Public Archaeology

ISSN: 1465-5187 (Print) 1753-5530 (Online) Journal homepage: https://www.tandfonline.com/loi/ypua20

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To cite this article: Patrick J. O'keefe (2000) Archaeology and human rights, Public Archaeology, 1:3, 181-194, DOI: 10.1179/pua.2000.1.3.181

To link to this article: https://doi.org/10.1179/pua.2000.1.3.181

PUBLIC ARCHAEOLOGY (1999) VOLUME 1 PAGES 181–194

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Patrick J. O'Keefe

ABSTRACT

How aware are archaeologists of the potential impact on their profession of increasing emphasis in public discourse on human rights, individual property rights and cultural rights? There has been an intense concentration on the concept of human rights since World War II; promoting the idea and refining the concept. One area still unclear is the right to property as an individual right. Is it a human right and, if so, what does it encompass? There are no absolute answers to these questions. They depend on the time and the place. In particular, the development of cultural rights, with its emphasis on the public interest, will be significant. Individual property rights already circumscribe the conduct of archaeology in many countries. Cultural rights will have a further impact on such aspects as the conduct of fieldwork, publication and the use made of archaeological results. These rights are now under development. But archaeology figures little in the discussions and that will be the state of things unless archaeologists themselves insist on being heard. This will involve organization, both nationally and internationally, on a permanent basis to monitor and influence those in a position of power.

KEY WORDS

Archaeology; ownership; human rights; management; cases; policy; cultural rights

Many archaeologists may wonder what relevance human rights have to their professional work. Their training did not refer to such rights and they may not have had any experience that seems to be related to them. However, that perception is not quite accurate. A number of issues that have significantly affected the practice of archaeology in recent years are founded on human rights, although the arguments may not always be cast in that form. A few such issues are site protection, conduct of exploration and excavation, publication of reports, treatment of human remains and the return of burial goods to indigenous peoples. As human rights figure more prominently on the international scene, it can be expected that their relevance to the conduct of archaeology will become more pronounced.

RELEVANT INTERNATIONAL INSTRUMENTS

The content of human rights is to be found in a number of international instruments, both extant and in preparation, as well as various state constitutions and legislation. The major international instruments are the Universal Declaration of Human Rights 1948, the European Convention on Human Rights 1950, the International Covenant on Civil and Political Rights 1966, the International Covenant on Economic, Social and Cultural Rights 1966, the UNESCO Declaration of

ISSN 1465-5187

the Principles of International Cultural Cooperation 1966, the American Convention on Human Rights 1978 and the African Charter on Human and Peoples' Rights 1981 (Banjul Charter). As far as archaeologists are concerned, the most important instrument in preparation is the Draft United Nations Declaration on the Rights of Indigenous Peoples, together with the Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, but also to be noted is the Draft Declaration of Cultural Rights (texts reproduced in Niec 1998; 191 and 203). These instruments, or potential instruments, are all intergovernmental in operation but initiatives by other bodies should also be considered in that they create conditions in which human rights emerge. Of relevance in the context of this analysis are, for example, the Principles for Partnership in Cross-Cultural Human Sciences Research With a Particular View to Archaeology, and the codes of ethics adopted by various professional associations of archaeologists, anthropologists and museums.

Some human rights are well established while others are only emerging. Some apply to individuals while others concern groups of people or society in general. The instruments mentioned above are not all equal in their legal or practical effect. For example, the Universal Declaration of Human Rights is a statement of principle. Although there is no enforcement mechanism in the Declaration itself, it is now widely regarded as representing customary international law which states should observe. The European Convention on Human Rights is an international agreement legally binding on those states that have become party to it. It has an enforcement structure consisting of the European Commission on Human Rights and the European Court of Human Rights. The UNESCO Declaration of the Principles of International Cultural Cooperation is merely exhortatory. It was made by the General Conference of the organization in an attempt to strengthen international cooperation by emphasizing to states the importance of culture. Here it must be said that cultural aspect of human rights is relatively underdeveloped compared with political, economic and social aspects. That limits even those political, economic and social aspects was emphasized by the World Commission on Culture and Development (1995; 15).

> Economic development in its full flowering is part of a people's culture ... Culture's role is not exhausted as a servant of ends – though in a narrower sense of the concept this is one of its roles – but is the social basis of the ends themselves. Development and the economy are part of a people's culture.

As will be seen, initiatives now under way are likely to enhance the role of cultural rights but these are still in their infancy.

The existing international instruments are cast in broad terms in that they are designed to apply to many different races, cultures and economic situations. To some extent they also reflect the times and conditions in which they were drafted. Needless to say, the discipline of archaeology is not mentioned and was never considered in their preparation. But archaeology is affected by the general standards they set. In the case of the Draft United Nations Declaration on the Rights of Indigenous Peoples together with the Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples there are quite specific provisions that will have an impact on the conduct of archaeology.

PROPERTY RIGHTS

Sites showing traces of human existence are of primary importance to archaeology and, through the information that archaeology can extract from them, to humankind. The European Convention on the Protection of the Archaeological Heritage (Revised) 1992 states:

> The aim of this (revised) Convention is to protect the archaeological heritage as a source of the European collective memory and as an instrument for historical and scientific study.

