ON DEFINING THE CULTURAL HERITAGE

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I. THE DEVELOPMENT OF INTERNATIONAL CULTURAL HERITAGE LAW

Examples can be found from ancient times of concern for the protection of cultural artefacts and early legislation to protect monuments and works of art first appeared in Europe in the 15th century. Cultural heritage was first addressed in international law in 1907 and a body of international treaties and texts for its protection has been developed by UNESCO and other intergovernmental organisations since the 1950’s. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict of UNESCO (henceforth the “Hague Convention”) is the earliest of these modern international texts and was developed in great part in response to the destruction and looting of monuments and works of art during the Second World War. It grew out of a feeling that action to prevent their deterioration or destruction was one responsibility of the emerging international world order and an element in reconciliation and the prevention of future conflicts. International law relating to the protection of cultural heritage thus began with comparatively narrow objectives, the protection of cultural property in time of war.

In 1956 UNESCO adopted a Recommendation on the conduct of archaeological excavations which, despite its limited subject-matter, contained principles fundamental to subsequent UNESCO instruments: that the protection of cultural heritage is incumbent on States owing to the importance which it holds for all of Mankind and as a means of encouraging international co-operation and thus prevention of international conflict, as well as “the feelings aroused by the... study of works of the past do much to foster mutual understanding between nations, and that... the international community as a whole is nevertheless the richer for such discoveries”, (Preamble). Further UNESCO Recommendations followed on specific questions, including the accessibility of museums

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3. 1907 Hague Regulations concerning the Law and Customs of War on Land protect “historic monuments” from sieges and bombardments.
safeguarding the beauty of landscapes and sites (1962)\(^6\) and preserving cultural property endangered by public or private works (1968).\(^8\) Two UNESCO Conventions were adopted in the early 1970s, relating to the prohibition and prevention of trafficking in cultural property (1970)\(^9\) and the protection of world cultural and natural heritage (1972),\(^10\) while five further UNESCO Recommendations were adopted between 1972 and 1980. Thus the main body of international texts relating to the protection and preservation of cultural heritage is of relatively recent date. It is worth noting that the three Conventions so far adopted by UNESCO reflect the political and/or intellectual concerns of the time at which they were developed: the 1954 Convention expressed the powerful post-World War II desire to reduce potential sources of international conflict; the 1970 Convention embodied an approach to cultural property which might be characterised as “nationalist” or “statist” whereby the interest of the State of origin (often in the developing world) should be paramount, mirroring the strong feeling within UNESCO during the 1970's amongst developing nations that the power of the dominant developed States should be counteracted;\(^11\) and the 1972 Convention reflected both the growing concern in environmentalist issues in its integration of the cultural with the natural heritage as well as the concept of a “common heritage of mankind” which had been developing at this time in relation to seabed mineral resources.

II. THE PROBLEM WITH “CULTURAL HERITAGE”

To some degree, therefore, the growing body of international instruments and other texts relating to cultural heritage was driven by contemporary concerns and intellectual fashions, further illustrating the lack of a single set of well-established principles underpinning this body of international law. There exists a difficulty of interpretation of the core concepts of “Cultural heritage” (or “cultural property”) and “cultural heritage of mankind” and as yet no generally agreed definition of the

11. M’Bow, then Director-General of UNESCO, voiced such sentiments in A plea for the Return of an Irreplaceable Cultural heritage to those who Created It delivered in 1979: “The men and women of these [despoiled] countries have the right to recover these cultural assets which are part of their being … The return of a work of art to the country which created it enables a people to recover part of its memory and identity …”, UNESCO Doc.SHC-76/CONF.615.5 (1979).
content of these terms appears to exist. The increasing global importance of cultural heritage instruments and the ever-expanding scope of the term and the areas in which it is used require a workable definition of the nature of the cultural heritage. Each such expansion introduces much more complex issues concerning the nature of cultural heritage and the construction of cultural identity than were apparent in earlier developments in this field. The danger therefore exists of creating future international instruments which extend the range of the term without having settled on a clear understanding of its meaning as employed in existing texts.

Writing in 1984, Prott and O'Keefe\(^\text{12}\) noted that, “... for various reasons each Convention and Recommendation has a definition drafted for the purposes of that instrument alone; it may not, at this stage be possible to achieve a general definition suitable for use in a variety of contexts”. Fifteen years on, it is time for lawyers and other specialists in the area of the cultural heritage to confront this and to consider the different meanings given to the above terms in various international legal texts as well as those implicit in their use but not explicitly stated. Although each instrument includes a definition which lists or otherwise describes the subject of that text, the lack of any generally agreed definition means that these must be interpreted internally without reference to any set of principles. This should not be seen as a criticism of the existing treaty texts and Recommendations themselves. The three UNESCO multilateral Conventions are similar to human rights instruments in setting standards worldwide and the Recommendations can have great influence on national practice despite not being binding on Parties. They have an important role in confronting specific problems and threats to the cultural heritage. However, there now exists a critical mass of treaty and other texts (including those from other intergovernmental organisations) which form a recognised body of international law and it is time to reassess its exact nature since cultural heritage as a concept has grown so far that it may well have become greater than the sum of its constituent parts.

Indeed, there appears to be the assumption of a common understanding of the content of the “cultural heritage” which fails to take into consideration its wider implications. This is compounded by the fact that the concept of “cultural heritage” has itself been imported from other academic disciplines such as anthropology and archaeology without incorporating the theoretical background which led to its development viz. the conceptual framework which gives it content and meaning. This difficulty was signalled by Prott writing in 1989,\(^\text{13}\) “While cultural experts

\(^{12}\) Prott and O'Keefe, *op. cit. supra* n.2, at p.8.

