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## **Heritage, landscape and spatial justice: new legal perspectives on heritage protection in the Lesser Antilles**

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## Chapter 3 Landscape in International Law

### 3.1 Introduction

This chapter surveys the evolution of landscape protection via three main spheres of international law: international cultural heritage law, international environmental law, and international human rights law. Landscape first emerged in soft law instruments, becoming a cross-cutting concept of these three areas of law, and finally a distinct body of law in its own right.<sup>446</sup> In so doing, landscape demonstrates the potential of international law to shed its imperialist origins to buttress landscape in its entirety, not as an aesthetic backdrop to human activity but a place embodying the diverse relationships communities have with land.<sup>447</sup> This is due to a number of underlying factors: heritage assuming a more holistic definition to embrace anthropological aspects beyond individual artefacts, thereby considering culture as a way of life for communities, heritage law becoming more human-rights focused, and the influence of sustainable development on the management and preservation of natural resources for future generations (and the continuation of these communities).

This has particular relevance for the post-colonial states in the Lesser Antilles, which are parties to most of the international treaties discussed herein, so this overview considers the implications of these trends and developments in landscape from this perspective. The focus on international and regional law in this chapter reveals the partial transformation of international law from instrument of empire to perceived vehicle for change in relation to human rights, cultural heritage and the environment.

The most recent demonstration of international law's attempt to empower local communities can be seen in the plurilateral responses to landscape. These have contributed to the crystallisation of a nascent landscape law, namely through the European Landscape Convention and other initiatives discussed below. Regional arrangements are significant to the Caribbean post-colonial small island developing states (SIDS), which have created co-operative institutional frameworks

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<sup>446</sup> The definitive text which is relied on in this chapter is Amy Strecker's *Landscape Protection in International Law* (Oxford University Press 2018), which analysed the role of international and European law in the protection of landscape, mainly as expressed in cultural heritage law, environmental law and human rights.

<sup>447</sup> Amy Strecker, 'Landscape as Cultural Heritage' in F Francioni and A Vrodljak (eds), *Oxford Handbook on International Cultural Heritage Law*, Oxford University Press (in press).

for addressing development issues common to the region. The potential for a Caribbean approach to landscape using existing regional fora as a springboard is examined by analysing regional and subregional instruments such as the Escazú Agreement and the St George's Declaration to the Revised Treaty of Basseterre, the constituent treaty of the Organisation of Eastern Caribbean States (OECS), to which most of the Lesser Antillean states belong.<sup>448</sup>

## 3.2 Protection of landscape in international law

### 3.2.1 Soft law

Landscape's entry into international law is via soft law instruments promulgated by UNESCO and the Council of Europe in the 1960s. The UNESCO Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites of 1962,<sup>449</sup> highlighted the aesthetic beauty of the landscape as its defining feature and worthy of protection. As Amy Strecker has noted, the Recommendation introduced a number of cornerstone concepts characteristic the traditional approach to landscape:

Terms such as 'virgin land' and 'dangers which threaten them' reflect the concern within the Recommendation of the acceleration of modern society and the effects of industrial and commercial development, but also of the misconception that landscape is predominantly a 'natural' construct, somehow external to human interaction.<sup>450</sup>

The remaking of landscape into the pastoral ideal was addressed in Chapter Two, and the implications of this philosophy on cultural heritage law are discussed later in this chapter. In 1968, UNESCO adopted the Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works.<sup>451</sup> With respect to landscape, cultural property was defined to include immovable heritage such as archaeological and historic or scientific sites, as

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<sup>448</sup> Barbados and Trinidad and Tobago are not members.

<sup>449</sup> UNESCO Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites, adopted on 11 December 1962.

<sup>450</sup> Strecker, 'Landscape as Cultural Heritage' 61; Art 1, UNESCO Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites.

<sup>451</sup> UNESCO Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, adopted on 19 November 1968.

well as their ‘setting’.<sup>452</sup> The Recommendation outlined the general principles for the preventive and corrective measures aimed at protecting cultural property from public or private works likely to damage or destroy it, including the ‘construction and alteration of highways which are a particular danger to sites or to historically important structures or groups of structures’,<sup>453</sup> the ‘construction of dams for irrigation,’<sup>454</sup> pipelines,<sup>455</sup> farming operations and afforestation.<sup>456</sup> As Strecker writes, the Recommendation promotes an innovative mechanism, the impact assessment, when it called for the conduct of surveys prior to any public or private works.<sup>457</sup> The Recommendation notably identifies in situ preservation of cultural property endangered by public or private works as critical ‘in order to preserve historical association and continuity’.<sup>458</sup>

The 1976 UNESCO recommendation concerning the Safeguarding and Contemporary Role of Historic Areas,<sup>459</sup> does not explicitly refer to landscape,<sup>460</sup> but emphasises the importance of historic areas in its preamble for the ‘daily environment of human beings everywhere’ which ‘represent the living presence of the past which formed them,’ [...] ‘provide the variety in life’s background needed to match the diversity of society, and that by doing so they gain in value and acquire an additional human dimension’.<sup>461</sup> As Strecker notes, this continues the theme underlying landscape in soft law that human interaction is secondary to the site’s aesthetic value, hence the focus on preservationist and restorative measures. There is little by way of participation and human rights concerns, but it is noted that plans to protect such areas should not disrupt ‘the social fabric’ and the poorest inhabitants should be compensated so that they can maintain their ‘traditional living patterns and occupations, especially rural crafts, small-scale agriculture, fishing etc.’<sup>462</sup> Ultimately, this is meant to preserve the area as is, a backdrop to

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<sup>452</sup> Art 1(a).

<sup>453</sup> Art 8(d).

<sup>454</sup> Art 8(e).

<sup>455</sup> Art 8(f).

<sup>456</sup> Art 8(h).

<sup>457</sup> Art 22. See also Strecker, ‘Landscape as Cultural Heritage.’

<sup>458</sup> Art 9.

<sup>459</sup> Adopted on 26 November 1976.

<sup>460</sup> Article 1(a) states that ‘Historic [...] areas shall be taken to mean any groups of buildings, structures and open spaces including archaeological and paleontological sites, constituting human settlements in an urban or rural environment, the cohesion and value of which, from the archaeological, architectural, prehistoric, historic, aesthetic or socio-cultural point of view are recognized’.

<sup>461</sup> Strecker, ‘Landscape as Cultural Heritage’, and see Preamble, Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas.

