Third Annual UNESCO Memory of the World Conference
Canberra 19 February 2008

Opening Address
Human Rights and Cultural Heritage
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It is a great honour to have been invited to deliver this address, but it is also a daunting task.

As you will quickly discover, I am not an expert on cultural heritage, but rather an international human rights lawyer and I feel decidedly out of my depth in this impressive gathering of experts on UNESCO's Memory of the World project from around the globe.

The aim of the Memory of the World program is of course to identify, preserve and ensure the long term survival of significant documentary heritage. After puzzling over what I could offer to your deliberations over the next few days, I thought I would consider what a greater human rights focus for the Memory of the World project might mean and explore some of the potential – and some of the problems -- of this approach.

International institutions have a tendency to compartmentalise areas of knowledge and endeavour.

To take the United Nations, for example, broad topics such as peace, security, the environment, the global economy, health and human rights are all associated with different parts of the UN system; they have different locations and headquarters and different systems and sensibilities. There is an understandable tendency for institutional jealousies to develop over budgets and influence.

There have been a number of attempts to develop cross-cutting themes within the United Nations in order to break down some of the artificial barriers created between major areas of life; for example, the idea of gender mainstreaming has been introduced into the UN to ensure that all areas consider the differing impact of policies and programs on women and men.

Then, in 1997 the UN Secretary-General designated human rights as a cross-cutting issue in his reform program, and this has become known as the

project of 'human rights mainstreaming'. According to the UN, mainstreaming human rights means integrating human rights into the broad range of United Nations activities.

But these mainstreaming projects have had, overall, a rather desultory impact on the UN's compartments; this is due to inadequate resources being devoted to the task; lack of time available for experts in one area to become familiar with another set of ideas and vocabulary; and a sense that the mainstreaming project is at heart cosmetic, irrelevant and likely to have little to offer.

The areas of cultural heritage and human rights have developed in quite separate ways, with different emphases and purposes. I want to argue that there is room for much more engagement and dialogue between these two fields and they have much to learn from each other.

1. The International Human Rights System

Let me explain first what I mean by the term 'international human rights system'. The protection of human rights, long considered a matter of purely domestic concern, became a matter of international obligation through the adoption of the UN Charter in 1945. Its preamble and first Article declared the protection of human rights and fundamental freedoms to be a basic purpose of the UN.

These very general words of commitment were given detail and focus in the Universal Declaration of Human Rights (UDHR) adopted in 1948 (whose 60th anniversary we celebrate this year).

The Declaration set out to record the fundamental rights recognised in legal systems across the globe. It included civil and political rights familiar to European and American lawyers, such as rights to life, liberty and property, as well as economic and social rights found in Latin American, Scandinavian and Soviet constitutions, such as the right to work.

After lengthy negotiations, most provisions of the UDHR were given treaty status in the two major human rights covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the UN General Assembly in 1966.

These three documents, the UDHR and the two Covenants, are sometimes referred to together as the 'international bill of rights'. They are at the heart of the international human rights system, but it also includes a great range of other treaties and declarations – some relating to particular rights (eg the Convention against Torture 1984) and some relating on particular groups of people (eg the Convention on the Rights of the Child 1989).

There are also well-developed regional systems for the protection of human rights, which operate in tandem with the UN system: The European system is the longest established, but the Inter-American and African systems are lively participants also in the international system.

UNESCO has of course long promoted the language of human rights and, in 2003, UNESCO adopted a detailed Strategy on Human Rights.

Professor Bill Logan's paper, which will be presented at the next session, very helpfully analyses the history of UNESCO's concern with human rights in the heritage context. All UNESCO's major declarations and treaties on cultural heritage acknowledge the importance of human rights.

Let me consider in more detail how the international human rights system relates to the protection of cultural diversity and heritage.

2. International standards and recognition of culture

I should start with the tension between the elaboration of international standards, intended to have global relevance, and the protection of specific cultures.

The move to formulate universal statements of rights in the mid-20th century was largely a reaction to the atrocities of the Second World War. The human rights movement set out to contradict the idea that countries were able to treat their people in any way they wanted and to assert a generalised, universal notion of human dignity that would provide a safety net against the actions of national governments.

Not surprisingly, the campaign to formulate a document such as the UDHR quickly prompted criticism of the possibility of developing truly universal standards. In 1947 the American Anthropological Association (AAA)

prepared a lengthy critique of the project undertaken by the UN Commission on Human Rights.

The AAA's major concern was the ethnocentrism of the idea of formulating a statement of universal values. It asked how such a declaration would be applicable to all human beings and not just a statement of western values.

The American anthropologists urged the drafting committee to respect cultural differences. They argued that 'no technique of qualitatively evaluating cultures has been discovered' and that 'standards and values are relative to the culture from which they derive.' Their statement declared that 'what is held to be a human right in one society may be regarded as anti-social by another people, or by the same people in a different period of their history.'