of various disciplines have a fairly clear conception of the subject-matter of their study, the legal definition of the cultural heritage is one of the most difficult confronting scholars today.” There may be no difficulty, for example, in understanding the intention of the 1970 UNESCO Convention as to the nature of the “cultural property” which it protects. There is, however, a difficulty with any attempt to identify exactly the range of meanings encompassed by the term cultural heritage as used now in international law and related areas since it has grown beyond the much narrower definitions included on a text-by-text basis. Recent work at UNESCO to develop strategies for the protection of intangible cultural heritage illustrates this problem.14 First, there is a great difficulty in identifying the exact content and nature of intangible cultural heritage to be protected and, to some degree, this is a question which should have been addressed earlier in relation to the cultural heritage in general. Second, the characterisation of folklore as “part of the universal heritage of humanity”15 while at the same time noting its power in asserting the cultural identity of the community which produced it contains an inherent contradiction since the very character which renders this heritage folklore—its intimate relationship to the identity of a specific community or people—is in opposition to the idea of it being a “heritage of mankind” in any but a very distant sense. This illustrates a wider problem of cultural heritage law articulated by Lowenthal.16 “Too much is asked of heritage. In the same breath, we commend national patrimony, regional and ethnic legacies and a global heritage shared and sheltered in common. We forget that these aims are usually incompatible.” As Prott notes, globalist concepts of the cultural heritage have now been adopted into legal discourse and UNESCO’s universalist task in setting international standards is in parallel with such developments as well as globalisation of the economy.17 An illustration of this is the UNESCO programme aimed at creating a world list of “masterpieces of the intangible and oral heritage” modelled on the 1972 World Heritage Convention.18 Further elaboration of the core concepts of “cultural heritage of humankind”

18. Vide supra n.14 for details.
(and similar terms) is clearly needed since the current conflation of inconsistent categories is problematic in the long term.19

III. IDENTIFYING CULTURAL HERITAGE

A. "Cultural heritage" or "cultural property"?

Traditionally, “cultural property” has generally been the term of art employed in international law to denote the subject of protection. Examples of this would be UNESCO’s 1954 Hague Convention protecting cultural property in the event of armed conflict and the 1970 Convention controlling the illicit movement of cultural items.20 The items concerned require protection because they are being treated as property to be bought and sold in the market-place without primary regard given to their value as cultural heritage. The 1978 UNESCO Recommendation21 gives the following definition: “movable cultural property shall be taken to mean all movable objects which are the expression and testimony of human creation or of the evolution of nature and which are of archaeological, historical, artistic, scientific or technical value and interest ...” (Article 1). This makes reference to the importance of other values, such as the informational one derived from context, but such qualifications do not answer the broader difficulties with the term “property” as applied to cultural artefacts.

As a broad category to describe elements of the cultural heritage in international law it remains problematic and an alternative usage which does not carry with it the ideological baggage of “cultural property” is preferable. Property is a fundamental legal concept around which important political and philosophical theories have developed.22 It carries with it a range of ideological baggage which is difficult to shed when using the term in relation to the cultural heritage or environmental protection where one needs to modify these associated traditional values in order to achieve the social goals desired. It is problematic to apply a legal concept involving the rights of the possessor to the protection of cultural resources which may involve a severe curtailment of such rights and the separation

19. Prott, op. cit. supra n.17, at p.228 notes: “The precise legal implications of terms such as ‘the common cultural heritage’, ‘world cultural heritage’ and similar phrases are not yet clear, although their use in legal instruments makes it imperative to explore the subject.”

20. Cited, supra n.4 and n.9.


22. L. V. Prott and P. J. O'Keefe “‘Cultural Heritage’ or ‘Cultural Property’?” 1:2 I.J.C.P. (1992) pp.307-320 at pp.309-312 consider traditional property law values in the context of cultural heritage law, making reference to points such as: the protection of the rights of the possessor; the important function of “property” and “ownership” in Western legal tradition; and the dangers of commoditisation of cultural heritage.
of access and control from ownership. Implicit also in the use of the term “cultural property” is the idea of assigning to it a market value, in other words the “commodification” of cultural artefacts and related elements by treating them as commodities to be bought and sold. There has been much debate over the ethics of trading in cultural artefacts, in particular archaeological materials, and the value of different legal approaches.

The strongest argument against the use of the term “cultural property” is that it is too limited to encompass the range of possible elements—both tangible and intangible—which can comprise the cultural elements being described. These might include monuments and complexes of buildings, sites of archaeological or historic significance, ancient works of art (including rock carvings and cave paintings), ethnographic items, places associated with the development of a technology or industry, landscapes and topographical features, grave sites, sacred places and ritual sites, natural features endowed with special cultural significance to a people, items of clothing or jewellery, weapons, daily utensils, ritual items, musical instruments, objects associated with certain historical characters, coins, carved obsidian or ivory, fossils, skeletal remains, pollen samples, ancient copper or tin mines—the potential list is extensive. These examples given above relate only to physical remains which have typically been the subject of laws for the protection of the cultural heritage. There exist also elements of intangible culture which would include, for example, the know-how related to a particular type of ship-building, oral poetry or musical traditions, ceremonial and ritual traditions, aspects of the way of life of certain societies and the special relationship between certain peoples and the land they inhabit. This category above all makes clear the extreme limitations of applying the term “cultural property” to such elements, some of which are expressed only in terms of knowledge or ideas. Prott notes that it is a purely Western legal category which is far too narrow and that it has been global influences that have allowed the broadening of the concept of cultural heritage.

The relationship between “cultural property” or “cultural heritage” is unclear, appearing interchangeable in some cases, while in others, cultural property is a sub-group within “cultural heritage”. The 1968 UNESCO Recommendation, suggests that “cultural property” has a

23. Such as French Law No.89–874 of 1 Dec. 1989 on Maritime Cultural Property which allows the State to intervene for the preservation of archaeological wrecks if the identified owner fails to do so themself (Art. 11).
25. Prott, op. cit. supra n.17.
meaning extending well beyond objects themselves: “…the product and witness of the different traditions and of the spiritual achievements of the past and thus is an essential element in the personality of the peoples of the world (preamble)”. The definition of the term “cultural property” given in Article 1 of the Hague Convention (1954) as “movable or immovable property of great importance to the cultural heritage” clearly shows it to be one element within the cultural heritage. Only two UNESCO instruments refer to “cultural heritage” in their titles27 and it is worth noting that both deal with “cultural and natural heritage”. This is no doubt in part due to the fact that to talk of “natural property” would be a very strange construction but there is, however, a more significant point which suggests a common character between cultural and natural heritage as resources (one man-made, the other not) which should be preserved for future generations in view of their importance on a cultural and environmental level. There is an aspect of “natural heritage” which forms a part of the cultural heritage given the importance of certain landscapes and natural features to particular groups and cultures.28 Cultural heritage as defined in these two instruments includes elements of an apparently mundane character such as topographical features and cultural landscapes and it is the relationship of humans to these elements (an intangible element) which gives them their importance and which renders them subject to protection. This leads one to the conclusion that “cultural heritage” has now become the term of art in international law29 since it is capable of encompassing this much broader range of possible elements, including the intangibles mentioned above.

