CULTURAL RIGHTS AS PEOPLE'S RIGHTS IN INTERNATIONAL LAW[1]

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Introduction

When one talks about peoples' rights, one can mean one of several very different things. One might mean peoples' moral claims. One might mean peoples' rights as established and recognised in law, and this would involve the weighing up of evidence as to whether they are so established or not[3]. Or one might mean, how far can such moral claims be established in law: what is their content? are they clear? do they meet the prerequisites for efficient enforcement by the legal system? In this last sort of discussion lawyers have a great deal to contribute, since it is their constant effort to clarify and define. Moreover this task is essential, if the rights asserted are to be given legal form and enforced. To this discussion, then, this paper is directed.

It is important, therefore, to assert that in analysing and critically dissecting the claims being made lawyers are not being obstructive, or saying that these claims should not be legally enforced. Rather the lawyer is emphasising that the effort to frame rules to meet these claims must meet the same criteria as any other claim for attention in the legal system: they must be formulated in a way that is clear and understandable, that gives notice to those subject to an obligation of the exact ambit of that obligation, and to those who must administer the rules, of their precise content. Moral claims may be phrased in ways that are inspirational, promotional and emotive: but to be enforced as legal rights they need rational restatement in a way which enables the enforcement mechanisms of the state or of the international community to be effective.

The contribution of lawyers to this debate is therefore crucial, and they should not be criticised for performing it. Yet there is clearly some impatience on the part of some Third World statesmen and scholars, and indeed on the part of political activists and idealists generally, at this approach. For the reasons already

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1 An earlier version of this paper was presented to the Symposium on the Rights of Peoples organised by the Australian National Commission for UNESCO, Canberra 14th-15th June, 1985.

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3. This, I take it, is the topic of Professor Brownlie's paper. see Brownlie, "The Rights of Peoples in Modern International Law", (1985) 9 Bulletin of the Australian Society of Legal Philosophy 104-19.

described, I think some of this impatience is misplaced However, for other very important reasons which I will discuss in the conclusion to this paper, I think their impatience is justified and requires serious attention.

Cultural Rights

Before discussing cultural rights it is essential to discuss the idea of "culture". The word culture has a great many possible meanings and at least two are significant in this discussion. The term is probably usually understood to mean the highest intellectual achievements of humanity: the musical, philosophical, literary, artistic and architectural works, techniques and rituals which have most inspired people and are seen by communities as their best achievements. This is the traditional view of the meaning of culture - what we might, for the sake of convenience, call Culture with a capital C. The second view of "culture" is that developed by anthropologists and means:

> the totality of the knowledge and practices, both intellectual and material, of each of the particular groups of a society, and - at a certain level - of a society itself as a whole. From food to dress, from household techniques to industrial techniques, from forms of politeness to mass media, from work rhythm to the learning of family rules, all human practices, all invented and manufactured materials are concerned and constitute, in their relationships and their totality, culture.[4]

In discussions of cultural rights it is not always clear which of these senses of the word are being invoked. Clearly Culture in the first sense is most significant to humankind and legal measures to ensure its protection are justified, but culture in the wider sense is also to be valued. The preservation of diversity, the understanding of cultural development, may well require the care of everyday objects and practices which do not constitute peaks of cultural achievement. Moreover, the line between "Culture" and "culture" is a difficult one to draw· while one era may regard, for example, certain objects as everyday items, another may regard them as "Art". An example in recent practice is the reclassification of certain crafts practised by women from "everyday objects" to "decorative art" to "Art" - this is true of quilting and other textile work.

However, some types of culture (in the anthropologists' sense) which do not seem (at any rate,

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4 Guillaumin, C., "Women and Cultural Values: Classes According to Sex and their Relationship to Culture in Industrial Society" in (1979) 6 Cultures No 1 - Cultural Values: the cultural dimension of development, 41

by standards currently being used) to represent peaks of human achievement, may well be worth preserving simply because they represent an interesting and different response of humanity to its environment. Clearly, assertions of rights to preserve a culture are not all embracing: certain features of ghetto culture may be impossible to sustain without abject poverty and deprivation, and may not be desirable in terms of hygiene and health. Yet other aspects of that same ghetto culture may be enriching to the human condition; and one may want to take some pains to preserve them, while eliminating the degrading and restricting conditions in which they first developed.

