



Essential Readings in Environmental Law

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CULTURAL HERITAGE AND ENVIRONMENTAL LAW

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OVERVIEW OF KEY SCHOLARSHIP

1. Blake, J., *International Cultural Heritage Law* (Oxford University Press, 2015)
2. Boer, B. and S. Gruber, 'Heritage Discourses' in Rubenstein, K. and B. Jessup (eds) *Environmental Discourses in International and Public Law* (Cambridge University Press: Cambridge 2012) 375-398
3. Francioni, F. and F. Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press, 2008)
4. Gruber, S., 'The Impact of Climate Change on Cultural Heritage Sites: Environmental Law and Adaptation' (2011) 2/2011 *Carbon and Climate Law Review* 209
5. Taylor, K., A. St. Clair, and N. J. Mitchell (eds), *Conserving Cultural Landscapes: Challenges and New Directions* (Routledge, 2014)
6. Boer, B., 'Culture, Rights and the Post-2015 Development Agenda', in Durbach, A. and L. Lixinski, (eds.) *Heritage, Culture and Rights: Challenging Legal Discourses* (Hart, 2016, forthcoming)
7. Lixinski, L., Sustainable Development in International Heritage Law: Embracing a Backwards Look for the Sake of Forwardness? (2014) *Australian Year Book of International Law Vol 32*
8. Vrdoljak, A., 'Human Rights and Culture Heritage in International Law' in Vrdoljak, A. and F. Lenzerini (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing 2014)

Background

The cultural and natural heritage is an inherent part of the human environment, and consequently the area of heritage law is a specialised but inherent and fundamental part of environmental law. The specialised area of heritage law has therefore necessarily attracted a narrower band of analysts than the broad area of environmental law.

Modern heritage law must be understood from the international, national and sub-national level (including states/provinces, and local level), and also as part of international environmental law, with which it can overlap, particularly in the context of world heritage.

At an international level, heritage law developed after the end of World War II as a reaction to the large-scale intentional destruction and loss of cultural heritage, with the negotiation and

completion of the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* in 1954. It reflected the view that any loss of cultural heritage also constitutes a cultural impoverishment of all humankind. This was followed by series of conventions on increasingly specific aspects of heritage. These include the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, the 1972 Convention concerning the protection of World Cultural and Natural Heritage (World Heritage Convention), the UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects*, the 2001 *Convention on the Protection of the Underwater Cultural Heritage*, the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage*, and the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. Most of these treaties have been extensively analysed, and some of the readings set out here focus on them in some detail. The *World Heritage Convention* is the best known of these treaties, and has been the subject of a great deal of discussion at international and national level. It recognises the equal importance of and close connection between cultural and natural heritage, which in fact is in many cases very difficult or even impossible to distinguish from each other. Conceptually, in the past two decades there has been a convergence between the natural heritage and the cultural heritage, epitomised for example by the development of the concept of ‘cultural landscapes’, now incorporated into the Operational Guidelines of the *World Heritage Convention*.

At national and sub-national level, the enactment of heritage provisions can be found in both separate heritage legislation and as a part of environmental and planning legislation. A very wide range of jurisdictions has enacted legislation to address tangible heritage. The tangible heritage includes both the natural and cultural heritage. Laws relating to the natural heritage are often seen to overlap with legislation relating to protected natural areas, generally referred to as national parks and nature reserves. Cultural heritage is normally divided into tangible and intangible aspects. Tangible heritage includes the built environment, and more generally the human-made environment. It also includes heritage objects, also known as cultural objects or artefacts. The word ‘relic’ is also used in some jurisdictions. This category covers the law relating to museums that contain moveable heritage items.

The intangible heritage deals with a large number of categories of matters of importance at international, national and local level. The comprehensive list of such items is found in the definition provision of the *Intangible Heritage Convention* mentioned above. They include ‘practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage’ (Article 2). National legislation on the intangible heritage is becoming more common, with better-known examples being seen in Japan and China.

A list of national legislation on the protection of heritage from around the world is maintained by UNESCO; see UNESCO Database of National Cultural Heritage Laws at <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/>

An increasingly important aspect of the discourses around the protection of heritage is the link between heritage and human rights, and specifically the right to culture. This became an important part of the discussions in the formulation of the Sustainable Development Goals and their associated Targets. Intangible heritage also incorporates issues relating to cultural identity, which can be related to geographical location and dislocation, and inevitably raises political questions concerning nationality and nationhood. Cultural identity matters are often

also related to Indigenous nations or communities living within dominant national majorities. In this respect, the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* is central to cultural identity considerations.