B. The nature of “cultural heritage”

Clearly, when seeking to understand the nature and content of the term “cultural heritage” it is necessary to consider the two constituent elements which make it up: “culture” and “heritage”. A major difficulty lies with the identification of “culture” and what constitutes it and if we look at the following definition of “culture” given by an anthropologist,30 the complexity of the question becomes clear:

… it is a totalizing concept because everything becomes, or is considered, culture. There are material culture, ritual culture, symbolic culture, social

27. 1972 Convention cited supra n.10; Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, UNESCO 16 Nov. 1972.
28. As the 1962 UNESCO Recommendation cited supra n.7 asserts, landscapes “represent a powerful physical, moral and spiritual regenerating influence, while at the same time contributing to the artistic and cultural life of peoples…”.
29. Prott and O’Keefe, op. cit. supra n.22.
institutions, patterned behaviour, language-as-culture, values, beliefs, ideas ideologies, meanings and so forth. Second, not only is almost everything in a society culture, but the concept is also totalizing because everything in the society is supposed to have the same culture (as in the concept of culture as shared values) . . .

This definition is far too extensive and inclusive to be of use as the basis for defining the “culture” at the root of cultural heritage legislation. It does, however, underline the existence of a strong intangible element to culture and it is clear that the material culture—the apparent subject of most existing cultural heritage legislation—makes up only a part of all that might be regarded as “culture”. Cultural heritage is obviously a more limited category than that of “culture” with “heritage” acting as a qualifier which allows us to narrow it down to a more manageable set of elements. The concept of “heritage” also provides one of the central characteristics of the phrase which determine its legal significance. It would include such elements as the “material culture, ritual culture, symbolic culture” and even “language-as-culture, values, beliefs”, while, in some circumstances, “ideas ideologies, [and] meanings” might also be included. Clearly a useful definition of cultural heritage for the purposes of this study cannot include “everything in society”. Rather, our understanding of the term will be gained by understanding the relationship between cultural heritage and culture itself. It is the symbolic relationship of the cultural heritage to culture in its widest sense (culture-as-society) which is central to understanding the nature of cultural heritage.

One must recognise that the identification of cultural heritage is based on an active choice as to which elements of this broader “culture” are deemed worthy of preservation as an “inheritance” for the future. Through this, the significance of cultural heritage as symbolic of the culture and those aspects of it which a society (or group) views as valuable is recognised. It is this role of cultural heritage which lends it its powerful political dimension since the decision as to what is deemed worthy of protection and preservation is generally made by State authorities on national level and by intergovernmental organisations—comprising member States—on international level. The national legislation and international law relating to cultural heritage are the formal expression of these political decisions and, as with most political questions, there is always room for controversy and competing claims. Indeed, competing claims and conflicts of interest on national and international level are endemic to any discussion of cultural heritage. It is not simply that decisions concerning cultural heritage often have important political consequences which they clearly do, but also the more fundamental point that the identification of cultural heritage is in itself a political act given its symbolic relationship to culture and society in general.
The idea of inheritance is central to the force of the term cultural heritage and adds a further set of notions to its meaning. It appears relatively straightforward to view cultural heritage as a valuable resource which we as a society wish to preserve in order to pass it on to future generations as their inheritance. This view of cultural heritage lies behind much of the rhetoric of the international law on the subject and reflects a powerful emotional impulse as well as an intellectual position. The 1972 UNESCO Convention\(^31\) makes this clear in the following duty placed on contracting States in Article 4: “... of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage” (emphasis added). The 1968 UNESCO Recommendation\(^32\) expresses a similar attitude in the preamble, stating that: “cultural property is the product and witness of the different traditions and of the spiritual achievements of the past ...”. Relatively few UNESCO Conventions and Recommendations make such explicit statements of the character of cultural heritage as an inheritance from past generations (and the present) to be passed on to future ones. However, it is implicit in most (whether they refer to the term “heritage” or not in the text) and provides a basic principle which underpins this whole body of international law. Thus far, there seems little difficulty in accepting this approach since it resonates with an instinctive response which most of us feel towards what we view as our cultural heritage. However, one should not forget the political aspect of the decision as to what is to be preserved for future generations. A central idea which accompanies the view of cultural heritage as a form of inheritance is its characterisation as a non-renewable resource akin to the environment or even mineral resources. Lowenthal\(^33\) draws out the connection between the cultural heritage and natural resources: “That the natural heritage is global is now beyond dispute. Fresh water and fossil fuels, rain forests and gene pools are legacies common to us all and need all care. Cultural resources likewise form part of the universal heritage.”

This reference to “universal heritage” brings into the equation a further characterisation of cultural heritage as the “common heritage of mankind” (CHM), placing it alongside a broader category of non-renewable resources. Joyner identifies five elements of the CHM notion

31. Cited supra n.10.
32. Cited supra n.8.
33. Lowenthal, op. cit. supra n.16, at p.228.
as applied to common space areas, and these should be borne in mind when considering its application to cultural heritage. The CHM doctrine was first developed in international law in relation to deep seabed mineral resources and was subsequently applied to the moon and its natural resources. The Preamble to the 1959 Antarctic Treaty makes reference to the notion, although its failure to designate the area as non-appropriable as well as the exclusivity of the “Antarctic Club” of the 12 original signatory States (plus “consultative parties”) mean that the notion has minimal influence in the area.