These different shades of meaning, of which discussion of cultural rights does not show much awareness, show that any attempt to talk about cultural issues in terms of rights may be slippery and difficult. Culture is not a static concept: cultures change all the time, and even the most enthusiastic supporter of cultural preservation would no doubt find elements in the culture under consideration which no special effort should be made to preserve. Likewise the proponents of cultural development are not urging total change: the degree of development and change of a culture which is desirable may be a subject of the keenest debate between members of that cultural group. Assertions of the right to develop and preserve a culture therefore conceal some of the most difficult areas of cultural policy-making

Peoples' Rights and Human Rights

Although the Symposium for which this paper was originally prepared was concerned with the rights of peoples, I find, like Professor Brownlie, that it is impossible to do justice to the topic without making reference to individual human rights and the general human rights context out of which the so-called "Third Generation" rights have emerged. Cultural rights, in my view, have been present implicitly, if not explicitly, in human rights thought from the start. Freedom to express one's views, to adhere to one's religion, to associate with others for peaceful purposes, are all essential to the maintenance and development of any culture. Though these rights were certainly not designed for this purpose, their existence is a necessary prerequisite for the protection of culture, especially, as Brownlie points out, for the culture of minorities.[5] But I agree with Brownlie that certain claims by groups which are not on their face unreasonable have involved matters not adequately covered by the classical formulations: among these he lists "claims to positive action to maintain the cultural and linguistic identity of communities".[6]

5 Brownlie, supra n 3, at 105
6. Ibid.

Brownlie suggests that these claims have not so far received recognition under the classical formulations and cites the Belgian Languages Case ((1968) 11 European Yearbook of Human Rights 832) as evidence that a Court will not require a State to provide subsidies and other material underpinning to these rights. I am not so sure that it is possible to decide what is "refraining" from and what is "providing" in this context, particularly in the case of education, where the provision of buildings, teacher training etc. and other material resources may be the inevitable implication of the child's right to education, and the parents' right to choose its form. (See, for example, the discussion of these issues by the Permanent Court of International Justice in Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, 1928 PCIJ Reports Series A, No. 15, 41 ff.)

There has certainly been a change of emphasis with the effort to extend cultural rights from the individual, or specified minorities protected by detailed and concrete treaty provisions, to broad general formulations as "rights of peoples". The most thorough attempt to do so has been in the Universal Declaration of the Rights of Peoples adopted at a conference at Algiers in 1976. (This was not a diplomatic or inter-State conference, i.e. not a conference creating new law by the consent of States in the traditional method of international law). Many of its ideas have been adopted by the Organisation of African Unity in its multilateral agreement of 1981, the Banjul Charter on Human and Peoples' Rights.

These two documents have been at the centre of the current discussion of the "third generation" human rights, the collective rights which are current important political assertions of Third World states, and subject to some scepticism and allegations of vagueness by many Western scholars. Among the collective or group rights which have been asserted are some new cultural rights. "Peoples' rights" have been said to include the right to self-determination, to protection against genocide, the rights of minorities, the right to peace and security, to permanent sovereignty over natural resources and the right to development[7]. Cultural rights have also been included, but relatively little work has been done on them "Cultural rights" remains a rather hazy category, for reasons which I think have to do with some of the fundamental difficulties relating to "peoples' rights".

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7 See Crawford, "The Rights of Peoples: 'Peoples' or 'Governments'?", (1985) 9 Bulletin of the Australian Society of Legal Philosophy, 136

Enumeration

There seem to be a number of rights which can loosely be described as "cultural rights". These are:

(1) the right to freedom of expression, together with the important concomitant rights of freedom of religion and freedom of association (though generally classified among civil and political rights, these rights seem to be an essential basis for the existence of any cultural rights). (Guaranteed by all the major human rights instruments.)

(2) the right to education (Universal Declaration 1948, Art. 26; International Covenant on Economic, Social and Cultural Rights, Art. 13.1; Protocol I to the European Convention on Human Rights 1950, Art. 2; American Declaration of the Rights and Duties of Man 1948, Art 12; Banjul Charter 1981, Art. 17.1).

(3) the right of parents to choose the kind of education given to their children (Universal Declaration, Art 26 3; International Covenant on Economic, Social and Cultural Rights, Art. 13.3; Protocol I to the European Convention on Human Rights 1950, Art. 2).