Preservation of sites, meaning prevention of any disturbance destroying the possibility of extracting information, is thus seen as of primary importance. As the ICOMOS Charter for the Protection and Management of the Archaeological Heritage (1990) states in Article 2:

> Land use must therefore be controlled and developed in order to minimize the destruction of the archaeological heritage.

In most countries this task is entrusted to the government and its authorities. Special procedures are established to regulate access to the site and what can be done to it. Often there are prohibitions against searching for antiquities or extracting them from a site once discovered. But this can interfere with property rights; rights to be found not only in the land, but also in the licence that the archaeologist receives to work on a site and in the information that is extracted.

Sources of such rights

Those working within a particular national legal system will first turn to local general law or specific legislation to see what property rights may exist. If that does not fulfil their expectations, then recourse may be had to governing legal instruments such as the national constitution or to international agreements to see what rights the law should convey. These may or may not be enforceable in the local courts or in international tribunals. Much will depend on the precise undertakings laid on, or adopted by, the state concerned.

NATIONAL CONSTITUTIONS

The Constitutions of some states specifically regulate the taking of property by the government. For example, Article 43 (1.1) of the Irish Constitution reads:

> The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to all positive laws, to the private ownership of external goods.

Kirby J., of the Australian High Court, summarizes his view of the effect of a number of constitutions in the following words:

> Ordinarily, in a civilised society, where private property rights are protected by law, the government, its agencies or those acting under authority of law may not deprive a person of such rights without a legal process which includes provision for just compensation. (*Newcrest Mining (WA) Ltd. V. The Commonwealth*, 660)

That case arose from a prohibition placed on operations for the recovery of minerals within Kakadu National Park, a World Heritage Site situated in the Northern Territory of Australia. Newcrest held mining leases within the park that had been granted before the park's creation. The company claimed that the Commonwealth had acquired its property which, under the Commonwealth Constitution, it could only do on just terms. This allegation was upheld by the Court.

But it must not be thought from Kirby's statement above that compensation must always be paid by the state under these constitutional provisions. Much will depend on the circumstances. In *O'Callaghan v. Commissioners of Public Works*, the Supreme Court of Ireland held that the rights of property guaranteed by the constitution are subject to regulation with reference to the common good, which plainly requires that national monuments be preserved, and to social justice, which may or may not, according to circumstances, require the payment of compensation. The Court accepted that O'Callaghan had bought a 38½ acre block of land knowing that it contained a prehistoric promontory fort listed for preservation under the Irish National Monuments (Amendment) Act 1954. He caused part of the site to be deep ploughed without giving notice of his intention to the Commissioners, who issued a preservation order. This prohibited O'Callaghan from effectively taking any action to change the site without official consent. In respect of compensation, the Court noted (at 368):

> ... the absence of such a provision for the payment of compensation to him in respect of a limitation of use of which he was substantially on notice before his purchase and which is a requirement of what should be regarded as the common duty of all citizens, to preserve such a monument, can be no ground for suggesting that the prohibition or limitation is an unjust attack on his property rights.

INTERNATIONAL INSTRUMENTS

Article 17 of the Universal Declaration of Human Rights states that everyone 'has the right to own property' and '[n]o one shall be arbitrarily deprived of his property'. The Banjul Charter states in Article 14:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the

> general interest of the community and in accordance with the provisions of appropriate laws.

Both these instruments specify that there is a right to property, but there is no suggestion that this is an absolute right or that all categories of object must be regarded as property. Article 21 of the American Convention on Human Rights reads:

> Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
> No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

Thus, the right of everyone 'to use and enjoyment of his property' is subjected to the interests of society. The Universal Declaration of Human Rights requires that states not act arbitrarily in depriving a person of property. The Banjul Charter and the American Convention on Human Rights talk also of public need or public utility, compliance with applicable laws and, in the case of the latter, subject to payment of 'just compensation'. It is clear that these instruments are ambivalent on the existence and nature of property rights. There is no provision on property in the International Covenant on Economic, Social and Cultural Rights. One commentator notes that this was due to the difficulty of 'obtaining consensus on the modalities of its legitimate acquisition and use' (Eide, 1998; 490). There is thus a lack of worldwide consensus over the status of property as a human right, and even if it can be said to be a right. However, such obligations as there are towards preservation of property rights, as interpreted by the appropriate bodies, are binding on those states party to the various instruments.

In respect of the European Convention on Human Rights, general property rights are found only in the First Protocol, their inclusion in the Convention itself being too controversial (Harris et al., 1995; 516). However, there are now 38 European states party to that Protocol, which means that the provision on property rights is widely accepted in that part of the world.

Article 1 of the First Protocol to that Convention reads:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

In the jurisprudence of the European Court of Human Rights, 'possessions' has been given a very broad meaning, including interests which go beyond the generally accepted notion of 'property' as such to include such concepts as contractual rights.

Article 1 of the First Protocol was considered by the European Court of Human Rights in the *Case of the Holy Monasteries v. Greece* where it was pointed out that it contains three distinct rules (at 31):

> The first, which is expressed in the first sentence of the first paragraph and is of a general nature, lays down the principle of peaceful enjoyment of property. The second rule, in the second sentence of the same paragraph, covers deprivation of possessions and subjects it to certain conditions. The third, contained in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest.