These issues also exercised the drafters of the UDHR.[1] Today, however, few countries would reject the UDHR; it is widely accepted as a fundamental statement and many constitutions and laws are based on its principles.

However, some traces of the early debates about the possibility of universal human rights standards remain, particularly in the claim that human rights essentially are 'a western construct with limited applicability'.[2]

Ten years ago, to mark the 50th anniversary of the UDHR in 1998, PM Mahathir of Malaysia proposed redrafting the Declaration to remove its western bias, although this proposal seems to have been a rhetorical one, and I am not aware of any attempt to follow it up.

Particularly in the area of women's rights, states regularly invoke notions of culture to justify breaches of rights. This can be seen in the terms of the large number of formal reservations made to the Convention on the Elimination of All Forms of Discrimination against Women on the basis of

[1] There were no negative votes, but some striking abstentions: Saudi Arabia (on the basis that the guarantee of religious freedom, including the right to change ones religion, was inconsistent with Islam, as was the guarantee of equal marriage rights for men and women), South Africa (on the basis that the UDHR would be used to attack apartheid) and the Soviet Bloc (on the basis that such a declaration was not needed in a communist society where there was no conflict between the interests of the state and those of the individual).

[2] Pollis & Schwab

culture and religion, by countries as diverse as the United Kingdom, Israel and the Maldives.

It is striking that Article 2 of the Intangible Heritage Convention restricts its coverage to those aspects of culture that are 'compatible with existing human rights instruments', suggesting that some aspects of culture are compatible with human rights standards and some are not.

But many of the human rights standards in themselves make considerable allowances for elements of local culture, so the idea that we can pit 'human rights norms' against manifestations of 'culture' gives the wrong impression of their relationship, suggesting that it is adversarial, rather than symbiotic.

Overall, we must be sceptical and questioning when we deal with assertions of culture as a reason to resist human rights standards.

We need always to investigate the politics of the `cultures' invoked. For example, the dominant cultures in many regions are, among other things, usually constructed from male histories, traditions and experiences.

Arati Rao has proposed a series of questions to assess claims of culture, particularly those used to counter women's claims of rights: first, whose culture is being invoked? Second, what is the status of the interpreter? Third, in whose name is the argument being advanced? and finally, who are the primary beneficiaries of the claim?[3]

Such an investigation reminds us that the idea of culture is a malleable and political one and that we should scrutinise carefully each invocation of culture in debates about human rights.

My point here is that the tension between the assertion of universal standards and the particular claims of culture is long standing. I think that it is a productive tension in many ways, underlining the need for the thoughtful translation of universal standards into particular local contexts.[4]

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[3] A. Rao, 'The politics of gender and culture in international human rights discourse', in J. Peters & A. Wolper eds, *Women's Rights, Human Rights: International Feminist Perspectives* (New York, Routledge, 1995) 167 at 174.

[4] The Vienna Declaration on Human Rights, adopted in 1993 by the international community, attempted to resolve the debate over the clash between universal standards and the arguments of cultural relativism in the following statement:

3. What international human rights standards are relevant to the protection of cultural heritage?

Article 27 (1) of the UDHR provides that "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'. This provision was included partly because of pressure from UNESCO.[5]

But it should be noted that Article 27 does not really endorse the idea of a diversity of cultural traditions – the use of the definite article 'the' implies that the community is co-extensive with the state, that there is a monolithic national culture, and does not explicitly acknowledge the importance of cultural pluralism, or the right of every person to participate in the cultural life of his or her particular community.[6]

A proposal to include a provision in the UDHR that protected the rights of minorities to their culture, religion and language was ultimately rejected. This was due in part to the hostility of the United States to such a provision, with Eleanor Roosevelt informing the Working Group that 'in the United States, there was no minority problem.'[7]

While the Soviet representatives strongly supported the provision, Latin American delegates were also concerned about this recognition of minority rights, and indeed Australia's delegate spoke against the provision on the basis that 'Australia had adopted the principle that assimilation of all groups was in the best interests of all in the long run'.[8]

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the State, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

[5] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, 1999) 218.
[6] Ibid 269.
[7] Ibid 272.
[8] Ibid 274.

Whatever these limitations, the first part of Article 27 suggests a type of shared ownership of culture.[9] But the second part refers to a privatised form of ownership of culture: "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

There is, then, a tension created in the international definition of the right to cultural life, and one that has not been resolved. It reappears, for example, in the controversies about the exploitation of traditional knowledge of Indigenous peoples.

Whereas the international intellectual property system administered by both the WTO and WIPO is built on *individual* ownership of intellectual property, it does not deal easily with Indigenous notions of *collective* ownership of traditional knowledge.

Article 27 was translated into the ICESCR in Article 15, which states that treaty parties 'recognise the right of everyone: (a) to take part in cultural life.' As its UDHR predecessor, it also refers to the right to benefit from intellectual property in scientific, literary and artistic works. Article 15 goes on to specify that treaty parties have a duty to conserve, develop and disseminate science and culture.