<sup>462</sup> Art 46, Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas.

human existence. However, as Strecker writes, the 1976 Recommendation did advance the role of local, regional and national planning, as well as the responsibilities of citizens in landscape protection, and Article 13 in particular established the obligation to provide ‘machinery for appeal against arbitrary or unjust decisions.’<sup>463</sup>

The Recommendation concerning the Protection, at National level, of the Cultural and Natural Heritage (1972) adopted by UNESCO at its seventeenth session to complement the World Heritage Convention, marked a departure in the development of the law. The preamble notes that ‘the cultural and natural heritage forms an harmonious whole, the components of which are indissociable’. This is the first time that the cultural dimensions are not divorced from the environment. In addition, the Recommendation recognised that the cultural and natural heritage should not be restricted to the monumental and iconic, and include vernacular facets of the heritage as well: ‘cultural and natural heritage should be considered in its entirety as a homogenous whole, comprising not only works of great intrinsic value, but also more modest items.’<sup>464</sup> This is a retreat from the view that purely aesthetic aspects of the heritage are worthy of protection. The duty to preserve cultural and natural heritage in order to hand it down to future generations incorporates considerations of sustainability in the protection of heritage, as this inter-generational component is a principle of the sustainable development approach.<sup>465</sup>

While ambitious in scope, the Recommendation nevertheless promotes measures that refer only to natural, not cultural, heritage, and they are in fact defined and categorised separately.<sup>466</sup> The text states that ‘member states should develop short and long range plans, based on inventories of their natural heritage, to achieve a system of conservation to meet the needs of their countries’.<sup>467</sup> No mention is made of culture in the article on planning, reflecting the underlying perception observed by Olwig that rural landscapes had been reframed as pristine natural environments, devoid of manmade influence, the original wilderness.<sup>468</sup> This dichotomy was to be embedded in the World Heritage Convention.

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<sup>463</sup> Strecker, ‘Landscape as Cultural Heritage.’

<sup>464</sup> Art 5, Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, adopted on 16 November 1972, and see Amy Strecker, ‘Landscape as Cultural Heritage.’

<sup>465</sup> Preamble.

<sup>466</sup> Arts 1 and 2.

<sup>467</sup> Art 37.

<sup>468</sup> See also Amy Strecker *Landscape as Cultural Heritage*, and discussion of the WHC below.

### 3.2.2 Landscape in cultural heritage law

The recognition of the value of cultural heritage to all of mankind was given prominent attention in the World Heritage Convention (WHC).<sup>469</sup> The WHC was conceived as a platform for the identification, recognition and protection of heritage with outstanding universal value. The States parties have the opportunity to submit an inventory of the most valuable cultural and natural property situated in their territories to the World Heritage Committee (the Committee). If the Committee considers the property as having outstanding universal value it adds it to the 'World Heritage List' (the List) and where that site is threatened, may include it on the 'List of World Heritage in Danger'.<sup>470</sup> The Committee has established certain criteria in the Operational Guidelines (Guidelines) to determine whether a property proposed for inscription should be included on the List.<sup>471</sup> The State Party, on whose territory the object is situated, has the duty to ensure its identification, protection, conservation, presentation and transmission to future generations.<sup>472</sup>

As Craig Forrest observes, the phrase 'cultural heritage' makes its international debut in the WHC text.<sup>473</sup> Widely considered a philosophical breakthrough, the reference to cultural heritage is a complete departure from predecessor treaties, which defined heritage as physical property.<sup>474</sup> While neither property nor heritage has been defined in conventional heritage law, it appears that cultural heritage 'is generally conceived of as a broader all-encompassing term of which cultural

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<sup>469</sup> Convention concerning the Protection of the World Cultural and Natural Heritage (opened for signature 16 November 1972, entered into force 17 December 1975), 1037 UNTS 151 (hereafter World Heritage Convention).

<sup>470</sup> WHC arts 11 (2) and (5). Paras 1 and 2 of the Operational Guidelines for the Implementation of the World Heritage Convention WHC.17/01 12 July 2017 state that:

1. The Operational Guidelines for the Implementation of the World Heritage Convention (hereinafter referred to as the Operational Guidelines) aim to facilitate the implementation of the Convention concerning the Protection of the World Cultural and Natural Heritage (hereinafter referred to as 'the World Heritage Convention' or 'the Convention'), by setting forth the procedure for:

- a) the inscription of properties on the World Heritage List and the List of World Heritage in Danger;
- b) the protection and conservation of World Heritage properties;
- c) the granting of International Assistance under the World Heritage Fund; and
- d) the mobilization of national and international support in favor of the Convention.

2. The Operational Guidelines are periodically revised to reflect the decisions of the World Heritage Committee.

<sup>471</sup> Abdulqawi A Yusuf, 'Article 1: Definition of Cultural Heritage' in Francesco Francioni and Federico Lenzerini (eds), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press, 2008) 30.

<sup>472</sup> WHC, arts 4 and 5.

<sup>473</sup> Forrest 25.

<sup>474</sup> Blake, *International Cultural Heritage Law* 128.

property forms a subsection'.<sup>475</sup> Using the term 'property' can commodify certain cultural aspects of life, which would be inappropriate for heritage resources that were never meant to be treated as goods in the marketplace, to be bought, sold or traded.<sup>476</sup>

This is chiefly as a result of the Cultural Turn, which first arose as a result of changes occurring at the end of the Second World War, and saw a retreat from the exclusive (and exclusionary) approaches to heritage protection. The movement originated in the humanities and social sciences and provided the impetus for deconstructing heritage in its elitist form and injecting the dynamism associated with anthropological understandings of heritage in its wider cultural context, relevant to livelihoods, identity and community.<sup>477</sup> International cultural heritage law began to mirror this development a few decades later, as UNESCO transitioned to an integrated perspective that incorporated intangible elements and traditional knowledge.<sup>478</sup>

The WHC thus pivots away from heritage as property dominated by private property rights and framed as economic in nature, towards recognition of a collective and public interest in the heritage.<sup>479</sup> Nevertheless, the scope of the treaty is limited to a subset of heritage, that which is of outstanding universal value.<sup>480</sup> Another constraint is that the way heritage was defined had implications for landscape protection. While the WHC recognised both natural and cultural aspects of heritage as worthy of protection, building on the 1972 Recommendation, criteria for assessing these sites were separated according to the type of site i.e. as natural or cultural. Although no explicit mention was made of landscapes in the original text of the WHC, the Operational Guidelines referred to landscapes under the criteria for natural heritage, namely as examples of the 'interaction between man and his environment'.<sup>481</sup> Where an interrelationship between natural and cultural resources existed, the 'mixed sites' designation (though not expressly catered for in the WHC) was the preferred solution adopted by the Committee.<sup>482</sup>

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<sup>475</sup> Blake, *International Cultural Heritage Law* 7 and at 128.

<sup>476</sup> Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press, 2013) 6.

<sup>477</sup> Strecker, *Landscape Protection in International Law* 122; see also Geertz, *The Interpretation of Cultures* and VE Bonnell and L Hunt, *Beyond the Cultural Turn* (University of California Press, 1999).

<sup>478</sup> Strecker, *Landscape Protection in International Law* 123.

<sup>479</sup> Lixinski 7 and Forrest 25.

<sup>480</sup> Yusuf, 'Article 1: Definition of Cultural Heritage' in *The 1972 WHC: A Commentary* 30.