The CHM notion has become an influential concept in our thinking about cultural heritage and is one that requires us to re-assess many of our assumptions about the nature of cultural heritage and rights to its enjoyment and control. There are, however, difficulties with applying the notion to cultural heritage. For example, one of the first attempts was in the 1982 Law of the Sea Convention (and thus in the context of resource-related law). This illustrates the potential for contradiction inherent in applying the notion to elements of cultural heritage given the need also to respect the special interests of the State of origin. In contrast, the Convention on Biological Diversity uses the term “common concern of humankind” in order to avoid attributing the status of a

34. C. Joyner “Legal Implications of the Concept of the Common Heritage of Mankind”, 35 I.C.L.Q. (1986) pp.190-199 at 192. The five elements listed are that: the areas are not subject to appropriation of any kind and sovereignty is absent; all people are expected to share in the management of the area and States act only as agents of “all mankind”; resources should only be exploited under the auspices of a common space regime mandate and any economic benefits should be shared internationally; uses of the area should be for exclusively peaceful purposes; and scientific research should be freely and openly permissible and for the benefit of all peoples. See also: A-C. Kiss “La notion du patrimoine commun de l’humanité,” Recueil des Cours (1992 –II) pp.99-256.

35. UN Law of the Sea Convention (1982) [21 I.L.M. 1261]—Arts.136 states: “The [deep seabed] Area and its resources are the common heritage of mankind” and Art.137 proceeds to set out the legal status of the Area and its resources.

36. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies [UN Doc.A/AC.105/L.113/Add.4 (1979)] entered into force on 11 June 1984 [18 I.L.M. 1434], known as the “Moon Treaty”. Art.11(1) reads: “The moon and its natural resources are the common heritage of mankind.”

37. 402 U.N.T.S. 71, 1 Dec. 1959; Preamble notes that, “it is in the interests of all mankind that Antarctic shall continue forever to be used exclusively for peaceful purposes …”.


39. Vide supra at n.16.

40. Art.149 reads: “All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.”

41. UN Convention on Biodiversity, 22 June 1992 [31 I.L.M. 818].
“common heritage” to biological resources with its legal implications. By using this formulation, international interest in the conservation and use of the resource is legitimised without challenging the territorial sovereignty of the State where it is located. The desire to avoid internationalising the ownership of biological resources is also relevant to cultural heritage. The 1979 UNESCO Convention, which stresses the non-renewable character of cultural heritage, also respects State territorial sovereignty although characterising it as CHM at the same time. Thus cultural heritage remains under the legislation and sovereignty of the territorial State while also representing a universal value towards whose protection the whole international community should co-operate. Kiss sees this as a significant aspect of the Convention, although other commentators have criticised it for failing to go further and establishing an international agency to administer those elements of cultural heritage that form a “universal heritage”. Thus there remain unresolved questions over the application of the CHM notion to cultural heritage, how best to do this effectively and whether it should be applied to its full extent or in a more limited sense.

The common space areas to which the CHM notion is applied are also treated as an inheritance to be transmitted to future generations, a sort of international patrimony. This last echoes strongly the way in which cultural heritage characterised as “cultural heritage of mankind” is viewed. Regarding the cultural heritage as an inheritance is not new and dates at least from the birth of UNESCO: Article 1 of the UNESCO Constitution (1948) requires the Organisation to “assure the conservation and protection of the world’s inheritance of works of art and

43. As the 1982 LOSC (cited supra n.35) does for deep seabed mineral deposits, for example.
44. Cultural heritage shares many of the characteristics of biological resources, such as its non-renewable nature and the importance given to safeguarding cultural diversity.
45. Cited supra n.10.
46. Art.6(1). This has been criticised as a compromise that limits the effectiveness of the Convention although it is a necessary one to ensure a sufficient number of signatory States.
47. Kiss, op. cit. supra n.34, at p.171: “Elle consacre le principe que certains biens se trouvant sous la souveraineté d'Etats ont un interest qui concerne tout l'humanité et que, de ce fait, ils doivent être conservés par les soins de la communauté internationale tout entière.”
48. J. Simmonds “UNESCO World Heritage Convention”, 2:3 Art, Antiquity and Law (1997) pp.251–281 at p.253 makes the point that: “[t]he Convention in no way ‘internationalises’ outstanding property, but rather emphasis that the primary responsibility for it lies with international co-operation and assistance in a supplementary role. The more radical approach would have established a distinct and novel international heritage, administered by an international agency.”
monuments of history and science”. What has changed over the years is the great broadening of the concept of what is to be regarded as comprising this inheritance, moving from a narrow definition of selected physical elements of “high culture” to often mundane cultural artefacts which express society more generally, and even to non-material elements of culture. The connection made between culture and nature (the environment) as expressed by the 1972 UNESCO Convention,50 whereby cultural heritage is viewed as non-renewable resource in the same way as a wilderness area or rainforest, an extension of the concept from 1948 and one which also adds a further dimension to the idea of cultural heritage. This relates also to the rights of indigenes to their natural environment as a cultural as well as natural resource, underlining both the intricate relationship between environment and culture and between cultural heritage and cultural rights.51 The submission from the Czech Republic to the Helsinki Conference of the Council of Europe in 199552 sums up this development of the concept:

Enlargement of the concept of cultural heritage to cultural aspects or cultural resources of the environment and of society—listed and unlisted, known and unknown, material and immaterial. They are similarly non-renewable and for human life, health and safety as necessary as natural resources of the environment.

When searching for a satisfactory definition of “cultural heritage”, a fundamental question is to the extent of the term. Is it limited only to those physical elements such as monuments, sites and artefacts already regarded as part of it or does it extend also to cover the non-material “intangibles” upon which people(s) pin their sense of identity? Since the mid-1980’s, there has been an increasing appreciation that these intangibles which relate to sets of knowledge and know-how, patterns of behaviour and oral traditions, for example, have been ignored in international law relating to the cultural heritage. There have been moves to remedy this in the work by UNESCO on expressions of traditional culture and folklore53 and in the area of the cultural rights of indigenous

50. For example, Bouchenaki, M. notes in “The world heritage” 3 European Heritage (1995) that: “This Convention, adopted in Paris in 1972, is a real breakthrough in that it reflects the international community’s awakening of (sic) two crucial factors: firstly, the connection between culture and nature and, secondly, the need for a permanent protective framework covering both legal, administrative and financial aspects.”