(4) the right of every person to participate in the cultural life of the community (Universal Declaration Art. 27.1); International Covenant on Economic, Social and Cultural Rights 1966, Art. 15.1.a; American Declaration of the Rights and Duties of Man 1948, Art. 13; Banjul Charter, Art. 17.2).

(5) the right to protection of artistic, literary and scientific works (Universal Declaration, Art. 27 2; International Covenant on Economic, Social and Cultural Rights, Art. 15.1.c; American Declaration of the Rights and Duties of Man 1948, Art. 13)

(6) the right to develop a culture (UNESCO Declaration of the Principles of International Cultural Co-operation 1966 Art. 1.2; Banjul Charter 1981, Art. 22.1); right to preserve and develop its own culture (Algiers Declaration 1976 Art. 13)

(7) the right to respect of cultural identity (Algiers Declaration Art. 2)

(8) the right of minority peoples to respect for identity, traditions, language and cultural heritage (Algiers Declaration Art. 19)

(9) the right of a people to its own artistic, historical and cultural wealth (Algiers Declaration Art 14)

(10) the right of a people not to have an alien culture imposed on it (Algiers Declaration Art 15)

(11) the right to the equal enjoyment of the common heritage of mankind (Banjul Charter Art. 22.2)

Of these eleven "cultural" rights, the first five seem to be cast as rights of individuals. Rights (6) to (11) are, however, cast as peoples' rights, and it is on these that I shall concentrate.

What are "peoples' cultural rights"?

People's cultural rights, as currently formulated in the instruments listed above, seem to fall into two distinct groups. The right to preserve and develop a culture, the right to respect for cultural identity, and the right not to have an alien culture imposed on it, all relate to the cultural identity and uniqueness of a people.A second group consists of the right of a people to its own cultural heritage and to participation in the world cultural heritage. These seem to relate to issues of property and are, I think, of a different order.

Rights relating to "cultural identity"

The concept of "cultural identity" is difficult precisely for the same reason as the concept of "a people" is difficult: it is hard to think of any satisfactory definition of "people" which would not use some form of cultural criteria. Similarly, it is difficult to think of any concept of a culture (other than a universal culture) which would not need to use the concept "people" (or "group" or "community" or other synonym) in its definition. The world abounds in disagreements between groups as to how a culture or "sub"-culture is to be classified; whether it needs special protection, whether it should be discouraged as a local (and perhaps less valuable) aberration of the pervasive culture, whether it should be given special assistance to develop further. An indication of this confusion is the inclusion in the Algiers Declaration of a people's right to cultural identity (Art. 2) and a minority's right to cultural identity (Art. 19). Niec's suggestion that the benefit of this right should be restricted to a "nation", whether or not organised as a national state[8], does not appear to me to have provided a solution.

Certain of the older generation of human rights, the right to freedom of expression, the right of parents to choose the education of their children, clearly enhanced the situation of minorities and assisted the survival of threatened minority cultures. Yet the assertion of

8. Niec, H , "Human Right to Culture", (1979) 44 Annuaire des Anciens Auditeurs de l'Academie de la Haye 109 at 112.

cultural identity across national frontiers (witness pan-Germanism in the 19th and 20th centuries) has been a most potent and disturbing political argument. Small wonder that these so-called "cultural rights" have for the most part been left unexplained and undeveloped.

An illustration of some of the discomfort which can be aroused by assertions of collective rights to cultural identity by minorities might be taken from Ghana. Within the modern State of Ghana are the Ashanti people, formerly an extremely powerful and wealthy tribe against whom the British conducted two expeditions in 1874 and 1900. They took from the Ashanti capital gold artifacts of deep symbolic significance. The objects are currently held in English collections, but the psychological and spiritual significance of the regalia makes any possible question of its return very awkward. The Ashanti are a tribe culturally distinct from the other peoples of Ghana; their culture is little understood, and they might justifiably feel a grievance if these materials were to be returned to the Ghanaian government. On the other hand, the return of the regalia, with its enormously powerful associations, to one tribal unit could very well cause a dangerous imbalance within the country[9]. The close connection between cultural symbols and practical politics is patent.

Identification of one particular group with important cultural resources may not always be so direct. Whose cultural heritage does an object belong to, when it is important to more than one group? The Elgin Marbles dispute is the most obvious example, but consider the Canadian Cultural Property Export and Import Act 1975, according to which an item can become part of the cultural heritage of Canada after it has been in the country thirty-five years, or if it has a close connection with Canadian history or national life. Thus an early seventeenth century Dutch atlas and papers of Rudyard Kipling, part of a well-known Canadian collection, have both been held to be of outstanding significance to Canada[10] and preserved there under the provisions of this Act.