<sup>481</sup> Operational Guidelines for the Implementation of the World Heritage Convention, CC-77/CONF.001/8 Rev, para 10 ii(c).

<sup>482</sup> Operational Guidelines WHC.17/01 13 July 2017, para 46.



### 3.2.2.1 The Mixed sites category: the need for recognition of landscapes

A number of mixed sites on the List had been inscribed on the basis of natural heritage criteria (ii) and (iii), which referred to ‘man’s interaction with his natural environment’ and to ‘the combined works of nature and man’ respectively.<sup>483</sup> However, mixed sites were not an appropriate designation for those sites in which cultural and natural elements could not be separated, or where neither culture nor nature predominated in the interactions of people and the environment.<sup>484</sup> Such landscapes were designated as natural sites because of the perceived absence of evidence of human interaction with the landscape.<sup>485</sup> This was deeply problematic. As Kathryn Whitby Last writes, properties nominated for both cultural and natural aspects were often accepted for one aspect only, rather than on a joint cultural/natural basis. Such was the case of the nomination of Yosemite National Park in the USA, which ultimately ignored the contributions of indigenous communities associated with the site in question as it was considered a natural site.<sup>486</sup>

This is due to the fact that the WHC text was influenced by a US draft proposal for a World Heritage Trust, which included natural zones, cultural and historic sites and provided for voluntary contributions.<sup>487</sup> Though mention was made of historic sites, the US proposal was primarily focused on conserving areas of outstanding natural beauty or natural sites of exceptional importance such as Yellowstone Park, and the Grand Canyon.<sup>488</sup> Termed vast wilderness areas, they were, as with Yosemite, modified Native American landscapes.<sup>489</sup> This conceptualisation of landscape dates farther back to England’s enclosure movement, as discussed in Chapter Two.<sup>490</sup> As Kenneth Olwig’s investigation into the origins of landscapes and their influence on England has shown, landscape as scenery was also transported to England’s

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<sup>483</sup> Yusuf, ‘Article 1: Definition of Cultural Heritage’ in *The WHC: A Commentary* 48-49.

<sup>484</sup> Kathryn Whitby Last, ‘Article 1: Cultural Landscapes’ in *The WHC: A Commentary*, 51-62, 60-61.

<sup>485</sup> Last, ‘Article 1: Cultural Landscapes’ in *The WHC: A Commentary* 51-52.

<sup>486</sup> *Ibid.*, 54.

<sup>487</sup> Raymond Goy, ‘The International Protection of the Cultural and Natural Heritage’ (1973) *Netherlands Yearbook of International Law* 4: 117-141, 126.

<sup>488</sup> Francesco Francioni, ‘Thirty Years On: Is the World Heritage Convention Ready for the 21st Century’ *The Italian Yearbook of International Law Online*, 01/01/2002, 12 (1): 13-38, 16.

<sup>489</sup> Olwig, *Landscape, Nature and the Body Politic*, 224 notes that with the expulsion of the Indian populace from Yosemite Park America was merely replicating practices in British landscaping, with imperial landscape garden parks that enclosed communal land and removed villages and commons.

<sup>490</sup> Olwig, *Landscape, Nature and the Body Politic* 202.

colonies in the Americas<sup>491</sup> and can be thus seen in the drafting of the WHC, which relied on a misrepresentation of indigenous landscape in defining and classifying natural heritage.<sup>492</sup>

While clearly innovative in its recognition of natural ‘heritage’, the WHC’s concept is rooted in a restrictive understanding of the environment, give the role of communities in shaping and ensuring the survival of ecosystems.<sup>493</sup> The search for exceptional and untouched natural sites can therefore exclude heritage sites such as landscapes that are worthy of protection, by undervaluing the role of communities in the formation of these places. Strict observance of these categories meant sites were deemed too modified to be acceptable as ‘natural’ sites, and too ‘natural’ to be accepted as cultural sites, because ‘a convention uniquely designed to integrate cultural and natural perspectives on heritage singularly failed to make this all-important connection.’<sup>494</sup> It would take some developments for the WHC to incorporate a more inclusive approach to heritage. The development of the concept of ‘cultural landscapes’ through the revisions to the Operational Guidelines resolved the previously irreconcilable issue of aligning mixed sites with the definition of natural heritage in Article 2 of the WHC.<sup>495</sup>

### *3.2.2.2 Introduction of the cultural landscapes category*

Due to the challenges associated with the mixed sites category, the World Heritage Committee requested the formation of a taskforce with representatives from the IUCN, ICOMOS and the International Federation of Landscape Architects to develop guidelines for the identification and nomination of mixed natural and cultural sites.<sup>496</sup> A first meeting was held in 1985 and guidelines were drafted. The first test was the 1987 nomination by the United Kingdom of the

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<sup>491</sup> Ibid.

<sup>492</sup> Erasing Native American landscapes across the United States in order to facilitate the development of the national park system in the nineteenth century - Yellowstone Park in fact was created by the expulsion of the Crow and Shoshone peoples - echoed a long-held practice of displacing communities from common lands. On the ‘natural and ‘neutral’ perceived values of parks, see also Karen Fog Olwig and Kenneth Olwig, ‘Underdevelopment and the Development of “Natural” Park Ideology’ at 17, and on Yellowstone and the universal logic of park development, Karen Fog Olwig, ‘National Parks, Tourism and Local Development: A West Indian Case’, 1980 *Human Organization*, 39(1): 22-30 at 22 and 27. See also Adrian Phillips, ‘The nature of cultural landscapes — a nature conservation perspective’ (1998) *Landscape Research* 23(1): 21-38.

<sup>493</sup> Blake, *International Cultural Heritage Law* 129.

<sup>494</sup> Phillips 29.

<sup>495</sup> Last, ‘Article 1: Cultural Landscapes’ in the *WHC - A Commentary* 51-52.

<sup>496</sup> Peter Fowler, World Heritage Papers 6. World Heritage Cultural Landscapes 1992-2002, (UNESCO World Heritage Centre, 2003) 66; Mechtild Rössler, ‘UNESCO and Cultural Landscape Protection’ in Bernd von Droste et al (eds), *Cultural Landscapes of Universal Value. Components of a Global Strategy* (Gustav Fisher Verlag with UNESCO, 1995), 42-49.

Lake District as a potential mixed natural/cultural landscape.<sup>497</sup> The application revealed the limitations of the WHC criteria and the need to develop specific criteria for cultural landscapes.