A state is entitled to take certain actions to protect aspects of the cultural heritage such as archaeological sites, antiquities etc. But there will come a point at which there is interference with peaceful enjoyment of their possession.

No issue arises under the terms of the Article unless there has been a deprivation of possession. But this will be held to occur only when all legal rights have been extinguished or effectively negated as where, for example, there is still an ownership interest but the owner cannot derive any benefit from it: for example, if an archaeologist were to hold a valid licence to excavate but be

unreasonably prevented by the government from entering the site. Deprivation of possession in these circumstances must be in the public interest, subject to the conditions provided for by law and by the general principles of international law. It may be presumed that measures to protect the archaeological heritage will be regarded as being in the public interest provided that a fair balance is struck between the interests of the community and the individual's right to possessions. Here the question of compensation becomes relevant. Payment of compensation by a state to its own nationals is not mandatory but goes to the question of fairness. The European Court of Human Rights said in the *Holy Monasteries Case* that (at 35):

> ... the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances. Article 1 does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest' may call for less than reimbursement of the full market value ....

In a case where the person who owns the possessions is a foreigner, compensation must be in accordance with international law. The 'general principles of international law', mentioned in Article 1 as one of the criteria for lawful deprivation of possessions, are generally said to require non-discrimination between foreigners together with payment of prompt, adequate and effective compensation. The content of these criteria and their application in practice is controversial and has changed over time with change in world politics.

Under Article 1, states have a broad right to control the use of property 'in accordance with the general interest'. The requirement here is that there be proportionality between the degree of control imposed and the effect on the owner. The case *Sporrong and Lonnroth v. Sweden* concerned land and buildings in Stockholm. The Swedish government had granted the city council an expropriation permit in order to allow redevelopment of the site. This never occurred but the permits affecting the applicants ran for 23 years and eight years respectively before being cancelled. Prohibitions on construction issued by the local administrative board ran for 25 years and 12 years respectively. The European Court of Human Rights ruled that there was a violation of Article 1 in that the prolonged extension of the expropriation permit and prohibition of construction upset the required fair balance between the protection of the right of property and the requirements of the general interest.

The possible effect of Article 1 can be seen in relation to the United Kingdom Protection of Wrecks Act 1973 which allows the relevant minister to designate a particular wreck as being of historical, archaeological or artistic importance. Salvage is thereafter prohibited unless subject to a licence requiring excavation in an archaeologically appropriate manner. This occurred in relation to the *Hanover*, a postal ship sunk in 1763 and found in 1997.

> ... designation forced the salvor in possession to cease salvage operations and quit possession of the wreck site. The salvor subsequently obtained an injunction restraining the Secretary of State from giving effect to the designation order, thus highlighting for the first time the Act's capacity to infringe vested proprietary and possessory interests, as well as raising serious concerns about the lack of any compensatory provisions. (Fletcher-Tomenius & Williams, 1998; 623)

The conclusion these authors reach is that (at 636):

> ... designation clearly amounts to outright deprivation in the case of a salvor in possession and thus violates the Convention. However strongly the policy of the Act is founded on issues of the public interest, Article 1 does not permit the abrogation of the general principle of peaceful enjoyment of possession on this ground alone.

Moreover, they take the view that the proportionality test is not satisfied. Referring to *Sporrong and Lonnroth v. Sweden*, they say (at 637):

> ... it was sufficient that the permits substantially interfered with enjoyment of possessions. It is difficult to avoid a similar conclusion in favour of the owner of a designated wreck. It is true that the effect of designation will vary according to whether excavation is authorised and over what timescale recovery might take place, yet

> the interference with owner's rights will always be substantial in the absence of the grant of an immediate excavation licence without onerous conditions.

There are significant policy interests involved with this argument. Substantial interference may be necessary to protect the archaeological heritage. The ICOMOS International Charter on the Protection and Management of Underwater Cultural Heritage argues that wrecks should be allowed to remain *in situ* unless there is a valid scientific reason for excavation and conservation of all material raised is assured. Moreover, the timescale for a proper underwater excavation may be measured in years. Another relevant point is that there are no proprietary rights until the wreck or object is taken into possession by the salvor. Even then such rights only exist because the law creates them. The law could be changed so that such proprietary interests do not arise. It would be difficult for prospective salvors to argue that they have been deprived of anything when all they have is the potential of gaining such interest when a wreck is discovered and reduced to possession. Expectations do not have the degree of concreteness to bring them within the idea of 'possessions' (Harris et al., 1995: 517)