Rights connected with the Cultural Heritage

The right of a people to its own cultural, artistic and historical wealth was first mentioned in the Algiers Declaration of 1976. The date, and the use of the word "wealth" rather than heritage, suggests that the drafters were not particularly concerned with intangibles such as

9 Chamberlin, E.R., Loot - the Heritage of Plunder, Facts on File, 1983, pp.69-97.

10 Secretary of State, Ottawa, Annual Report: Cultural Property Export and Import Act, 1979-80, pp 18-19; 1982-83, pp 20-22

language, traditions, rituals etc but had in mind cultural property, in respect of which a campaign has been mounting, through the United Nations and through UNESCO, for the "restitution" of cultural objects taken from their places of origin, especially in colonial times, and now located in Europe or America. The right to the equal enjoyment of the "common heritage of mankind" first appeared in the Banjul Charter in 1981, and it seems, from the context, that the cultural heritage is at least included though this is not specified.

It is difficult to be precise about the meaning of either of these two provisions.

The right of a people to its "artistic, historical and cultural wealth" may mean no more than that a state, or a minority in a state, has the right to prevent despoliation of sites of importance on its territory and to prohibit traffic in movables. There is no suggestion that a people should have "permanent sovereignty" over its cultural wealth in the way that it would have over its natural resources under the UN Declaration on Permanent Sovereignty over Natural Resources of 1962. This would certainly cause bitter problems over immovables: there are many sites which are primarily associated with the culture found in one State but are now within the borders of another. A prime example was seen in the Case of the Temple of Preah Vihear (1962 ICJ Reports 6), which concerned a religious site built by the Khmer people whose descendents now live in Kampuchea, but which by the 19th century was within the Thai area of power The problem of ensuring the care of such sites, especially where the different States concerned may currently be hostile to one another, would hardly be improved by the vigorous assertion of rights such as that here described. (Interestingly, this right was not adopted by the Banjul Charter.) Although cultural rights relating to education, religious tradition and language have been studied in relation to minority groups[11] little attention has so far been paid to the protection of the archaeological heritage in this context.

It seems more likely that the formulation of a people's right to its artistic and historical wealth was intended not primarily to relate to sites, but to shore up the demand for restitution of movable cultural property, especially in respect of those newly independent states which can clearly show that all the most significant items of their cultural heritage were taken from their territory when they had no control over it and they have not even a nucleus from which to build a national collection. Countries such as Nauru and

11 Capotorti, F , Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities (UN Doc. E/CN 4/Sub 2/384/Rev.),1979,p 57 ff

Vanuatu, which found themselves, at their independence, stripped of all examples of their traditional cultural material would be the kind of States which might want to assert such a right.

Further, the assertion of this right could be intended by its proposers to cover yet another situation: where cultural objects have been exported illegally from their country of origin and the State of their present location refuses to enforce the export prohibition of the State of origin. For example, the Maori carvings concerned in the case of Attorney-General for New Zealand v. Ortiz ((1984) Appeal Cases 1) had been illegally exported from New Zealand but the House of Lords held that the New Zealand government was not their owner and could not succeed in a suit for possession in the United Kingdom. Perhaps the assertion of a people's rights to its artistic and historical wealth is intended to improve the prospects of success in such a venture. Cases such as this may be quite spectacular. Consider the case of the collection of Central Aboriginal artifacts, recordings of songs, rituals and folklore made by the archaeologist Strehlow from the 1930s on. According to his records, he was entrusted with much of this information, some of it secret, by the elders of the Aranda tribe at a time when they saw their culture under great threat from encroaching Westernisation and were fearful of a lack of serious interest of their own younger tribal members. The collection passed with Strehlow's death into the hands of his widow, and in 1984 was reported to have been taken out of the country in defiance of an Australian export prohibition[12]. The collection (popularly called "the crown jewels of Australian archaeology") had extraordinarily high commercial value (as had been seen by the few commercial uses Strehlow had made of parts of it in his lifetime) and an incalculable spiritual and cultural value to the Aranda community in its resurgence of tribal and aboriginal identity. (The collection was subsequently reported to have been returned to Australia after negotiations between the Australian government and those responsible for its exportation). An assertion of a "people's right" to its own artistic and cultural heritage in this kind of context might be more in the manner of an assertion of some permanent right to decide on its location, or even an assertion of the primacy of a spiritual/cultural claim over a commercial one.