In 1992, the first expert meeting on World Heritage cultural landscapes was held in La Petite Pierre, France.<sup>498</sup> Based on the meeting's recommendations, the Operational Guidelines were subsequently revised to officially include 'cultural landscapes'<sup>499</sup> within the scope of the WHC, and were adopted by the sixteenth session of the World Heritage Committee.<sup>500</sup> Cultural landscapes were defined as:

cultural properties representing the combined works of nature and of man designated in Article 1 of the Convention. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal.<sup>501</sup> [...] 'The term embraces a diversity of manifestations of the interaction between humankind and its natural environment'.<sup>502</sup>

It was further noted that landscapes 'should be selected on the basis both of their outstanding universal value and of their representativity in terms of a clearly defined geo-cultural region and also for their capacity to illustrate the essential and distinct cultural elements of such regions'.<sup>503</sup>

As Mechtild Rössler writes, most of the world's landscapes are to a considerable extent human artefacts, representing countless generations of human activity and creativity, but have for the most part been ignored because they lack the monumental elements inseparable in the European mind from the traditional 'cultural heritage'.<sup>504</sup> Their omission on the World Heritage List

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<sup>497</sup> Last, 'Article 1: Cultural Landscapes' in *The WHC: A Commentary* 55.

<sup>498</sup> Report of the Expert Group on Cultural Landscapes (La Petite Pierre, France, 24-26 October 1992). WHC-92/CONF.202/10/Add. See Amy Strecker, Article 13 (d)(ii) - Respecting Customary Practices; Last, 'Article 1: Cultural Landscapes' in *The WHC: A Commentary* 57; Mechtild Rössler, 'Linking Nature and Culture: World Heritage Cultural Landscapes', *Cultural Landscapes: the Challenges of Conservation*, World Heritage 2002, Shared Legacy, Common Responsibility; Associated Workshops, 11-12 November 2002 (Ferrara), 10.

<sup>499</sup> Pioneered by cultural geographer Carl Sauer and the Berkeley School of Geographers.

<sup>500</sup> Decision 16COM XIII. 1-3.

<sup>501</sup> *Operational Guidelines for the Implementation of the World Heritage Convention*, 1999, 35, <<http://whc.unesco.org/archive/opguide05-en.pdf>> accessed 8 January 2018

<sup>502</sup> *Ibid*, para 37.

<sup>503</sup> *Ibid*, para 36.

<sup>504</sup> Mechtild Rössler, 'World Heritage cultural landscapes: A UNESCO flagship programme 1992 – 2006', (2006) *Landscape Research* 31(4): 333-353, 349 and see M Cleere 'The uneasy bedfellows: universality and cultural heritage, in R Layton, J Thomas and P Stone (eds), *Destruction and Conservation of Cultural Property* (Routledge 2001).

skewed the List, making it unrepresentative of the totality—and hence the universality—of human cultural development and achievement.<sup>505</sup>

The WHC further enhanced its Operational Guidelines to address landscape following the issue of the Kakadu natural and cultural landscape in Australia, home of the Mirrar people. Strecker notes that the Australian government developed plans to expand uranium mining into the park without proper consultation, or the free, prior and informed consent of the Mirrar people, which led to protests. The Mirrar people eventually approached the World Heritage Committee in Paris, essentially by-passing the State. The World Heritage Committee held a single-item Extraordinary Session in Kakadu in July 1999 to address concerns about the serious threats to the living cultural heritage values of the Mirrar people and requested the Australian government to provide updates on actions to remedy the situation.<sup>506</sup> Ultimately the project was abandoned due to financial challenges and consistent protest from the Aboriginal communities. The Operational Guidelines now incorporate participation considerations where heritage is concerned.<sup>507</sup>

Three categories of cultural landscapes were incorporated into the Operational Guidelines:<sup>508</sup>

- i. clearly defined landscapes designed and created intentionally by man. This embraces garden and parkland landscapes characteristically constructed for aesthetic, social and recreational reasons which are often but not always associated with religious or other monumental buildings and ensembles;
- ii. organically evolved landscapes resulting from an initial social, economic, administrative, and/or religious imperative and have developed their present form by association with and in response to the natural environment. Such landscapes reflect that process of evolution in their form and component features. They fall into two sub-categories:
  - a) relict (or fossil) landscapes in which an evolutionary process came to an end at some time in the past, either abruptly or over a period. Their significant distinguishing features are, however, still visible in material form:
  - b) continuing landscapes which retain an active social role in contemporary society closely associated with a traditional way of life. They are continuing to evolve while, at the same time, exhibit significant material evidence of their historic evolution;

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<sup>505</sup> Rössler 349.

<sup>506</sup> Third Extraordinary Session of the World Heritage Committee, 12 July 1999. WHC-00/CONF.205/5Rev.

<sup>507</sup> See A Strecker's discussion, 'Article 13: Respecting Customary Practices' (in press).

<sup>508</sup> Defined in para. 39, 1999 Operational Guidelines for the Implementation of the World Heritage Convention.

iii. associative cultural landscapes with definable powerful, religious, artistic or cultural associations with the natural element rather than material cultural evidence, which may be insignificant or even absent.’

The criteria concerning continuing and associative landscapes gave recognition to continuing tradition, customary practices and the associative dimension to landscapes. By doing so, the landscapes category was distinctive for ‘the acceptance of communities and their relationship with the environment.’<sup>509</sup> As Amy Strecker writes, the inclusion of both continuing landscapes and associative landscapes were influenced by arguments raised by Indigenous Peoples in response to the ‘natural’ heritage nominations of well-known heritage sites in Australia and New Zealand, most notably Uluru and Tongariro National Park respectively.

UNESCO has promulgated cultural landscapes, with their traditional resource management supported by customary law, as living models of sustainable use of land and natural resources. Because they also illustrate the religious and cultural connections indigenous peoples have with their natural environment,<sup>510</sup> landscapes have inspired UNESCO to use the category as a springboard for promoting international cooperation among nations and peoples.<sup>511</sup>

The inscription of sites as cultural landscapes on the World Heritage List has had major effects on the interpretation, presentation, and management of these properties. The nomination process led to awareness-raising among local communities, rekindled pride in their heritage, and rehabilitated and revived local traditions.<sup>512</sup> Sustainable land-use and community stewardship have stimulated the marketing of specific agricultural products or traditional arts and crafts. The introduction of cultural landscapes into the World Heritage field amplified the understanding of heritage beyond monuments and strict nature reserves – there are cultural linkages in time and space that make landscapes living repositories, and the concept is therefore exemplary for the evolution in protected area thinking and heritage conservation as a whole.<sup>513</sup>

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<sup>509</sup> Mechtild Rössler, ‘World Heritage Cultural Landscapes: A UNESCO Flagship Programme 1992-2006’.

<sup>510</sup> Graeme Aplin, ‘World Heritage Cultural Landscapes,’ (2007) *International Journal of Heritage Studies* 13:6, 427-446, 440.

<sup>511</sup> Aplin 440 and see UNESCO World Heritage Centre, ‘Cultural Landscapes: The Challenges of Conservation.’ World Heritage Papers no. 7. Paris: UNESCO World Heritage Centre, 2003.

<sup>512</sup> Rössler 337.