52. Enhancement of the Cultural Heritage of Central and Eastern Europe (Strasbourg, 1996), Doc.MPC–4(96)5 at p.3.

and tribal peoples. It is appropriate also to mention recent developments in the Council of Europe in this area since there has been a growing acceptance in that Organisation of the importance of this aspect of the cultural heritage both in the cultural and human rights domains. The broadening of the concept of cultural heritage at the Council of Europe level is illustrated by work begun in the late-1980’s aimed at identifying the concept of cultural landscapes as a new component of cultural heritage policy. Although still a physical element of the cultural heritage, cultural landscapes bring us closer to the intangible elements since their study often relates to ethnographic information about the way of life of people as well as the close links existing between certain topographical and landscape features and cultural identity.

In 1993, a summit meeting of the Council of Europe Heads of State made a direct connection between cultural heritage and the human rights dimension of the work of the Organisation, calling for it to “[give] expression in the legal field to the values that define our European identity” which also suggests a relationship between the political aims of pluralist democracy and human rights, cultural heritage and its role in the construction of identity. Following this, texts emanating from the Helsinki Conference of Ministers responsible for the Cultural Heritage (1995) recognised that existing definitions of cultural heritage are too limited. The new elements to be included generally relate to the immaterial aspects of cultural heritage, as in the interface between material elements and a sense of cultural identity. The general text from the 1995 Helsinki Conference, for example, states that present definitions of cultural heritage are still too narrow and that:

> “the relationship that must exist between the cultural heritage and the natural and social environment to which it belongs is underestimated. Lastly, being based on architectural and archaeological heritage, these definitions focus on the physical side, completely ignoring the question of its function in contemporary society.” (at 5)

A further document from the Helsinki Conference produced by Finland proposes a definition of cultural heritage which concentrates particularly on its intangible elements: “In a wide sense, the concept of the cultural heritage covers all the manifestations and messages of

54. Vide supra n.52.
55. Following adoption of the 1985 Convention on the Architectural Heritage of Europe [ETS no.121].
58. The Cultural Heritage—an Economic and Social Challenge (produced as a General text of the conference) at p.5.
intellectual activity in our environment. These messages are passed on from generation to generation through learning, intellectual quest and insights.” Such manifestations of cultural heritage (in all its various forms) are seen as “mediated through” the built environment and the landscape. Thus we have the idea that the physical elements of cultural heritage—that which has been traditionally viewed as comprising it—are in fact the vehicles by which cultural heritage (in its intangible sense) is mediated to us. This strongly suggests the importance of considering these intangibles when framing future instruments, even where the ostensible subject may be material cultural elements.60 The intimate relationship between cultural heritage and the social and political dimension—its function in society—is made clear by the Swedish delegation’s text61 which states that:

Clearly, the development of society can be interpreted through cultural heritage which sheds light on the problems and difficulties facing us. Similarly, it can be used to legitimise social and political ambitions, which is not necessarily a good thing. However, if properly used, the cultural heritage provides an identity and a measure of stability for multi-ethnic societies and in periods marked by mobility and rapid change.

The significance of this statement is the stress it places on the importance of understanding the political and social aspects of policies towards cultural heritage and the way in which this can work as a power for good or for bad. It is for this reason that a clear understanding and definition at international level of the concept of cultural heritage is vital since much can flow from this in terms both of public policy and of possible unintended outcomes. It is also imperative to understand the degree to which the notion of what is deemed to comprise cultural heritage is not an absolute but is in fact an act of deliberate selection, as shown by Williams.62

For tradition (“our cultural heritage”) is self-evidently a process of deliberate continuity, yet any tradition can be shown, by analysis, to be a selection and reselection of those significant received and recovered elements of the past which represent not a necessary but a desired continuity.

This act of selection is often a “political” decision undertaken by national authorities, and various UNESCO texts relating to cultural heritage and cultural property also stress the political context within

60. For example, current work by a diplomatic conference established by UNESCO to review the 1954 Hague Convention is illustrative of a recognition that the existing law does not take sufficient account of the motivation behind the destruction of cultural heritage in time of armed conflict which relates to its role in the construction of identity.
which such protective measures operate.\textsuperscript{63} For example, the 1972 Convention\textsuperscript{64} states in its Preamble that the “deterioration or disappearance of any item of cultural or natural heritage constitutes a harmful impoverishment of all the nations in the world” while the 1970 Convention\textsuperscript{65} notes that “the interchange of cultural property among nations for scientific, cultural and educational purposes … inspires mutual respect and appreciation among nations” (Preamble). These international instruments should be placed in the context of their underlying politics which is more complex than these statements suggest. The 1970 Convention, for example, reflected a contemporary struggle between developing and developed nations over control of art-works and archaeological remains set in the wider political context of post-colonialism.\textsuperscript{66} The 1972 Convention can be seen as reflecting another ideological position gaining currency at the time, that of a globalist approach towards protection of natural (and cultural) resources as the “common heritage of mankind”.\textsuperscript{67} A further illustration of the way in which cultural heritage texts can be seen as reflecting the political interests of the organisation to which they belong is given in the Final Declaration from the Helsinki Conference: “… the values inherent in cultural heritage and the policies needed to conserve it can make an important contribution to the aims of democracy and balanced development pursued by the Council of Europe.”\textsuperscript{68} Recognising the importance of intangibles to the concept of cultural heritage, in particular, has some serious implications in political and social terms which extend well beyond the traditionally accepted boundaries of the term. These include, for example, complex areas such as the construction of cultural identity, the significance of the destruction of cultural (and religious) monuments as a weapon of war and the existence of cultural rights of minorities and indigenous and tribal peoples which introduce a completely different and at times subversive view of the cultural heritage.