There may also be cases where a minority group within a State seeks restitution of movable cultural

12. The collection was reported in the news media to have been taken out of Australia: "Flight of Sacred Stones", The Bulletin, 13/11/1984, and to be being returned to Australia by agreement between the Australian federal government and the exporter in April and June 1985: see reports in the Canberra Times, 24/4/1985 and 19/6/1985

property or control over its movement within the State For example, a significant claim being made within Australia is currently the claim to prevent the movement of aboriginal material away from its traditional owners, or the community which has the closest association with it Such claims were originally considered at the time of the passing of the Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 but achieved very limited recognition in that Act (the Act is due to be replaced by more comprehensive legislation within two years). Such claims have been given greater recognition in the New Zealand Antiquities Act 1975 which places certain restrictions on the transfer of ownership of Maori antiquities within that country, as well as on their export.

The right to equal enjoyment of the common cultural heritage is an even hazier notion. Does it mean the right to cultural exchanges? Or could it be intended to be the basis of an argument about the right to literacy and to scientific and technological advances made by other peoples? Or is it perhaps an assertion on behalf of the smaller and less affluent cultures to assistance from such international bodies as may have any to give? Is it a reference to the world cultural and natural heritage defined in terms of sites of supreme importance in the development of humankind in the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage? That interpretation does not seem to make any sense: either such sites are, or are not, on the territory of a "people". If they are, then they are part of its own cultural heritage, and if they are not, then the only content this provision would have would be as an assertion that sites of importance to all humankind are also of importance to the world's individual peoples.

"Universal" culture and "specific" cultures

An important distinction has to be made between general cultural rights (e.g. to education, participation in cultural life); rights related to a specific culture and rights related to cultural resources of universal significance.

A number of UNESCO instruments emphasize the importance of all cultures to the human experience: thus the UNESCO Convention for the Protection of the World Cultural and Natural Heritage 1972, is based on the assumption that everybody has an interest in the greatest cultural achievements, and international campaigns to protect threatened sites (such as Abu Simbel and Borobodur) are supported by the commitment of persons outside the local culture to their preservation.

At the same time it is clear that some of the rights discussed above, such as the right to develop a culture, or the right of parents to choose the kind of education they desire for their children, are more in the nature of

"special status" rights which can be claimed by minorities whose cultural survival or creative activity is threatened. The protection accorded by these minority rights could include the protection of sites of particular significance to that particular group, even if no other persons outside that group were interested in them. However, just as distinguishing a "nation" from a "people" from a "minority" is one of the perennial problems of international law, so deciding when a "culture" is distinct and important enough to need special legal protections and guarantees is a very difficult task.

Consider as an example, the case of Kakadu National Park, site nominated by Australia and accepted for the UNESCO World Heritage List under the 1972 Convention[13]. It is of universal cultural significance because of its unique sites of rock art, which were still actively being worked within living memory and stretching back in an unbroken tradition many thousands of years. It shows the continuing evolution of the aboriginal community in its environment, the development of new styles and achievements and new ways of humanity looking at itself. Some of the features of these rock galleries have important parallels, and equally important contrasts, with other important rock art sites, such as Altamira in Spain and Lascaux in France. The galleries have been little explored, and clearly are an enormous storehouse of artistic and intellectual experience requiring special protection for their significance to all humankind. At the same time they have a special significance for all Australians, including the recently arrived European settlers, confronted with an unfamiliar and at first hostile environment. Indisputably they have special significance for the aboriginal population of Australia, a group whose interests were systematically ignored or overborne by the immigrant population until very recently, and to whom they permit an assertion of cultural uniqueness, value and superiority very important in their recent and growing assertions of equality Above and beyond all those claims are the special claims of those descendants of the original artists, those tribes located in that part of Australia who still have special close connections with the land and are its guardians and "traditional owners" (using that term in a non-technical sense).