When they teach heritage law, professors take a variety of approaches. At undergraduate level, they make it a part of a general environmental law course. At postgraduate level, a range of heritage courses are taught as separate subjects. Either way, it is important to ensure that students have a good understanding of the international law on heritage and its connections with global environmental and human rights issues, as well as the links between the international obligations and how they are implemented at national level.

Overview of Key Scholarship

1. *International Cultural Heritage Law* by J. **Blake** provides an excellent overview of the development of cultural heritage law and policy at the international and regional level. It analyzes the relevant legal frameworks within the broader context and explores the processes of international cultural policy-making. The individual chapters discuss international cultural heritage law and its place in international law generally, illicit excavation and the illegal trade in archaeological finds, protection of underwater cultural heritage, intangible aspects of heritage and their safeguarding, cultural heritage as traditional knowledge and creativity, regional approaches to protection, human rights issues related to cultural heritage, and newly-emerging topics and challenges including the relationship between cultural heritage and sustainable development and the gender dynamics of cultural heritage. Of particular significance in the context of the environmental protection is chapter 4, which provides an in-depth discussion of the relationship between the protection of cultural heritage and the environment and the relevant legal context.
2. In *Heritage Discourses*, by **B. Boer and S. Gruber** explore a variety of discourses in heritage protection and provide a brief theoretical overview on the ideas behind heritage law. They start by explaining and exploring the multiple ways of characterising and classifying heritage. Within public and international law, selected forms of heritage are protected in mostly consistent, though at times culturally distinct, ways. The paper emphasises the influence of international law as providing a universal protection regime for widely accepted forms of heritage that has generally been incorporated into public laws of nations or has acted as an overarching influence which has been gradually adopted by initially reluctant nations. It also highlights how other forms or interpretations of ‘heritage’ at a national level are perceived and protected, often mimicking the international regime, while not necessarily being protected under it. Presenting the different categories and understandings of ‘heritage’ underscores the term’s dynamism. Heritage does not mean just one thing, and it is not used consistently in language and argument. Heritage concepts change over time and this evolution is reflected in policies and legal instruments at an international and domestic level. The paper shows how ‘heritage’ is used as a discourse in a variety of contexts relying on environmental theories to promote conservation of places, communities and cultures. While this continuing flux of heritage discourses can be confusing, it is often a richly rewarding interplay between what is regarded as of value and worth legally protecting, and what can be left to one side in the continuous march of seemingly inevitable ‘development’.

3. ***The 1972 World Heritage Convention: A Commentary***, edited by **F. Francioni and F. Lenzerini**, provides a detailed legal commentary on the *World Heritage Convention*, which is the most comprehensive and widely ratified among UNESCO treaties on the protection of both cultural and natural heritage. The Convention recognizes the deep links between cultural and natural heritage and includes provisions for the identification, presentation, registration, protection, and monitoring of cultural properties and natural sites of outstanding universal value. In addition to the Convention, the World Heritage Committee established Operational Guidelines, which are the implementing rules governing the operation of the Convention and have been extensively revised since their adoption. The Convention and its Operational Guidelines have been interpreted widely over the recent decades and been subject to several court cases around the globe. The book provides guidance to those interpretations, explains the economic and political dimension of world heritage conservation and management, describes the roles of and interactions between states parties, the World Heritage Committee, other treaty bodies, and relevant international organizations and actors, and clarifies the operation and aims of instruments such as the List of World Heritage in Danger.
4. **S. Gruber** addresses in ***The Impact of Climate Change on Cultural Heritage Sites: Environmental Law and Adaptation*** the severe threat of climate change to many cultural heritage sites from a legal perspective. Threats include floods, increasing extreme weather events, desertification, deterioration of permafrost, and the decay of cultural landscapes. Protecting cultural heritage sites proves to be very difficult as they are very diverse. The key to successful mitigation is – in addition to reducing carbon emissions – to reduce stress from unsustainable activities, which may aggravate the negative impact of climate change. This paper argues that provisions from various areas of environmental law, such as heritage conservation law, pollution law, land use law, construction law, water law, environmental impact assessment law, and planning law, must be used in an integrated way with the aim of mitigating and adapting to the effects of climate change on heritage properties. Of particular importance in this context is the application of the precautionary principle when dealing with heritage sites.
5. Cultural landscapes represent a particularly close connection between cultural and natural heritage. They include for example landscapes mostly shaped and designed by humans, urban landscapes, or associative landscapes of spiritual significance with only very limited or no evidence of human interaction. ***Conserving Cultural Landscapes: Challenges and New Directions***, edited by **K. Taylor, A. Clair, and N. J. Mitchell**, explores the meaning and development of the concept of cultural landscapes, threats, conservation strategies, and the role and involvement of relevant organisations and stakeholders. In addition to theoretical aspects, numerous examples and case studies are presented to highlight new developments and concepts, present and future problems, and potential solutions to the most pressing challenges for conservationists and concerned communities such as local indigenous peoples. The topics discussed include inter alia World Heritage cultural landscapes, land stewardship, traditional knowledge, climate change, natural hazards and disasters, and a range of different management approaches.
6. In ‘***Culture, Rights and the Post-2015 Development Agenda***’, **B. Boer** provides an analysis of the Sustainable Development Goals (SDGs) and Cultural Heritage, focusing on efforts to ensure that culture and cultural heritage are adequately reflected in the