<sup>513</sup> *Ibid.*, 340.

### 3.2.2.3 Challenges with the cultural landscapes category

The main point of contention however, is that landscapes are not in fact synonymous with protected areas or parks. World Heritage ‘cultural landscapes’ were intended to give recognition to the intangible and associative values attached to certain landscapes, to sustainable agricultural practices and to ‘people and communities’ – essentially the human dimension of landscape. But as Strecker notes, the WHC’s inherent focus on ‘outstanding universal value’ means that a critical element of landscapes is not accounted for – that they are contested as reflective of the democratic character of the community, and not concerned with presenting a model that is fixed in time.<sup>514</sup> With respect to cultural landscapes, the Committee had adopted the following guidelines concerning their inclusion on the World Heritage List:

(i) the existing balance between nature and human activity may only be modified in a way which ensures the continuation of this special relationship and will exclude any major alterations to the appearance and function of the area...; (ii) legislative protection must exist as well as practicable mechanisms for bringing the relevant institutions together to ensure the preservation of the significant harmonious balance between nature and human activity in an evolving context; and (iii) the area nominated should be of such a size that these protective measures can seriously be expected to be effective.<sup>515</sup>

Aplin notes that these suggested criteria and guidelines have potentially negative implications. The wording limits inscription of Cultural Landscape sites to those that maintain ‘traditional’ forms of land use and evince little change over time. While this has the advantage of limiting the sites to those characterised by a well-established balance between human activities and the biophysical landscape, the implication is that to meet the definition of landscape, change is restricted. The relationship is frozen in time, and this is not ‘natural, but, rather, an artificial or bureaucratic restriction on cultural evolution and development’.<sup>516</sup> Furthermore, maintaining such a balance may not be acceptable because it compels community members to live a lifestyle

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<sup>514</sup> Strecker, *Landscape Protection in International Law* 85.

<sup>515</sup> Item 13 of the Provisional Agenda: Revision of the Operational Guidelines for the Implementation of the World Heritage Convention—‘Elaboration of Criterion or Criteria for Cultural Landscapes’. WHC Document SC-91/CONF.002/11 (1991).

<sup>516</sup> Aplin 431.

that may be physically challenging, demanding and economically static. We can return to the example of the Rice Terraces of the Cordilleras to illustrate this conflict.<sup>517</sup>

Customs and traditional farming practices were increasingly under threat due to market forces, poverty, and environmental issues.<sup>518</sup> As a result of abandonment of terraces, dispossession of property rights and conflicts over resources, the Cordilleras were placed on the List of World Heritage in Danger in 2001.<sup>519</sup> After a number of fact-finding missions, benchmarks were set in 2006 by the World Heritage Centre and the advisory bodies ICOMOS and IUCN, giving consideration to local peoples' perceptions, local development aspirations of the communities, and functional governance mechanisms.<sup>520</sup> Following efforts by the state party to remedy the situation, the Cordilleras were withdrawn from the List of World Heritage in Danger in 2012. Nevertheless, Strecker notes that the case reveals the challenges of designating living landscapes, when outstanding universal value implies restrictions on the fundamental rights of its inhabitants such as development and self-determination, to be discussed later in the chapter.<sup>521</sup>

Landscapes are not by definition preserved in amber. Such thinking is at odds with the understanding of heritage as dynamic and evolving, and in fact heritage conservation itself, which is not about fossilisation or creating models to be emulated.<sup>522</sup> The WHC has made significant advances in its understanding of cultural heritage, by attempting to make the List 'more credible, representative and less Eurocentric' with the cultural landscapes category, but as the Cordilleras example shows, landscapes are not detached from local circumstances, and long held practices of a community regulating access, use and management evolve over time in response to economic, environmental and social stimuli.<sup>523</sup> Sensitivity to rather than insulation from local circumstances is critical to any effective heritage preservation strategy.

Recognition of a cultural place as a World Heritage site can intentionally or unintentionally marginalise certain groups, the unrecognised 'others' with a long and verifiable association with

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<sup>517</sup> Aplin 432.

<sup>518</sup> Strecker, *Landscape Protection in International Law* 69.

<sup>519</sup> *Ibid.*, 68.

<sup>520</sup> *Ibid.*

<sup>521</sup> *Ibid.*, 69.

<sup>522</sup> Lowenthal, *The Heritage Crusade* 88.

<sup>523</sup> Strecker, *Landscape Protection in International Law* 71.

the place, and repeat the exclusion of communities as was undertaken to create US parks,<sup>524</sup> if the dynamic inter-relationship between the community and land is not recognised. Landscape is more than park management by traditional communities, even though recognition of the associative cultural landscape values of traditional people as being worthy of World Heritage listing can empower these groups via new heritage tourism management arrangements,<sup>525</sup> and many listed sites did not receive protection until recognition by the WHC caught the attention of the wider public.<sup>526</sup> How the WHC relates to local implementation efforts to protect heritage is thus considered in the next section.

#### *3.2.2.4 Lesser Antilles and WHC implementation*

With respect to the role of international law, the former British colonies of the Lesser Antilles have inherited the dualist doctrine of the common law, which requires implementing legislation to give the force of law to treaty obligations.<sup>527</sup> Legislative enactment of the treaty may take the form of pre-existing statute or treaty-specific enactments (implementation by enactment), or incorporation by reference, stating in a short statute that the treaties listed (sometimes in a schedule) have ‘the force of law’ in the country concerned.<sup>528</sup> Without this legislation, the executive (Cabinet) on signing the treaty, would be able to legislate without the legislature, and so usurp the role of Parliament - this process therefore ensures effective functioning of the executive and legislative branches of government.<sup>529</sup> Winston Anderson notes that in keeping

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<sup>524</sup> As Ben Boer points out, while the identification and delineation of the cultural and natural heritage as items of ‘outstanding universal value’ is a central obligation for States Parties to the WHC, the act of identification is complex, and often politically motivated. The process can potentially raise a number of cultural, social, political, economic, human rights, and religious issues in certain cases. There are often competing claims between the properties that a national government may want to protect and the properties that particular groups within a country may wish to protect through World Heritage listing. See Boer, ‘Identification and delineation of world heritage properties’ in *The WHC: A Commentary* 86.

<sup>525</sup> K Taylor and J Lennon, ‘Cultural landscapes: a bridge between culture and nature?’ (2011) *International Journal of Heritage Studies* 17(6): 537-554, 550.

<sup>526</sup> Kerstin Odendahl and Mayte Peters, ‘The Significance of Cultural Heritage for State Stability and its Protection by Public International Law’, in Julia Raue and Patrick Sutter (eds), *Facts and Practice of State-building* (Brill 2009) 278.