Cultural Rights and the Right to Development

The problems of delineating, understanding and applying cultural rights are compounded when the areas of conflict and overlap with other collective rights are

13. See the World Heritage List as annexed to the UNESCO General Conference Document 23 C/86 (Twenty-third Session, Sofia 1985), which is the Report of the Intergovernmental Committee for Protection of the World Cultural and Natural Heritage.

examined. This can be well illustrated by the conflict with the right to development The right to development is seen by many Third World partisans of collective rights as central to the scheme of collective rights, since without it the economic basis for the realisation of many of the basic human rights, civil, political and, especially, economic rights, may not exist.

Yet the assertion of the right to development may run directly counter to the right to preserve or develop a culture. Economic development may obliterate or mutilate important cultural sites and destroy social structures which are essential for the survival of traditional arts and other cultural activities. Pressures to exploit tourism as a source of foreign revenue often leads to degradation of traditional crafts to cater with the increased demand, to the provision of services for tourists inimical to the local environment and to damage to static lifestyles from the constant stamp of tourist feet.

Economic development may mean cultural stagnation: cultural development may mean economic stagnation. An awareness of this paradox has led to the suggestion that "development" must be redefined to include socio-cultural as well as economic factors[14].

While it is true that these conflicts can be lessened by sensitive planning, they cannot be eliminated. It may be argued by some groups which have a culture which is threatened by a surrounding majority culture, inimical to many of its values (such as an indigenous culture under threat of Westernisation) that it seeks the right <u>not</u> to develop, in order to preserve or <u>re</u>develop its traditional culture. The point is that very serious decisions with most far-reaching implications are going to have to be made on matters of cultural policy and social and economic development. None of these decisions is made any easier by framing the issues in terms of "rights" rather than of compromise.

For example, the desire to obtain technological knowledge, to participate more fully in international trade, to encourage tourism might lead a government to phrase its claims for aid for the teaching of English as part of the right to development. At the same time the desire to consolidate national identity, to improve literacy, develop local cultural traditions and preserve important kinds of cultural activity might lead the same government to encourage the use, development and teaching of an indigenous language. The debate concerning the

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14 Makagiansar, M , "Preservation and Further Development of Cultural Values" in (1979) 6 <u>Cultures</u> No 1 - Cultural Values: the cultural dimension of development, 11

status of Creole in Mauritius is an interesting example[15]

The right to development might also be called on in a situation such as Egypt's when it was decided to build the Aswan High Dam. Against it could be urged the right to participate in the world's cultural heritage: since this was a clear case where sites of extreme and universal significance would have been completely removed from access and in due course irretrievably lost.

Cultural policy and cultural rights

It should be clear from this discussion that I believe that a great deal of further analysis has to be done before these important complexes of cultural policy can effectively be transformed into enforceable law by way of declarations of rights in international legal instruments. This may yet be done, but the relatively vague formulations and their many ambiguities, need careful study before they can be regarded as safely established in law.

This, however, is not a statement that formulations of cultural rights are not important. Indeed, it seems to me that questions of culture underlie a good many of the political demands from which the classical human rights developed. Many of the issues mentioned in the course of this paper are regarded as of very great significance, particularly by the newer States. A recent publication by the Association of Conservation of Cultural Treasures of the Republic of Korea[16] insists that the conquest of a nation is only complete, not by military subjection, however thorough, but by destruction of the indigenous culture. Such an attitude illustrates the drive to give threatened cultures additional protection by formulating certain demands about culture into human rights protected by international instrument which cannot be derogated from.

In my opinion it is this factor which accounts for the drive to phrase cultural issues as human rights issues. If there is any content to be given "ius cogens" in international law, there seems to be reasonable agreement that "human rights" are in it. The vigorous assertion that these critical cultural issues are

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15. Lenoir, P., "An Extreme Example of Pluralism: Mauritius" in (1979) Cultures No. 1 - Cultural Values: the cultural dimension of development, 63 at 70-72.

16 Association for Conservation of Cultural Properties of Korea Inc., Conservation of Cultural Properties, undated publication received in May 1978, in Korean, p. 13 From translation procured in preparation for the book by Prott, L.V. and O'Keefe, P J , Law and the Cultural Heritage, Vol 1: Discovery and Excavation, Professional Books, Abingdon U K , 1984

"rights" is understandable in this context. "Human rights" has been an emotive and potent force in the process of improving the human condition It is one to which Western States have shown commitment, and, in the achievement of the traditional civil and political rights particularly, great pride. Issues raised as human rights issues will be given serious attention. Critical attention is better than no attention.