Concept of property

The concept of property is not constant. Something may have been regarded as property in time past but changing values have now rendered that notion morally, if not legally, repugnant. For example, there are valid arguments that, irrespective of the situation in the past, certain archaeological material should not now be regarded as property in any circumstances (for example, human remains) or only after particular conditions are fulfilled (for example, religious objects originating from an existing belief system). Another example comes from the way the results of archaeological investigation are treated. The International Covenant on Economic, Social and Cultural Rights requires States to recognise the right of everyone to 'benefit from the protection of the moral and material interests resulting from any scientific ... production of which he is the author' (Article 15[1][c]). The law of intellectual property currently gives ownership to the creator of an original work. Under this doctrine, the archaeologist may, depending on the circumstances, have copyright in his or her field notes. But the concept of copyright is undergoing critical reappraisal and its status as a human right has been questioned. For example, the Bellagio Declaration called 'on the international community to expand the public domain through expansive application of concepts of "fair use", compulsory licensing, and narrower initial coverage of property rights in the first place' (at 391). Reflecting these changing views, the Principles of Archaeological Ethics of the Society for American Archaeology state that intellectual property should be 'treated in accord with the principles of stewardship rather than as a matter of personal possession'. The Rüschlikon Principles consider the results of archaeological work to be outside the scope of property:

> Archaeological work and findings, particularly documentary records and primary field data, are of public interest, not commodities to be exploited for personal enjoyment and profit, and not private property. (Paragraph D.15)

State ownership

In many states ownership of undiscovered cultural objects is vested in the state. Often this was done many years ago, before the emergence of the concept of property rights as a human right. It cannot be argued that any deprivation of rights that then occurred could now be called in question on the grounds of such rights. The idea of state ownership of undiscovered antiquities is an ancient one tied in with the concept of treasure trove, derived from Germanic law and applied also in Scandinavia (O'Keefe & Prott, 1984; 311). But can a state now declare that it is the owner of such objects without breach of human rights obligations? The argument in favour is based on the notion that the right of the landowner or finder is not a property right. His or her rights to the item when it is found are civil rights, i.e. enforceable at law. If the law removes those civil rights before the item is found, there is no taking of property, merely an extinguishing of the civil rights (O'Keefe

& Prott, 1989; 430). Similarly, if finders have had rights up until the coming into force of the new law, it is not an existing right that is abrogated but only the possibility that such a right would come into existence at the time the object is found.

USE OF SITES

Many states provide in their legislation that, when antiquities are found, all activities on the site are to be suspended pending an archaeological investigation. The site is not taken or acquired by the state but the owner or occupier is prevented from using it. However, human rights questions could be raised if the prohibition is seen to be lasting for an excessively long period and no compensation is forthcoming, as happened, for example, in a different context in the *Sporrong and Lonnroth v. Sweden* case. It is well known that archaeological investigation of a site can take a considerable period of time, in which case compensation would be needed.

CULTURAL RIGHTS

At one time the legal character of cultural rights was denied by those who saw them as requiring action by states which could not be subjected to international scrutiny. That view has now been rejected and all human rights, including therein cultural rights, are to be treated equally (Niec, 1998; 176). But the category of cultural rights is relatively undeveloped. A full understanding of its content has not yet been achieved although rights in respect of the cultural heritage are in the course of being recognised. For example, in 1998 ICOMOS affirmed that 'the right to cultural heritage is an integral part of human rights considering the irreplaceable nature of the tangible and intangible legacy it constitutes, and that it is threatened in a world which is in constant transformation'. The relationship of cultural rights to other human rights is unclear. There are numerous reasons for this. One is that cultural rights often relate to the collectivity or group while rights such as property rights are individual. What happens when these conflict? In spite of such conceptual problems, cultural rights are enshrined in international instruments and are slowly gaining content.

Sources of such rights

Article 27(1) of the Universal Declaration of Human Rights states:

> 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.

The International Covenant on Economic, Social and Cultural Rights requires the 137 States Party to the Covenant to 'recognise the right of everyone ... to take part in cultural life' (Article 15 [1] [a]). Niec (1998; 180) emphasizes the connection between individual and group rights:

> As for peoples, within the international frame of human rights there also exists the recognition of cultural rights as collective rights. ... the *African Charter on Human and Peoples' Rights* acknowledges the right of all peoples to cultural development. This right is fortified by standardizing the duty of all individuals 'To preserve ... positive African cultural values'. Hence the collective right to culture supplements the individual's cultural rights.

Cultural rights and cultural heritage

Stavenhagen (1998; 1) casts a duty on states to provide for development of the concept of cultural rights:

> But States do have obligations to ensure the respect, protection and fulfilment of each one of these rights and these should be spelled out in the case of cultural rights and their various interpretations.

This was endorsed by ICOMOS (1998) when it stated that the right to cultural heritage carries duties and responsibilities of individuals and communities as well as institutions and States. O'Keefe (1998, 909), drawing on the work of the Committee on Economic, Social and Cultural Rights created by the Economic and Social Council in May 1986, indicates how this might be seen:

> As regards the cultural heritage, a State's duties under Article 15 are twofold in theory. First, it must maintain and safeguard artistic, historic and archaeological property (immovable and movable) found on its territory as

> an integral aspect of promoting the cultural life of *its own citizens*, be it the whole nation or some minority therein. Second, a State is also under a responsibility to preserve such objects and places for the benefit of *all humanity*, as part of 'mankind's cultural heritage'.