There are other human rights provisions that help define a right to particular cultural heritage. Another provision relevant to cultural heritage is Article 27 of the ICCPR, which provides that:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This provision has been the basis of successful claims by Indigenous peoples in Sweden and Canada to preserve cultural practices. As far as I am aware, it has not yet been used in campaigns to preserve documentary cultural heritage, but it is well-adapted to this task.

[9] Ibid. 217.

Another fundamental human rights provision, the right to self-determination, contained in Article 1 of the two Covenants, also contributes to the definition of a duty on states to preserve cultural heritage. Common Article 1 provides:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

So, international human rights standards set out a range of obligations on nation states to protect cultural heritage. The standards are not perfect, but they could be invoked by the cultural heritage community more actively.

One way of doing this is by using the various mechanisms to monitor states' implementation of their human rights obligations. States that are parties to the two Covenants, for example, are required to make regular reports to specialist treaty-monitoring committees.

The Committees rely on information from civil society and NGOs to scrutinise these reports and to pressure governments to better observe their obligations, and national MoW committees could play a role here.

The ICCPR provides for a further, optional, monitoring mechanism through a system of individual complaints to its expert committee, the Human Rights Committee. This could be a useful avenue if a state's refusal to protect cultural heritage constituted a breach of Article 27.

I should note that not all states parties to the ICCPR recognise the right of individual complaint, but Australia has, as have 109 other countries.

Of course, many other human rights provisions are relevant to questions of the protection of cultural heritage: these include the prohibition on discrimination on the basis of (among other things) race, sex, language, religion, political or other opinion, national or social origin; [10] the right to freedom of thought, conscience and religion;[11] and the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds in any media.[12]

[10] ICESCR, Article 2; ICCPR Articles 2, 26.
[11] ICCPR, Article 18.
[12] ICCPR, Article 19.

International human rights law thus provides a network of standards, a safety net, which supports the rights of all people to have access to their documentary heritage. The destruction of such material either by deliberate human intervention, for example during armed conflict, or by failure or neglect in preserving these documents, is a violation of human rights norms.

Moreover, in certain circumstances, the destruction of documentary heritage can constitute a war crime, over which the new International Criminal Court has jurisdiction.[13]

In this sense, the MoW project has firm human rights foundations. But a human rights approach to the MoW project suggests some further and perhaps uncomfortable questions for debate, for example:

- MoW project focuses on documentary sources – but what of the human rights of those people who have been deprived of access to memories or those with an oral tradition? This is a particular problem given the lack of Western states' participation in the Intangible Cultural Heritage Convention.

- Do the MoW nomination and registration processes discriminate, even unintentionally, on the basis of race, sex or political belief? For example, how responsive is the system to recording the memories of women who are in many societies excluded from the public sphere and relegated to the private realm of home and family? Are the memories of particular racial groups accorded even unwitting priority over others?

These questions suggest the value of a thorough human rights analysis of the MoW project

Let me conclude on a slightly different tack, by arguing for human rights to be understood as heritage.

Of course, this already happens to a certain extent. For example, the Australian MoW Register already lists some important documents in the struggle for recognition of human rights here in Australia; for example the

[13] ICC Statute, Article 8.2. iv.

manuscripts relating to the landmark *Mabo* case, decided by the High Court of Australia in 1992, which recognized indigenous forms of title over land; and the Sorry Books, which record Australians' reactions to the plight of the Stolen Generations of indigenous people, now so remarkably officially recognized in the Prime Minister's formal apology last week.

But, there are many other important human rights documents that could be considered from Australia, for example, the evidence collected by the HREOC inquiry into the Stolen Generations over ten years ago, documents relating to the treatment of refugee applicants in Australia; and the community consultations in the ACT and Victoria that led to those two jurisdictions adopting Australia's first bills of rights.

And, at the international level, the documents relating to the adoption of the UDHR are an important part of the world's cultural heritage.

I note that last year, the UN Human Rights Council held an informal meeting on the topic of 'Archives and Human Rights' and emphasised the importance of setting up a universal databank of the archives of authoritarian regimes in order to allow prosecutions for crimes. The suggestion was that this databank could be hosted by the MoW project.

Although such a proposal raises significant questions of privacy and criminal procedure, it seems to me to be a valuable initiative to consider.

So, I have argued that the human rights and cultural heritage communities should engage more closely with one another and become aware of the connections and dissonances between our two fields.

The discourse of human rights is imperfect in many ways, but it offers, at least, in the words of Roberto Unger, 'a protective sphere for vital interests, which people need to persuade them that they may accept vulnerability, run risks, undertake adventures in the world, and operate as citizens and people.'[14]

For this reason, it can ground, extend, and challenge the MoW programme and reshape the memories that the programme preserves.

[14] *Economic and Social Rights and the Right to Health* (Harvard Law School, 1995) p 13.