There seems in many Third World States to be resentment and criticism of the caution of Western legal scholars in the acceptance of newly formulated rights, and a belief that their attitudes may be obstructive. For reasons set out in the Introduction to this paper, I think that this is to confuse different issues. Nonetheless I do think that many Western scholars are not altogether realistic in their approach to these issues.

Consider this statement by Brownlie:

> I should make my own position absolutely clear. As policy goals, as standards of morality, the so-called new generation of human rights would be acceptable and one could sit round a table with non-lawyers and agree on practical programmes for attaining these good ends. What concerns me as a lawyer is the casual introduction of serious confusions of thought and this in the course of seeking to give the new rights an actual legal context.[17]

This statement seems unexceptional. But Third World states would be justified in arguing that there has been no sitting round a table and agreement on practical programmes on issues of cultural policy, and no willingness shown to pay attention to issues of cultural policy of very serious concern to them. To take an example: archaeologically rich countries have been concerned for generations with the despoliation of their sites for the benefit of Western markets. Discussions on the international control over illicit exploitation of antiquities took place in the League of Nations between 1919 and 1922 but resulted in no international instrument (though they did become the basis of the first antiquities legislation in Iraq). A draft Convention on the Repatriation of Objects of Artistic, Historical or Scientific Interest, Which Have Been Lost, Stolen or Unlawfully Alienated or Exported was submitted to the Member States of the Legue of Nations in 1933, but was not adopted. A draft Convention for the Protection of National Historic Artistic Treasures was submitted to the Member States of the League in 1936 and referred back for further study. A draft Convention for the Protection of National Collections of Art and History, drawn up in 1939, which would have applied only to objects

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17. Brownlie, supra n 3, at 116

individually catalogued as belonging to a State but which were stolen and unlawfully expatriated therefrom, was never adopted because of the outbreak of war Lastly, the final Act of the Cairo Conference of 1937, which adopted certain international principles applicable to archaeological excavations, failed to receive the implementation it needed because of the worsening international situation, though it later formed the basis of the 1956 UNESCO Recommendation on that topic.

Thus it took 50 years and the failure of 3 or 4 major instruments to get a viable international instrument to deal with the problem (the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer or Ownership of Cultural Property). That Convention is a very much weakened version of the instrument originally proposed, and even that draft had differed from its unsuccessful predecessors. Of the 54 States which are currently parties, of European States only Italy is a party; the United Kingdom, Switzerland and the Federal Republic of Germany, all major art markets, are not. Although the United States is a party (since 1983), its acceptance is extremely limited.

Despite this evidence of persistent and serious concern for the protection of cultural resources, Western statesmen and international lawyers have shown that their interests are not engaged by the serious and complex problems in this area. Examining current periodicals of international law, for example, one is struck by the hundreds of articles being written on exploitation of the seabed, changes in laws relating to maritime transit, and the sharing of economic resources of the sea. On international issues of cultural policy there are probably no more than 10 international lawyers showing any interest in the subject, and probably not more than 5 working on the problems with any degree of serious effort, rather than dabbling with one or more specific issues as an "instant expert".

In this context I understand and sympathise with the efforts of lawyers from newer States to formulate cultural issues as human rights issues. If States will not utilise the existing techniques of formulating new, conceptually satisfactory and practically effective rules to control a serious source of international friction, one can hardly blame those who seek to use techniques which may be conceptually unsatisfactory but do make use of an existing strong ideological commitment, to achieve their ends. There is an international political momentum behind the "peoples' rights" movement which may be unstoppable. I suspect that much of the distaste of Western international lawyers for the intellectual disarray of current international formulations of international rights conceals a complacent commitment to the interests of Western States It is easy to say, "Let us sit around a table and discuss these issues", but that

statement ignores the long record of failure of Western states and Western scholars to do any such thing, and the present apparent lack of serious effort to address the policy issues in the area of cultural protection.

I think it very important, in concluding this critical analysis of cultural rights as they are presently formulated, to recognise the very strong pressures existing to refine and expand those which are now embryonic or emerging. I think it realistic to expect that more will be formulated, proclaimed and promoted, despite all we can say or do, despite all our hand-wringing and nay-saying. If we really care for the texture of international law and its intellectual integrity, then we should do something solid about the practical problems that are encouraging its distortion, and not simply spend our time lamenting it.

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