The idea of a duty on the part of states in relation to cultural heritage can be found in other sources. Mention has been made above of the state taking ownership of undiscovered antiquities. The courts in Ireland have seen this as no less than a duty on the part of the state, at least in respect of finders. In *Webb v. Ireland*, Finlay, Chief Justice of the Supreme Court of Ireland, says (at 594):

> It would, I think, now be universally accepted, certainly by the People of Ireland, and by the people of most modern States, that one of the most important national assets belonging to the people is their heritage and knowledge of its true origins and the buildings and objects which constitute keys to their ancient history. If this be so, then it would appear to me to follow that a necessary ingredient of sovereignty in a modern State and certainly in this State, having regard to the terms of the Constitution, with an emphasis on its historical origins and a constant concern for the common good is and should be an ownership by the State of objects which constitute antiquities of importance which are discovered and which have no known owner. It would appear to me to be inconsistent with the framework of the society sought to be protected by the Constitution that such objects should become the exclusive property of those who by chance may find them.

Four other judges of the Supreme Court concurred, two of them explicitly. For example, Walsh says (at 601):

> I fully agree with the view expressed by the Chief Justice that it would now be universally accepted by the people of Ireland that one of the most important national assets belonging to the People is their heritage and the knowledge of its true origins, and the buildings and objects which constitute the keys to their ancient history. I also agree with him in his statement that it is a necessary ingredient of the sovereignty of a modern state, and for the reasons he gives, that is for the common good that there should be ownership in the State of all objects which constitute antiquities of importance and which are discovered to have no known owner.

These statements were further endorsed by Barr of the High Court of Admiralty of Ireland in *King & Chapman v. The Owners and All Persons Claiming an Interest in the "La Lavia", "Juliana" and "Santa Maria de la Vision"* (unreported judgment of 26 July 1994).

Similar views can be found elsewhere. For example, the President of the Italian Republic has said in an official statement (audience given in 1995):

> A country with a rich sub-soil is likely to have archaeological remains worthy of excavation and endeavours to defend them. It is not so much the right to defend them as the duty to defend them.

The Draft Declaration of Cultural Rights, referring to 'cultural heritages which are significant manifestations and expressions of the various cultures', envisages that rights in this regard 'entail an obligation for everyone to respect this heritage' and that 'custodians of the heritage, and particularly public authorities, have a responsibility to preserve it for present and future generations' (Article 3[2]). ICOMOS has expressed the right to cultural heritage in these terms (1998):

> The right to have the authentic testimony that cultural heritage constitutes, respected as an expression of one's cultural identity within the human family;
> The right to better understand one's heritage and that of others;
> The right to wise and appropriate use of heritage;
> The right to participate in decisions affecting heritage and the cultural values it embodies;
> The right to form associations for the protection and valorisation of cultural heritage.

CULTURAL RIGHTS AND PROPERTY RIGHTS

There is considerable scope for conflict between cultural rights and property rights. It cannot be said that one is inherently superior to the other. However, they usually appear in different documents. There is nothing on property rights in the International Covenant on Economic, Social and Cultural Rights and there is nothing on cultural

rights in, for example, the European Convention on Human Rights. Yet many states are party to both instruments, Denmark, France, Germany, Netherlands and the United Kingdom to name but a few. It would be possible for a state to avoid a clash by complying with the conditions of the European Convention on Human Rights for deprivation of possessions such as payment of compensation. But what is the situation where a state cannot afford to pay compensation or decides that scarce funds should be devoted to purposes essential to preserving the lives of its citizens? Should the public right to culture override private property rights?

Impact of claims by indigenous peoples

Of significance in developing the concept of the right to culture in connection with property rights is likely to be the demands of indigenous peoples. In the United States of America the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) compels federal agencies and museums receiving federal funds to return to Native Americans human remains and, under specified conditions, certain defined cultural items, including archaeological material. The rationale for this has been cast in terms of human rights.

> The Panel believes that human rights should be the paramount principle where claims are made by Native American groups that have a cultural affiliation with remains and other materials. Such human rights include religious, cultural, and group survival rights, as understood within the context of U.S. and international standards of human rights and rights of self-determination. (Report of the Panel, 1990; 494)

NAGPRA has been seen as providing a form of compensation to Native Americans for past injustices (Harding, 1997; 739):

> The reallocation is a recognition of the human rights of Native Americans and the need to compensate them for their sufferings but it is not a direct recognition of rightful ownership.

Museums returning objects are not compensated but would have to rely on otherwise applicable private property laws if they wished to take such action. NAGPRA does not apply to museums which do not receive federal funds; to private collectors, auction houses, dealers etc. Nevertheless, these holders of Native American material, particularly that having a sacred character for the Native Americans concerned, are becoming much more sensitive to the nature of the material in their possession (Protzman 1998).

In Australia official government policy favours the practice of museums voluntarily returning material to Aborigines. There is legislation, the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, which may apply in some circumstances but in the main museums have acted on their own initiative to return materials. Particular policies have developed for human remains and objects of a sacred/secret character. In recent years, the Australian Government and Aboriginal groups have sought to recover such remains and objects from overseas collecting institutions. A number of returns have been made, particularly of human remains.