post-2015 Agenda for Global Action and the SDGs, in the context of the emerging recognition of the human right to culture. The post-2015 Agenda sets out a philosophical and practical framework for sustainable development and implementation of policy on a worldwide basis up to the year 2030. The chapter observes that despite the reasonably vigorous attempts by various public and non-government protagonists to place culture and heritage concerns into the Agenda, these attempts were not successful. It argues that the focus must be achieving this objective through various mechanisms that will implement the SDGs and their Targets. It is argued that if the principle/concept of sustainable development is to be made fully effective in the post-2015 Agenda, cultural aspects must be as strongly reflected in future policy frameworks and legal instruments as the economic, environmental and social aspects. The approach of the chapter is to examine the historical antecedents to the post-2015 Agenda and the SDGs, and then to examine the more recent resolutions and policy instruments. A more integrated and holistic approach to culture, cultural heritage, environment, sustainable development and human rights is urged, where cultural rights, environmental rights and sustainable development are not only seen as linked elements of the post 2015-development agenda, but that they are inseparable from each other. It argues that the achievement of the SDGs is more likely to be effective if the cultural element is characterized as an integral aspect of the legal and policy frameworks. Critical to this argument is an acknowledgment that the right to culture and cultural life are fundamental aspects of human rights, as recognised in the *Universal Declaration of Human Rights* and the *Covenant on Economic, Social and Cultural Rights*, the *Covenant on Civil and Political Rights*, as well as in the regional human rights instruments. Failure to take culture fully into account in the implementation of the SDGs will undermine the determination expressed in the new Agenda to take ‘the bold and transformative steps which are urgently needed to shift the world on to a sustainable and resilient path’.

7. **L. Lixinski** provides in *Sustainable Development in International Heritage Law: Embracing a Backwards Look for the Sake of Forwardness?* an excellent critical overview of the links between sustainable development and heritage issues. Lixinski addresses the tensions that arise from the relationship between heritage and sustainable development, and in particular the ways in which they converge, and how that convergence can on occasion be self-defeating. He argues that ideals of sustainable development and heritage protection can hinder their own success if they are indiscriminately applied. He uses several cases studies to indicate these issues. He concludes heritage and sustainable development are concepts that go hand-in-hand, and that conceptually, he argues, they include ‘a sort of romanticised version of a past that needs to be rescued, a past of harmony between man, nature and culture that has not yet been tainted by modernity, industrialization and technology’. He maintains that this view is largely an untenable future, if applied tokenistically. He also argues that the focus of heritage regimes on listing, as a top-down method, serves this tokenistic approach quite well, and that lists for both tangible and intangible have been used to promote sustainable development as ‘an achievable vision’, although this seems only to be the case for some isolated communities. Lixinski suggests a community integrated governance approach to heritage, if integrated in all levels of heritage governance, ‘is potentially more capable of fulfilling the promise of sustainable development than current top-down approaches’.

8. In '*Human Rights and Culture Heritage in International Law*', A. **Vrdoljak** looks at the issue of cultural diversity as a 'common good', and explores the relationship between culture and human rights in international law, and discusses possible future development of that relationship. She highlights the transformative effects of culture and human rights in their function of dissolving boundaries in international law, which she argues are often barriers to its progressive development. The chapter is in two parts. She examines the dominance of the state in the protection of cultural heritage and the mid twentieth century interpretations of cultural rights. She then discusses the rise or re-emergence of non-state groups into the 21st century and their role in dissolving the pre-existing boundaries and accepted wisdoms in international law in this field. She argues that 'rather than leaving international law and international society in a fragmented state, culture and human rights and their protection ... are a common good which may serve to reformulate the values and aspirations which bind citizens with a state, individuals within international society.'