<sup>527</sup> Upheld by case law throughout the English speaking Caribbean; see *Natural Resources Conservation Authority v Seafood and Ting International Ltd* 58 WIR 269 (App Ct 1999) (Jamaica) concerning the absence of local legislation for CITES, and *Talisman (Trinidad) Petroleum Ltd vs Environmental Management Authority* Dec. EA3 Environmental Commission (2002) (Trinidad and Tobago) which considered the legal effect of the unincorporated Ramsar Convention.

<sup>528</sup> Winston Anderson, *Principles of Caribbean Environmental Law* (Environmental Law Institute, 2012) 36.

<sup>529</sup> Malcolm Shaw, *International Law* (5<sup>th</sup> edn, Cambridge University Press 2003) 136.



with British practice, treaties are often signed and ratified, followed by a lag in the process to develop implementing legislation.<sup>530</sup>

Implementation by enactment is the traditional approach, which involves repeating verbatim or by paraphrase the substantive provisions of the treaty to which the State is party.<sup>531</sup> However, the technical capacity required of legislative drafters, in terms of familiarity with the nuances of international treaty law, and ability to translate soft law obligations into legislative rights and duties is often absent in this region.<sup>532</sup> In addition, the measures necessary for compliance with a specific treaty may be onerous, demanding the establishment of specific enabling administrative/institutional arrangements; public awareness and education initiatives; management measures; and regulation and enforcement.<sup>533</sup> The trend in the last two decades has been to provide support to these countries to develop capacity to improve implementation of international treaties, via training for legislative drafters, focal points, grantwriters and policymakers, to create the enabling environment to facilitate uptake of treaty obligations in the existing institutional framework and improve overall treaty governance. These practices are evident in the approach to implementation of the WHC in the Lesser Antilles.

The Lesser Antillean states which are the subject of this study are all parties to the World Heritage Convention, and five countries have UNESCO listed sites: Antigua and Barbados each have a cultural site,<sup>534</sup> and there are three natural heritage sites in Dominica, Saint Lucia and St Kitts respectively.<sup>535</sup> However, no cultural landscapes have been designated, and this is interesting because the UNESCO listed sites all have cultural and historical significance to their populations as public spaces and symbols of patriotism. Two main initiatives with relevance to landscape protection, the UNESCO Small Island Developing States (SIDS) Programme<sup>536</sup>, and the Training Course in the Management of Caribbean cultural resources in a natural

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<sup>530</sup> Winston Anderson, 'Multilateral Environmental Agreements (MEA) Implementation in the Caribbean: Report and Guidelines' (UNEP 2000) 9.

<sup>531</sup> Ibid.

<sup>532</sup> Ibid.

<sup>533</sup> Anderson, 'Multilateral Environmental Agreements (MEA) Implementation in the Caribbean' 4.

<sup>534</sup> Nelson's Dockyard, Antigua, and Historic Bridgetown and its Garrison, Barbados. See <<https://whc.unesco.org/en/list/1499/>> and <<https://whc.unesco.org/en/list/1376/>> accessed 19 September 2019

<sup>535</sup> Morne Trois Pitons National Park, Dominica <<https://whc.unesco.org/en/list/814/>>, Pitons Management Area, Saint Lucia <<https://whc.unesco.org/en/list/1161/>>, and Brimstone Hill Fortress National Park <<https://whc.unesco.org/en/list/910/>> accessed 19 September 2019

<sup>536</sup> Website at: <<https://whc.unesco.org/en/sids/>> accessed 8 October 2019

environment: Sites of Memory and participation of local communities<sup>537</sup> will be briefly discussed.

The SIDS were recognised as a distinct group of developing countries in June 1992, at the UN Conference on Environment and Development. The 29th session of the World Heritage Committee in 2005 adopted the World Heritage Programme for SIDS, and the SIDS have since become a point of focus for World Heritage identification and protection. The UNESCO SIDS Programme develops World Heritage activities in these areas, providing support for new nominations to the World Heritage List, and training in sustainable conservation and management practices for sites already inscribed. In 2014, the International Year of the SIDS resulted in the outcome document the Samoa Pathway<sup>538</sup>, for which a SIDS Action Plan was developed to implement its goals for sustainable development. Heritage is specifically referenced.<sup>539</sup>

Priority 4 of the SIDS Action Plan calls upon the international community to support SIDS in designing and implementing their own innovative cultural policies to strengthen heritage and creativity and leverage the economic, social and natural benefits of culture. It further reaffirmed that ‘indigenous bio-cultural heritage recognises the deep connections among people, culture, knowledge and the natural environment, and can meaningfully advance sustainable development’. In this context, protecting tangible cultural heritage, safeguarding intangible cultural heritage, promoting responsible sustainable tourism, boosting creative industries and transmitting traditional knowledge are crucial. This also implies adopting a holistic approach to the cultural heritage of SIDS in the specific context of the relationship of these human settlements to the land and the sea, which requires high levels of protection and whose potential for driving sustainable development is as yet relatively underexplored.<sup>540</sup>

As a subset of SIDS, the Lesser Antillean states benefit from these activities and initiatives. Two documents developed to support WHC implementation apply to these states: the Regional Work Plan for Culture in Latin America and the Caribbean 2016-2021, and the Action Plan for World

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<sup>537</sup> See <<https://whc.unesco.org/en/events/1000/>> accessed 8 October 2019

<sup>538</sup> SIDS Accelerated Modalities of Action (SAMOA) Pathway, A/RES/69/15 at para 81.

<sup>539</sup> UNESCO SIDS Action Plan (2016-2021) 199 EX/5.INF.REV, at para 7.

<sup>540</sup> UNESCO SIDS Action Plan (2016-2021) 199 EX/5.INF.REV, at para 7.

Heritage in the Caribbean 2015-2019.<sup>541</sup> The Action Plan presents an operational framework to facilitate the implementation of the Latin America and the Caribbean plan in the specific context of the Caribbean, and proposes an updated Caribbean Capacity Building Programme for World Heritage, which had been previously developed in 2007 to build capacity in Caribbean countries to implement the WHC.<sup>542</sup> Objective 1 of the Action Plan concerns improving the conservation and management of the cultural and natural heritage. In order to consolidate institutional, policy and legal networks, actions should sensitise decision-makers about the value of cultural and natural heritage, promoting coordination and communication among different levels of government whose laws and actions may interfere with the protection, conservation and heritage management, and integrate heritage into national development policies. The first action to achieve this outcome requires that ‘*cultural landscapes, industrial heritage, modern heritage, vernacular architecture, marine and archaeological sites and sites of memory* [be integrated] into heritage protection policies.’<sup>543</sup> Local communities are to be involved in heritage protection, conservation and management activities.

Objective 2 of the plan, which addresses the updating and harmonisation of heritage inventories, notes that cultural landscape designation constitutes a gap, in spite of the wealth of cultural landscapes in the Caribbean, particularly landscapes related to the Slave Route and Sites of Memory.<sup>544</sup> Also highlighted is the fact that States should be aware that the inscription on the World Heritage List is not an end by itself, but the continuation of a process to enhance the effective identification and protection of cultural heritage in the Caribbean.<sup>545</sup> Objective 4 is

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<sup>541</sup> UNESCO, ‘Action Plan for World Heritage in the Caribbean 2015-2019’. Adopted in Havana on 28<sup>th</sup> November, 2014.