Maoris have been particularly concerned with the return of human remains from overseas collections and private owners and it is now official Maori policy that all Maori human remains be returned (Simpson, 1996; 236). Prominent in such demands have been *toi moko* or tattooed heads. While some were undoubtedly taken by force from Maori tribes, others were in fact sold for guns. They have been treated as commodities in the markets of North America and Europe, regularly appearing in auction catalogues and dealers' stock. However, action for return in many cases has been successful whether by court proceedings (O'Keefe, 1992; 393) or negotiation. While such objects as tattooed heads have no direct relevance to the conduct of archaeology, the precedents being built will influence what happens to material from archaeological sites.

There are considerable implications for property rights emerging from this practice whether supported by legislation or not. The remains of the ancestors of indigenous peoples, their grave goods, their sacred and secret objects have been treated in Europe and North America as property, ownership lying not only with museums but also with individuals. In many cases, indigenous peoples

contend that they should not have to pay compensation to reclaim those remains. In a significant number of instances, faced with demands from the descendants, such remains have been returned voluntarily. The more this is done, the more it can be said that there is developing a right to return which could be cast as part of the right to culture.

The process can be seen as incorporated in the Draft United Nations Declaration on the Rights of Indigenous Peoples. Article 12 reads:

> Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts ... as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13 continues this theme:

> Indigenous peoples have ... the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to use and control of ceremonial objects; and the right to the repatriation of human remains. States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Although the Draft Declaration is the premier vehicle for stating such a claim, they are also being advanced in other fora and incorporated in other instruments. For example, in 1993, a group representing indigenous peoples from New Zealand, Australia, the Pacific, Japan, India, South America and the United States of America together with a number of international experts drafted the Mataatua Declaration. In respect of 'cultural objects', this states:

> 2.12 All human remains and burial objects of indigenous peoples held by museums and other institutions must be returned to their traditional areas in a culturally appropriate manner.
> 2.13 Museums and other institutions must provide, to the country and indigenous peoples concerned, an inventory of any indigenous cultural objects still held in their possession.
> 2.14 Indigenous cultural objects held in museums and other institutions must be offered back to their traditional owners.

Cultural heritage looted by the Nazis

Recent years have seen the intensification of efforts to locate and return material that falls into this category. Such efforts have no direct relevance to archaeology and human rights but are affecting the concept of property where cultural heritage is concerned. Various statements of principle have been made: the Washington Conference Principles on Nazi-Confiscated Art; the ICOM Recommendations Concerning the Return of Works of Art Belonging to Jewish Owners; the United Kingdom National Museum Director's Conference Statement of Principles and Proposed Actions on Spoliation of Art During the Holocaust and World War II Period; and the Report of the Association of Art Museum Directors of the USA Task Force on the Spoliation of Art During the Nazi/World War II Era. None of these specifically posits the recommended actions in terms of human rights, but there will be an impact on property rights in cultural heritage. For example, Austrian Law No. 181 of 4 December 1998, Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen, empowers the Federal Minister of Finance to give back to their original owners, or successors in the case of death, cultural objects from the Austrian Federal Museums and Collections without payment. This legislation overrides, for a period of 25 years, the provisions of the Monument Protection Act on voluntary transfer of objects in the sole ownership of the state and the export control legislation for cultural objects. On 4 November 1999, the Parliamentary Assembly of the Council of Europe adopted a Resolution on looted Jewish cultural property, inviting the parliaments of all member states to give immediate consideration to ways in which they may be able to facilitate the return of such property and suggesting ways in which laws may be amended to enable this. Actions such as these further single out ownership rights in cultural heritage as different from that in other forms of property and re-emphasize its aspect as a cultural right.

CULTURAL RIGHTS AND ARCHAEOLOGICAL PRACTICE

This article so far has concentrated on establishing the respective contents of the right to cultural heritage as a cultural right and therefore a human right and the right to property or possessions as a human right. Illustrations have been given of situations where the interplay of these rights could affect archaeology. But this is only part of the impact that human rights can have on archaeology. As the content of cultural rights is further developed, there could be a more immediate effect on the way archaeologists work. At the moment, what the future holds can be seen by studying the contents of international instruments not yet in force or those drafted by non-governmental bodies.

Conduct of archaeological fieldwork

In most states archaeological fieldwork is subject to an authorization from a designated government authority. This usually includes work in areas occupied by indigenous peoples who, by and large, have not been seen as having any say in whether or how the work is done. However, as noted above, Article 12 of the draft United Nations Declaration on the Rights of Indigenous Peoples states that they have the right to 'maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts'. The Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples also state that, in order to protect their heritage, indigenous peoples must exercise control over all research conducted within their territories (Paragraph 8).

These notions are given more content by instruments such as the Rüschlikon Principles for Partnership in Cross-Cultural Human Sciences Research with a Particular View to Archaeology sponsored by the Swiss Academy of Humanities and Social Sciences and the Swiss Liechtenstein Foundation for Archaeological Research Abroad and drafted by a group of international experts in 1994 (reproduced in O'Keefe, 1997; 123). The Principles stress the need for close consultation with the local communities, not only indigenous peoples, where the work is taking place. For example, paragraph B.9 states:

> When planning archaeological campaigns abroad, archaeologists must identify the communities whose cultural heritage is the object of planned investigations and gain their informed consent. In doing this, archaeologists take into account that the relationship between communities and their cultural heritage exists irrespective of legal ownership or formal official competence.