\textbf{C. Cultural heritage, cultural identity and cultural rights}

One area in which this broadening of the concept of cultural heritage has taken place is that of cultural rights, which in the 1990's has involved

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64. Cited supra n.10.
65. Cited supra n.9.
67. Vide supra n.34.
68. \textit{Final Declaration} of the 1995 Helsinki Conference of the Council of Europe vide supra n.31, point I.C. at p.2.
direct consideration of the humanitarian and human rights aspects of the cultural heritage. This has been spurred on by recent conflict in former Yugoslavia, involving attempts by one party to the conflict to eradicate the cultural heritage of the other in order to destroy their ethnic/cultural identity as a weapon of war. The importance of this to the present discussion is the manner in which it illustrates that the material culture is understood to be symbolic of cultural identity on a deeper level. The deliberate destruction of cultural monuments and artefacts during periods of armed conflict, particularly between groups who define their opposition in ethnic terms, serves to illuminate the nature of the cultural heritage itself and its role in the construction of identity. Indeed, it could be seen that it is the intangible heritage—the relationship of a people to their cultural heritage—which is really under attack in such conditions. A Council of Europe report on the subject of minority rights placed this idea within the political context of Europe and the conflict in former Yugoslavia:69 “... les conflits actuels que l'on constate dans une partie de l'Europe justifient une reflexion urgent sur le theme de l'identite culturelle dont le patrimoine, au sens plus large, est la manifestation la plus tangible”. There have been moves at international level to consider the protection of cultures under threat and the material remains of these cultures through human rights mechanisms. This work illustrates the extreme complexity of the area of cultural rights and the associated concept of cultural identity. Preparatory work by the Council of Europe in 1992 relating to the possible preparation of an additional Protocol to the European Convention on Human Rights (the ECHR), recognised the need for a comprehensive definition of “cultural” for the purposes of any attempt at identifying “cultural rights”. The problems inherent in this were clear:

“Cultural” embraces all aspects of culture—not only arts, sciences, languages and values but all the traditions which determine lifestyles. The idea is to avoid the confusion created by numerous texts which simply append “cultural” to a list of other adjectives (e.g. artistic, scientific and cultural).70

Thus we see that, in the quest to define cultural rights, the same difficulties exist of identifying the nature of the “culture” to which these rights are to be related as when identifying the nature of the “culture” of which the “heritage” is to be protected and passed onto future generations. By seeking to identify “culture” in relation to cultural rights and cultural

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identity, we can gain a better understanding of the nature of cultural heritage itself. This becomes clearer when one considers that cultural rights may include a set of rights of people (or a people) to the cultural heritage, a corollary to the rights of the cultural heritage to protection and preservation generally provided for by cultural heritage texts. In other words, the traditional approach towards protecting the physical elements that represent cultural heritage expresses the right of those elements (the cultural heritage) to protection. This new generation of (cultural) rights would relate rather to the rights of people (or a people) to their cultural heritage, a right which includes the protection of that heritage but much broader issues also. Thus the more recent right, by implication, includes the former—that of the cultural heritage to be protected—and elucidates the concept.

Any discussion of cultural rights inevitably involves issues relating to the cultural identity of the people or peoples to which such rights are ascribed. Indeed, it is its role in the construction of cultural identity which is the element being protected when cultural heritage is treated as an element within human rights. Kamenka sets out the relationship between the notions of cultural rights, cultural identity and cultural heritage in the following passage which refers to:

… the importance to human beings of the sense of identity, given not so much by material improvement, but by customs and traditions, by historical identification, by religion … [That sense of identity] is, for most people, essential to their dignity and self-confidence, values that underlie in part the concept of human rights itself.

Here the relationship between material and non-material cultural heritage and human rights is clear. Understanding the importance of a sense of cultural identity to us all as individuals, a group, or humankind and the role of cultural heritage in its construction helps us to understand the nature of cultural heritage itself. Generally speaking, the justification for protecting cultural heritage has always been assumed in cultural heritage law as a given which needs little further elaboration. However, consideration of the existence and nature of the cultural rights associated with cultural heritage involves complex issues of identity that can lead to widely conflicting interests.

Human rights theory has always accepted the existence of a range of cultural rights, such as the freedoms of religion and of expression, but its

connection with cultural heritage is a relatively new idea. As Prott notes, even if they were not designed for this purpose, the existence of cultural rights is a prerequisite for the protection of culture. UNESCO has a special role in relation to cultural rights. Article 1 of its Constitution reads: “[The purpose of the Organisation] is to contribute to peace and security by promoting collaboration among nations through education, science and culture in order to further universal respect for justice, the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United nations.” In 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted, although economic, social and cultural rights have tended to be regarded as secondary to civil and political rights by governments and other bodies. Even where cultural rights have been given a formal expression in the ICESCR they have not been given sufficient attention and have often been treated under relevant provisions of the ICCPR. For example, UNESCO stated in 1977 that, “‘cultural rights’ is a relatively new concept … The preoccupation with political rights was followed up by the recognition of ‘economic rights’—the right to work, the right to leisure, the right to security. It is perhaps understandable that a formulation of the concept of ‘cultural rights’ should have followed these.”

The difficulty in arriving at an exact definition of “culture” itself and in talking about rights in relation to cultural matters may well have contributed to this, with moves to create a right to the cultural heritage as

73. Prott, op. cit. supra n.67, at p.95.
74. In recognition of this is the publication of UNESCO Cultural Rights and Wrongs (Unesco Publishing, Paris, 1998) which explores cultural rights, including their relationship with the cultural heritage, to mark the 50th anniversary of the 1948 Universal Declaration of Human Rights.
76. Non-governmental human rights organisations, for example, work almost exclusively in the field of civil and political rights, although specialist agencies of the UN (such as the FAO and WHO) deal with economic and social rights while UNESCO deals with cultural rights.
a response. Given the importance of cultural heritage to the creation and assertion of cultural identity, such moves reflect a shift away from talking about cultural rights as rights of the individual towards collective and group rights of people. The idea that groups have rights and that these will be taken care of by protecting individuals’ rights has always been an underlying assumption of human rights instruments. There are, however, difficulties associated with ascribing collective rather than individual human rights in particular that what constitutes a “people” for the purposes of one right is not necessarily the same for another. In the case of rights related to cultural identity, this is compounded by the fact that the concept of a “people” is difficult to define without reference to cultural criteria (including that of identity) while it is difficult to define “culture” (except some universal culture) without reference to the concept of a “people”.