<sup>542</sup> The Caribbean Capacity Building Programme (CCBP) was a targeted response to the needs identified in the ‘Latin America and the Caribbean Periodic Report’, which showed that most of the Caribbean States Parties still lacked the capacity and expertise needed to enable full protection and management of present World Heritage sites, and to identify new sites. Within the CCBP over twelve expert meetings have been organised, and six training manuals focusing on the various aspects of management (application of the World Heritage Convention, tourism, historic centres, risks, cultural landscapes and natural heritage) have been published. See Patricia E Green, ‘Caribbean Cultural Landscape: the English Caribbean potential in the journey from ‘tentative listing’ to being ‘inscribed’ (2013) *Journal of Heritage Tourism* 8(1): 63-79, 71, and *World Heritage Papers 38: Safeguarding Precious Resources for Island Communities*, UNESCO Paris, 2014, 20.

<sup>543</sup> Action 1.27 (emphasis added).

<sup>544</sup> A UNESCO programme that aims at providing recognition and protection to places that have a significant importance for local communities because of their sacred or symbolic values. See <  
<http://www.unesco.org/new/en/social-and-human-sciences/themes/slave-route/>> accessed 18 October 2019

<sup>545</sup> Objective 2, Action Plan, World Heritage in the Caribbean 2015-2019, p. 8.

devoted to communities, and their traditional knowledge. While involvement and participation of communities is encouraged for heritage preservation and economic benefit, the objective does not address ownership by communities, or recognise them as heritage creators, and does not go so far as to centre these communities in heritage protection.<sup>546</sup> This is borne out by objective 5, which addresses the establishment of tourism itineraries at local, national and Caribbean levels, in particular related to the Slave Route, Indentured Labour Routes, Sites of Memory, fortifications, cultural landscapes and others, to further promote Caribbean heritage,<sup>547</sup> but does not make clear whether these sites have received community support as tourist attractions.

Under the auspices of the Caribbean Capacity Building Programme, established in 2007, workshops and supporting activities have been held to meet the CCBP's aims of strengthening capacities of Caribbean experts to implement the World Heritage Convention. Training includes six modules concerning the WHC itself, tourism, risk management, cultural landscapes, historic centres and natural heritage. In 2013, a workshop was held on Sites of Memory, which paid particular attention to the management of cultural resources in a natural environment, and the participation of local communities.<sup>548</sup> The subject under discussion concerned natural areas, which often include tangible and intangible cultural heritage that is managed traditionally by local communities - this is landscape though not identified as such. It was noted that many of these spaces may have a protected status or natural resources which may imply the participation in its management by external stakeholders from governmental and non-governmental entities, as well as from private companies, which could impact the capacity of local communities to continue benefitting from those cultural resources.<sup>549</sup>

It was recommended that States parties consider pursuing serial nominations based on shared history and heritage.<sup>550</sup> It was acknowledged that these concepts open the doorway to innovative approaches to heritage protection, but there were no attempts to link land use change to identity and heritage in any proposed strategies. Interestingly, there has been a study on Cultural

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<sup>546</sup> Objective 4.

<sup>547</sup> Action 5.1.5.

<sup>548</sup> 'Management of Caribbean cultural resources in a natural environment: Sites of Memory and participation of local communities' Concept Note, Barbados, 11-15 March 2013 at 1.

<sup>549</sup> Concept Note 1.

<sup>550</sup> Report of the Workshop: Management of Caribbean cultural resources in a natural environment: Sites of Memory and participation of local communities, Barbados, 11-15 March 2013, at 12.

Landscapes in the Pacific, but none on the Caribbean, where capacity building initiatives are ongoing and clearly need to develop community-oriented approaches to landscape in order to maximise the potential of UNESCO's heritage protection regime.<sup>551</sup>

### 3.2.3 Landscape in environmental law

Despite shared conventions in treaty-making practices, and notable similarities to environmental agreements in the structure of the World Heritage Convention,<sup>552</sup> environmental law and cultural heritage law have had limited interaction on the subject of landscape. Originally, heritage sites were to be included at the 1972 UN Conference on the Human Environment to be held in Stockholm, but in order to accommodate parallel negotiations for the agreement that would be ultimately become the WHC, delegates refrained from direct mention of the world heritage in the formal Declaration of the UN Conference on the Human Environment, and this appeared to define the field's approach to cultural heritage issues until fairly recently.<sup>553</sup> Advancements in the law pertaining to parks and protected areas, as well as biodiversity conservation, have brought landscape matters within the purview of the environment.

#### 3.2.3.1 IUCN and protected areas

As a global environmental body, the IUCN has widened its ambit on nature reserves and national parks to now include a 'protected landscapes' category.<sup>554</sup> This is due in part to its prior involvement in the WHC process to include a 'mixed sites' category, and later the cultural landscapes category.<sup>555</sup> The protected landscapes category can be distinguished from other

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<sup>551</sup> ICOMOS Thematic Study: Cultural Landscapes of the Pacific Islands (2007). See *World Heritage Series 38: Safeguarding Precious Resources for Island Communities*, at 22. The Caribbean Capacity Building Programme developed two activities with relevance to Caribbean landscapes: Module 4: Management of Cultural Landscapes (2008) and a Workshop on Management of Cultural Landscapes, as part of the Regional Meeting on Heritage, Biodiversity and Community (October 2008, Havana, Cuba). See *World Heritage Series 38: Safeguarding Precious Resources for Island Communities*, at 22.

<sup>552</sup> Janet Blake notes that the structure of the WHC emulates wildlife treaties such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Bonn, 23 June 1979 in force 1 November 1983 27 UST 1087; and The Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar (Iran), 2 February 1971, in force 21 December 1975 996 UNTS 245, with a main treaty text and two or more lists requiring certain criteria be met for inscription. See Blake *International Cultural Heritage Law* 128.

<sup>553</sup> Catherine Redgwell, 'Article 2: Definition of Natural Heritage', in *The World Heritage Convention: A Commentary* 64-65.