No specific mention is made of human rights as being the basis for this injunction, but it is clear that they, and particularly the right to take part in cultural life, form the underlying rationale. The Principles are intended to enhance cross-cultural cooperation, the paramount means of preserving and enhancing cultural diversity, which 'is as important and significant as biological diversity for maintaining the conditions of humane, peaceful existence of mankind'.

Part of archaeological fieldwork involves selection, of the site, the method of approach etc. But selection does not mean that certain aspects of a site can be neglected because of religion, race or other defining characteristic. The Principles of Archaeological Ethics of the Society for American Archaeology emphasize that archaeologists are stewards of the archaeological record:

> Stewards are both caretakers of and advocates for the archaeological record. In the interests of stewardship, archaeologists should use and advocate use of the archaeological record for the benefit of all people.

This mirrors the thrust of Article 15(1) of the International Covenant on Economic, Social and Cultural Rights:

> The States Parties to the present Covenant recognise the right of everyone ... (b) To enjoy the benefits of scientific progress and its applications

Publication

At the outset it must be acknowledged that an excavation can take years to complete. Analysis of the results may involve the input of many experts and cost significant amounts of money. But, even ac-

knowledging this, it appears that non-publication of results is a significant problem. Wiseman speaks of the barriers that prevent wide dissemination of new archaeological knowledge affecting Bible studies:

> The first and perhaps most important barrier is the bottleneck of publication – the failure promptly to make available the information as it comes out of the ground. (Wiseman, 1990; 61)

Another commentator on the situation in the Middle East says:

> Over the years the proportion of excavations [in Israel] for which no reports have been published has steadily increased. In neighbouring countries, the situation may be even worse. The failure to publish is a disease not only of local archaeologists, but also of foreigners working in those countries. (Shanks, 1994; 63)

The Rüschlikon Principles emphasize the necessity for the publication of the results of archaeological fieldwork.

> The process and the findings of archaeological campaigns in foreign countries must be documented, interpreted, and published following international standards in a reasonably short time after completion of the excavation. (Paragraph 3.15)

It is not too much to say that there is emerging a recognition that, not only local communities, but also other specialists and the general public have a right to know the results of archaeological fieldwork.

There are different forms of publication and publications for different audiences. Recognizing this, the European Convention on the Protection of the Archaeological Heritage (Revised) 1992 requires states to take all practical measures to ensure that a summary scientific record is published before the 'necessary comprehensive publication of specialized studies' (Article 7[ii]).

Use of archaeology

The results of archaeological work have often been used in the building of national identity by giving people pride in their ancestry.

> Antiquity, playing a crucial role in modern Greek society, is constantly used by the state, by different interest groups and by individuals for a variety of purposes. The construction of national identity is one such purpose. (Hamilakis & Yalouri, 1996; 127)

ICOMOS states in its International Charter on the Protection and Management of Underwater Cultural Heritage (1996, Introduction) that this aspect of the heritage 'contributes to the formation of identity and can be important to people's sense of community'. But archaeology can also be misused. Arnold and Hassmann refer to the 'systematic and institutionalized abuse of archaeology for ideological and political ends during the Third Reich' (1995; 70). The connection between heritage, including archaeology, human rights and nationalism, was stressed by Murphy in the Australian High Court decision in *The Commonwealth v. Tasmania*. This case involved interpretation of the *Convention concerning the Protection of the World Cultural and Natural Heritage* 1972 and arose from the construction of a dam which would have destroyed both cultural and natural heritage in a world heritage site. Murphy said (1983; 176):

> The preservation of the world's heritage must not be looked at in isolation but as part of the cooperation between nations which is calculated to achieve intellectual and moral solidarity of mankind and so reinforce the bonds between people which promote peace and displace those of narrow nationalism and alienation which promote war. The United Nations came into being because of the Second World War. In its constitutive documents, proceedings and evolution over forty years, there has been a continuing emphasis on removing the causes of war – the denial of human rights and intense nationalism.

The Society for American Archaeology counters the misuse of archaeology by stressing that archaeologists should 'advocate use of the archaeological record for the benefit of all people'. Archaeologists thus have a crucial role in furthering human rights and in countering the misuse of their profession and its work.

> I believe part of the role of archaeology is to make us think critically: to question received wisdoms and work

against accepted truths. If we are to expand the possibilities of histories, the range of human potentialities, and insist on archaeologies as constructions of human becomings, not essential and pre-determined destinies, then archaeology in Europe (as elsewhere) has a role to play in informing, inspiring and eventually empowering people, by demonstrating that pasts, presents *and* futures are made, not given. (Pluciennik, 1998; 822)

CONCLUSION

The world community recently celebrated the 50th anniversary of the Universal Declaration of Human Rights. But the content and application of human rights is still controversial, particularly the right to property as an individual right. Cultural rights are emerging as a powerful force concerned, among other things, with public and group rights to cultural heritage including information. Archaeology, itself a young discipline, operates in the field between this clash of principles, often apparently unaffected by and unaware of what is occurring. This will not continue. As the principles solidify and their application is more direct, the effect will be felt by archaeologists. But such is the nature of things that archaeology will not be considered in the development of those principles unless archaeologists themselves insist on it.

