### **Traditional Knowledge Preservation**

There is room for PNG to utilize its legal framework for the documentation and preservation of traditional knowledge. Village courts have informal court procedures that do not follow the rules of evidence, they are meant to apply custom to settle disputes through mediation in local communities.<sup>100</sup> Under the *Organic Law* village courts are delegated functions by the Provincial Governments.<sup>101</sup> Throughout the country there are 14,496 village courts that cover 90% of PNG.<sup>102</sup> The use of custom in village courts has its challenges due to most custom not being written and recorded, which has led magistrates to use formal rules of law rather than applying custom.<sup>103</sup> If the village courts recorded their custom-based decisions, it may assist with the preservation of custom. The solution may be found in a collaboration between Local Level Governments and Provincial Governments with the village courts to document traditional knowledge through a bottom-up approach.

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<sup>97</sup> Miranda Forsyth, 'How Can Traditional Knowledge Best Be Regulated? Comparing a Proprietary Rights Approach with a Regulatory Toolbox Approach' (2013) 25 (1) *The Contemporary Pacific* 18. <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2297186](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297186)> (Accessed 1 May 2022).

<sup>98</sup> Estrada Bonell and Marmol Cartana Camila 'ICH Inventories Implementation of the UNESCO Convention' (June 2015) *Revista d'Ethnologia de Catalunya* (40) 94-106. <<https://raco.cat/index.php/RevistaEtnologia/article/view/293385>>.

<sup>99</sup> Intangible Cultural Heritage Centre for Asia and the Pacific, *Intangible Cultural Safeguarding Efforts in Papua New Guinea* (2010) e-knowledge Center ICHAP Project Resources <<https://www.unesco-ichcap.org/eng/ck/sub1/sub5.php>>.

<sup>100</sup> Village Courts Act 1989.

<sup>101</sup> Organic Law on Provincial and Local Level Governments (1995/1997) s 42 (1) (i).

<sup>102</sup> Department of Justice and Attorney General, 'Village Courts and Land Mediation Secretariat', (Online, 2022) <<https://www.justice.gov.pg/index.php/2015-04-26-07-32-15/village-courts-and-land-mediation-secretariat>> (Accessed 3 September 2022).

<sup>103</sup> Australian Law Reform Commission, 'Papua New Guinea Village Courts', (online, 18.08.2010) <<https://www.alrc.gov.au/publication/recognition-of-aboriginal-customary-laws-alrc-report-31/30-indigenous-justice-mechanisms-in-some-overseas-countries-models-and-comparisons/papua-new-guinea-village-courts/>>.

## CONCLUSION

The cultural property legal framework in PNG can be described as dated, but it has proved to be effective when protecting cultural property that has a national interest on one occasion. This paper has set out six recommendations while highlighting that there is room for PNG to utilize its existing domestic legal framework. Communities may be able to turn to the *Organic Laws* to develop safeguards and controls over their own cultural property and the preservation of traditional knowledge may be achieved through village courts. There is a need for legislation on repatriation and restitution of cultural property. Therefore, PNG must become a state party to the 1970 UNESCO Convention and 1995 UNIDROT Convention. The implementation of accessible inventories for declared national cultural property will be invaluable for museums and collectors to know the true nature of these items before acquiring them. It is important that PNG's laws and policies are responsive and realistic in terms of the issues we face, only then can we provide adequate protection for the preservation of cultural property for our future generations.