Certain claims asserted by groups, such as maintaining the cultural and linguistic identity of communities, have not been adequately protected under traditional human rights approaches. This has led to calls for new concepts and principles despite the difficulties entailed. The right to the cultural heritage (including access to the cultural heritage of mankind) should be considered in the context of the new “third generation” human rights such as the right to development or a decent environment which have been the subject of much debate. This has also been seen as a tactical move to bring within the scope of human rights certain

80. Prott, op. cit. supra n.74, at pp.96–97 lists eleven cultural rights identified in existing human rights instruments. Six of these are relevant to the cultural heritage and are peoples’ rights.
81. I. Brownlie “The Rights of Peoples in Modern International Law”, in Crawford, op. cit. supra n.54, pp.1–16 at p.4.
82. J. Crawford “Some Conclusions” in Crawford, op. cit. supra n.67, pp.159–175 at p.170 states that: “What constitutes a people may be different for the purposes of different rights. For example, the right to existence (incorporating the right not to be subjected to genocide and the right not to be deprived of one’s subsistence) is plainly applicable to a very broad category of groups, considerably more so than the principle of self-determination, or any view of that principle.”
83. Prott, op. cit. supra n.67, at p.97.
international concerns in order to give them greater force and appeal,\(^87\) at risk of an inflation of rights and a consequent distortion of existing human rights. A useful comparison can be drawn between the proposed new right to a decent environment and the right to the cultural heritage.\(^88\) While noting that environmental rights could fit easily within the diverse categories of human rights and offer beneficial access and remedies, Boyle\(^89\) concludes that there are strong arguments against such an approach. He makes the point that, in view of existing international law for the protection of the environment, such a new right would be redundant. If applied to cultural heritage, this suggests that the roots of the perceived problem may lie in the low importance accorded to existing cultural rights. Rather than creating a new right to the cultural heritage, better enforcement of existing cultural heritage instruments and the development of areas of cultural heritage law are needed.

An instrument which makes explicit reference to a right to the cultural heritage is the Banjul Charter (1981) of the Organisation of African Unity (OAU) which includes a reference in Article 22.1 to the right of all people to “their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the cultural heritage of mankind”.\(^90\) It is not clear exactly what this equal enjoyment of the cultural heritage of humankind would actually entail. Does it refer to the outstanding examples of cultural heritage as defined by the 1972 World Heritage Convention?\(^91\) Is it the right to cultural exchanges or a call for international assistance to developing States for the safeguarding of their cultural heritage? This uncertainty raises questions as to the appropriacy of seeking to create such rights to cultural heritage, in particular to the equal enjoyment of the cultural heritage of mankind. There exists, for example, the potential for clashes between the right to cultural heritage and another new “third generation” right, that of development. Assertion of a right to development in support of building a major dam or encouraging mass tourism may well run counter to the right to preserve a culture and its related heritage.

87. Crawford, op. cit. supra n.82, at p.163 notes that activists and NGO’s in Western countries “had a range of concerns not met by the traditional and individual rights. These concerns extended to the environment, to peace … to cultural rights, and to the rights of various oppressed groups which did not fall within the orthodox framework of self-determination. It was from this diverse combination—coalition would be the wrong word—that claims to a ‘third generation’ of peoples’ rights emerged.”

88. There are many obvious similarities between the protection of the environment and the cultural heritage, such as the idea that both are a finite and non-renewable resource to be preserved for future generations.

89. Boyle, op. cit. supra n.85.


91. Cited supra n.10.
It has been in relation to the rights of indigenous and tribal peoples that recent interest in these new rights in relation to cultural identity and the cultural heritage has been most active. This finds expression, for example, in Article 2.2(b) of the International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples (1989) in which “... promoting the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions” is made a government responsibility. More recently, the link between human rights and the cultural heritage has been made directly. For example, the European Round Table final document (Helsinki, 1993) includes in Article 3 a reference to: “[the] right to protection and development of cultures in which to participate, including preservation of the national and international cultural heritage...” with a direct reference to the “Protection of Cultural Heritage” in Article 23. The protection of cultural heritage is also given importance in the Fribourg Draft Protocol (1994) which states in article 2 that:

Everyone, both individually and collectively, has a right to the protection of his cultural heritage in all its forms. This implies:
— the right to respect of all cultural assets specific to the various communities to which the individual belongs;
— the right not to be unduly separated from mankind’s common heritage comprising the totality of cultures accompanied by respect for their specific characteristics.

Here the right to the protection of one’s own cultural heritage accompanied by access to and enjoyment of the cultural heritage characterised as the “common heritage of mankind” is firmly placed within the body of human rights.

Where the debate over creating such new rights in relation to cultural heritage is of particular interest is the insight it can give into the nature of cultural heritage and those aspects that are insufficiently recognised and protected. The concept of cultural identity is intimately related to that of cultural rights and provides an important link between cultural rights and cultural heritage. The ILO Convention illustrates the linkage of these

92. Existing formulations of minority rights (such as Art.27 of the ICCPR) only protect the rights of individuals who are members of a minority group and not the collective rights of the group itself. There has thus been pressure for collective rights of ethnic minorities to ensure the future survival of the group, its culture and cultural identity.
95. Preliminary Draft Protocol [to the E.C.H.R.] (Freibourg, 1994), the “Freibourg Protocol”.
concepts in the phrase: “Promoting ... cultural rights of these peoples with respect for their social and cultural identity” (Article 2.2(b)). The existence of rights relating to cultural identity in the context of human rights (of minorities) is also expressed in Article 3 of Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe:96 “Every person belonging to a national minority shall have the right to express, preserve and develop in complete freedom his/her ... cultural identity.” This idea is extended further by Recommendation 3 of the European Round Table (Helsinki, 1993) which states that the right to participate in a cultural life should be interpreted as including: “... rights necessary to protect the cultural identity of the group ... [including the] preservation of the national and international cultural heritage”. Thus cultural heritage is an integral part of cultural identity and it is the need to protect the cultural identity of individuals, groups and humankind which justifies the requirement to protect and preserve cultural heritage. This takes us beyond the general assumption that its protection and preservation “is a good thing” and is a central aspect of understanding the nature of cultural heritage. One should bear in mind, however, Prott’s warning that cultural identity in terms of a “people” is a problematic concept from a legal viewpoint.97 This proviso again underlines the fact that, when using terms such as cultural identity or cultural heritage, one must guard against assuming that the definition (in a legal sense) will be straightforward. It also suggests that an examination of the development of these ideas in their original, non-legal, contexts is important for informing and elucidating the legal texts.98 As such literature makes clear, cultural identity and its construction is a very difficult concept per se and so the law is entering dangerous intellectual ground when treating such subject-matter. For these reasons, the identification of an exact legal definition which can account for these complexities is no simple matter.