Perhaps it is now the time for associations of archaeologists, together with other interested bodies, to set up permanent offices to monitor the activities of their governments and see that the interests of archaeology are properly put before legislators. No longer can this be done on an *ad hoc* basis. Collection and distribution of information, the formation of policy, making this known to government and the influencing of government must be organized both nationally and internationally if archaeologists are to attempt to play the role they have arrogated of being stewards of the past.

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REFERENCES

Arnold, B. & Hassmann, H. Archaeology in Nazi Germany: the Legacy of the Faustian Bargain. In: Kohl, P. L. & Fawcett, C. (eds.) *Nationalism, Politics, and the Practice of Archaeology*, Cambridge University Press, Cambridge (1995) 70.

Audience given 9 June 1995 to Heads of Delegations attending the UNIDROIT Diplomatic Conference: UNIDROIT *Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects: Acts and Proceedings*: xvii

Bellagio Declaration: Statement of the Bellagio Conference: Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post Colonial Era: March 11, 1993, *International Journal of Cultural Property* 4 (1995) 389.

Case of the Holy Monasteries v. Greece Judgment of 9 December 1994, European Court of Human Rights Series A no. 301-A

Eide, A. The historical significance of the Universal Declaration, *International Social Science Journal* 158 (1998) 475.

Fletcher-Tomenius, P. & Williams, M. The Protection of Wrecks Act 1973: A breach of human rights? *International Journal of Marine and Coastal Law* 13 (1998) 623

Hamilakis, Y. & Yalouri, E. Antiquities as symbolic capital in modern Greek society *Antiquity* 117 (1996) 70.

Harding, S. Justifying repatriation of Native American cultural property, *Indiana Law Journal* 72 (1997) 723.

Harris, D.J., O'Boyle, M. & Warbrick, C. *Law of the European Convention on Human Rights*, Butterworths, London (1995).

ICOMOS *Declaration of ICOMOS Marking the 50th Anniversary of the Universal Declaration of Human Rights*, Stockholm, 11 September 1998 (copies available from ICOMOS Headquarters, Paris).

ICOMOS *International Charter on the Protection and Management of Underwater Cultural Heritage* ratified by the 11th ICOMOS General Assembly, Sofia, Bulgaria, 5–9 October 1996 (copies available from ICOMOS Headquarters, Paris).

ICOMOS Charter for the Protection and Management of the Archaeological Heritage ratified by the ICOMOS General Assembly, Lausanne, Switzerland, October 1990 (copies available from ICOMOS Headquarters, Paris).

Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, June 1993 International Journal of Cultural Property 4 (1995) 383–387.

Newcrest Mining (WA) Ltd. V. The Commonwealth [1996–1997] 190 *Commonwealth Law Reports* 513.

Niec, H. (ed.) *Cultural Rights and Wrongs*, Institute of Art and Law, UNESCO Publishing, Leicester, Paris (1998).

Niec, H. Casting the Foundation for the Implementation of Cultural Rights. In: Niec, H. (ed.) *Cultural Rights and Wrongs*, Institute of Art and Law, UNESCO Publishing, Leicester, Paris (1998) 176.

O'Callaghan v. Commissioners of Public Works (1985) 5 *Irish Law Reports Monthly* 364.

O'Keefe, P.J. & Prott, L.V. *Law and the Cultural Heritage: Volume I: Discovery and Excavation*, Professional Books, Abingdon (1984).

O'Keefe, P.J. & Prott, L.V. *Law and the Cultural Heritage: Volume III: Movement*, Butterworths, London (1989).

O'Keefe, P.J. Maoris claim head *International Journal of Cultural Property* 1 (1992) 393.

O'Keefe, P.J. *Trade in Antiquities: Reducing Destruction and Theft*, UNESCO, Archetype Publications, Paris, London (1997).

O'Keefe, R. The 'Right to take part in cultural life' under Article 15 of the ICESCR *International and Comparative Law Quarterly* 47 (1998) 904.

Pluciennik, M. Archaeology, archaeologists and 'Europe', *Antiquity* 72 (1998) 816.

Protzman, F. Justice delayed, *ARTnews* December (1998) 134.

Report of the Panel for a National Dialogue on Museum/Native American Relations (Feb. 28, 1990) *Arizona State Law Journal* 24 (1992) 487.

Shanks, H. Archaeology's dirty secret, *Biblical Archaeology Review* 20 (1994) 63.

Simpson, M. G. *Making Representations: Museums in the Post-Colonial Era*, Routledge, London (1996).

Sporrong and Lonnroth v. Sweden 5 *European Human Rights Reports* 35.

Stavenhagen, R. Cultural Rights: A Social Science Perspective. In: Niec, H. (ed.) *Cultural Rights and Wrongs* (Institute of Art and Law, UNESCO Publishing; Leicester, Paris; 1998) 1

The Commonwealth v. Tasmania [1983] 158 *Commonwealth Law Reports* 1.

Webb v. Ireland (1988) 8 *Irish Law Reports Monthly* 565.

Wiseman, D. J. The bottleneck of archaeological publication, *Biblical Archaeology Review* 16 (1990) 61.

World Commission on Culture and Development. *Our Creative Diversity*, UNESCO, Paris (1995).