The relationship between material remains and cultural identity is well illustrated by the case of grave sites and human remains of indigenous peoples. It is not surprising that the problems associated with excavating human remains have most often occurred in the context of burial sites of indigenous peoples such as the native Americans and the Australian aboriginals.99 This has arisen because of the sacred and cultural signifi-

97. Vide supra n.83.
cance which such peoples invest in the burial sites of their often distant ancestors, a view not always shared or understood by archaeologists from a “European” cultural tradition. This is an issue which has been subject to much debate amongst archaeologists and museum professionals over the last two decades reflected in some high-profile cases resulting in the return by museums and universities of Aboriginal and Native American artefacts and skeletal remains. As a result, many museums and other institutions with holdings of human (and other) remains of indigenous peoples have adopted policies favouring their return where their cultural and spiritual significance can be demonstrated. The ICOM Code of Ethics (1986) and the Museums Association (UK) Code of Ethics for Museums Professionals, for example, both refer to the sensitivities surrounding collections of human remains and other such material. The ICOM Code requires that governing bodies and museum professionals “consider all the ethical and legal implications before continuing the active or passive acquisition of human remains” and that requests for the return of human remains should “involve consideration of ownership, cultural significance, the scientific, educational and religious value of the interested individuals or groups, the strength of their relationship to the remains in question ...” (s.6.7). The Museums Association Code requires professionals to be “aware that the curation of human remains ... can be a sensitive issue. A number of interested parties may claim rights over such material. These include actual and cultural descendants, legal owners and the nationwide scientific community.” Both these ethical codes make clear the complexity of the different interests where human remains are concerned and that the cultural heritage, both in its material and non-material forms, is one of the distinctive features of the identity of any group. This highlights not only the importance of cultural heritage in the construction of cultural identity, but also the related fact that, group identity being more often than not exclusive, it involves conflicts of interest and conflicting claims which require a sophisticated understanding of the cultural heritage to address.

IV. CONCLUSION

What then are the common elements of cultural heritage as understood in international law? First, is the sense that it is a form of inheritance to be

101. Recent cases include the decision by Edinburgh University to return a collection of shrunken heads to the Maori community in New Zealand and the return of the native American “ghost-dancing” shirt from Kelvingrove Museum, Glasgow.
kept in safekeeping and handed down to future generations. Another
important aspect of cultural heritage is its linkage with group identity and
it is both a symbol of the cultural identity of a self-identified group, be it a
nation or a people, and an essential element in the construction of that
group’s identity. This characteristic of cultural heritage is thus “less a
substance than a quality”104 and is some kind of added value which carries
an emotional impact, such as the colonial architecture which may inspire a
sense of familiarity and even pride in a British visitor to India while
providing a source of offence to many Indians. In this way, cultural
heritage is less of an objective, physical existence than the range of
associations which accompany an object or monument and which provide
the sense of being part of a group. The role of cultural heritage as a vehicle
for the expression and even construction of a nation or group’s cultural
identity is a double-edged sword which can act both for the good and for
the bad. It can lead to an aggressive assertion of identity, whether national
or ethnic, which may cause and certainly foster armed conflict in which
the destruction of cultural monuments—the symbols of the cultural
identity of one of the parties to the conflict—often becomes a weapon of
war. It also has great potential for creating cohesion within a group, be it a
self-identified ethnic minority within a State, a nation State or even a
supranational body.

Both the European Union and the Council of Europe have sought to
recruit cultural heritage, in so far as it reflects pan-European character-
istics, as a vehicle for the construction of a sense of European identity.105
This enterprise, however, is by no means free of difficulty. For example,
the formulation “a common cultural heritage enriched by its diversity” by
the Council of Europe is an attempt to reconcile the idea of a common
European heritage/identity with a recognition of the cultures of national
minorities which results in a mutually contradictory position.106
UNESCO instruments also illustrate the way in which the rhetoric
relating to cultural heritage reflects a political view of the Organisation.
For example, the 1970 UNESCO Convention states,107 “Considering that
the interchange of cultural property among nations for scientific, cultural
and educational purposes increases the knowledge of the civilization of
Man, enriches the cultural life of all peoples and inspires mutual respect

104. R. R. Knoop “The Role of the Cultural Heritage Organisations”, 3 European
105. The choice of the Bronze Age in Europe as the subject for an awareness raising
campaign on archaeology within the Council of Europe in 1993 illustrates the political
character of such decisions—it was seen as one of the few periods in the history or prehistory
of the “Greater Europe” when it was culturally inter-connected without the controversy of
imperialism and conquest.
107. Cited supra n.9.
and appreciation among nations” (Preamble). Such sentiments also serve to support the Organisation’s view of its own political importance by setting out the advantages for international relations of the kind of international interchange on the cultural level which is one of UNESCO’s main raisons d’etre. In this way, heritage is placed at the centre of a sense of collective international identity based on mutual self-respect.

Thus the concept of cultural heritage is one which serves many present purposes be they cultural, social or political and this is crucial to understanding the meaning of the term and, more importantly, the implications which flow from its employment in international law. There are undoubted benefits to be had for individual peoples, nations or the international community as a whole from developing the notion of cultural heritage and creating an international legal framework for its protection. There is no question of the value of, for example: attempting to prevent the destruction, deliberate or otherwise, of artefacts and other remains with a cultural significance during armed conflict; seeking to prevent the illicit excavation of archaeological sites and control the illicit trade in cultural artefacts; or creating a mechanism for the protection and preservation of sites and monuments judged to be of “universal” significance with the States where they are located acting as trustee on behalf of the world community. Where the difficulty lies is in the fact that these are all narrowly-targeted responses to specific problems which do not provide a single, generally agreed, definition of the cultural heritage and fail to recognise the deeper implications of the concepts applied. International cultural heritage law has developed with an uncertainty at its centre over the exact nature of its subject-matter and based on a set of principles which are not always coherent. Indeed, as this paper suggests, applying these principles may at times lead to contradictory positions and unintended outcomes.