<sup>554</sup> See IUCN *Management Guidelines for IUCN Category V: Protected Areas Protected Landscapes/Seascapes* (IUCN, 2002)

< <https://www.iucn.org/theme/protected-areas/about/protected-areas-categories/category-v-protected-landscapeseascape> > accessed 6 October 2019

<sup>555</sup> Strecker, *Landscape Protection in International Law* 67.

protected areas<sup>556</sup> by its recognition of and requirement that the close relationship between nature and people, the physical environment as well as the associated social, cultural and traditional values. Protected landscape is defined as:

an area of land, with coast or seas as appropriate, where the interaction of people and nature over time has produced an area of distinct character with significant aesthetic, ecological and/or cultural value, and often with high biological diversity. Safeguarding the integrity of this traditional interaction is vital to the protection, maintenance and evolution of such as area.<sup>557</sup>

Category V areas (protected landscapes) have been recognised by other regimes such as the 2003 African Convention,<sup>558</sup> the Man and Biosphere Programme (MAB),<sup>559</sup> and the International Tropical Timber Organisation Guidelines on the Conservation of Biological Diversity.<sup>560</sup>

### *3.2.3.2 Convention on Biological Diversity*

The Convention on Biological Diversity recognised the symbiotic nature of the relationship between nature and culture when it acknowledged the role communities can play in the protection of biological diversity in Article 8(j) of that treaty:

States shall, subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

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<sup>556</sup> The other five IUCN categories of protected areas include 'strict nature reserve/wilderness area', 'national park', 'natural monument', habitat/species area, and 'managed resource area'.

<sup>557</sup> The Management Guidelines also include the objective 'to support lifestyles and economic activities which are in harmony with nature and the preservation of social and cultural fabric of the communities concerned', 'to bring benefits to and contribute to the welfare of the local community'. IUCN *Management Guidelines* 23, 29.

<sup>558</sup> African Convention on the Conservation of Nature and Natural Resources (revised Maputo 2003). Date of Adoption: March 07, 2017, Preamble and Article V.

<sup>559</sup> The overarching objective of the biosphere reserve is 'sustainable development'. People are not excluded from the protected area, and are a defining component of the management and conservation of the area and its surroundings. See Amy Strecker, *Landscape Protection in International Law* 68.

<sup>560</sup> 5 June 1992, 1760 UNTS 79; 31 ILM 818 (1992). Entry into force: 29 December 1993; see also Management Guidelines for IUCN Category V, 30.

That this interaction between cultural diversity and biological diversity is expressed in practices and traditions linked to the land is also clear. The CBD established a working group on article 8(j) in 1998 at the fourth meeting of the Conference of the Parties (COP). In 2000, the COP agreed to enhance the role and involvement of indigenous and local communities in the achievement of the objectives of the CBD. As a result, the 'Akwé: Kon Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place or which are likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities'<sup>561</sup> were produced. This document has important ramifications for landscape protection, as it is intended to respect indigenous and local communities' land resources by integrating relevant criteria in the assessment of cultural, environmental and social impacts of proposed developments.

The Preamble to the Guidelines recognises the negative impacts of many developments on sacred sites and traditional lands of indigenous and local communities, and the corresponding loss of these communities' traditional knowledge, innovations and practices as a result. Governments are encouraged to engage in a legal and institutional review of all matters related to cultural, environmental and social impact assessment, and where possible incorporate the guidelines into national legislation, policies, and procedures, 'bearing in mind that nothing in these guidelines should adversely affect biodiversity and the livelihoods of other communities, and that they should be implemented in a manner that is consistent with international law and with other international obligations.'<sup>562</sup>

The Guidelines acknowledge the unique relationship between the environment and indigenous and local communities and promotes where possible the incorporation of cultural and social considerations within any environmental impact assessment legislation or policies.<sup>563</sup> In determining the scope of a cultural impact assessment, possible impacts on continued customary use of biological resources should be considered, as well as possible impacts on the respect, preservation, protection and maintenance of traditional knowledge, innovations and practices, on

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<sup>561</sup> COP 7 Decision VII/16. Secretariat of the Convention on Biological Diversity (2004). Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities.

<sup>562</sup> Para 4.

<sup>563</sup> Para 23.

sacred sites and associated ritual or ceremonial activities. The need for cultural privacy should be respected.<sup>564</sup>

Where social impact assessments are concerned, possible impacts on traditional uses of natural resources, traditional lifestyles, social cohesion and access to biological resources for livelihoods should be considered.<sup>565</sup> Protocols should be established where particular development activities will involve interaction with indigenous and local communities and the use of particular sites or resources.<sup>566</sup> Baseline studies can be used for assessing income and asset distribution, traditional systems of production and sharing natural resources, and views of the communities on the future, whether informally or formally articulated in community or government plans.<sup>567</sup>

The Guidelines emphasise that where cultural, environmental and social impact assessment processes relevant to indigenous and local communities are made an integral part of environmental impact assessment and incorporated into legislation, and the requirements for project/policy developers to find the most culturally, environmentally and socially sound, efficient options that avoid, reduce or mitigate adverse impacts are made explicit, this will prompt developers, at a very early stage, to use cultural, environmental and social impact assessment tools to improve the development process prior to the project application or consent stage or in some cases prior to screening procedures.<sup>568</sup> This has the potential to protect functioning landscapes and the communities that live in them.

The impact of changes to the landscape on communities has also been considered in the human rights context.

### **3.2.4 Landscape in human rights law**

#### ***3.2.4.1 The significance of human rights to landscape***

Human rights law has increasingly become relevant to landscape protection as communities seek solutions to conflicts over the natural and cultural heritage in the absence of other forums to raise such challenges. There is no right to landscape in human rights law, as human rights are defined

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<sup>564</sup> Para 27.

<sup>565</sup> Para 43.

<sup>566</sup> Para 30.

<sup>567</sup> Paras 44, 45, 51 and 55.

<sup>568</sup> Para 67.



in terms of the individual whereas landscape is a collective right, but Amy Strecker has noted that there exists a cultural rights dimension to landscape, if we consider landscape as the source of cultural heritage, the sum of practices which could be expressed materially in the environment and also represent a way of life as part of a people's collective identity.<sup>569</sup>

There is also a human rights dimension to landscape as expressed in the rights associated with environmental integrity, or rights to a healthy environment. Other rights are associated with landscape protection, such as the right to property (broadly interpreted to include customary rights or collective property) or the right to family and private life.<sup>570</sup> Importantly, the human rights approach to landscape therefore engages the relationships between people and landscape, not just with the physical space itself, and concerns rights of access to enjoy landscape as cultural heritage (since being deprived of such a right violates human dignity and freedom)<sup>571</sup> as well as the associated rights of customary rights or collective property.

#### *3.2.4.2 International human rights law in the regional courts: the European and Inter-American Human Rights systems*

##### *The European Court of Human Rights*

The European Convention on Human Rights and Fundamental Freedoms (ECHR)<sup>572</sup> makes no reference to any right to the environment or cultural heritage in its text or protocols. Although environmental protection is not guaranteed under the ECHR, the case law has resulted in protection of the environment under certain circumstances, notably to facilitate effective enjoyment of other individual rights and freedoms, such as the right to family and private life and the right to property; and where those rights need to be restricted in the general interest of society, which could relate to environmental protection of safeguarding cultural heritage.<sup>573</sup> By contrast, there are explicit references to the environment in the American Convention on Human Rights. Article 11 of the Additional Protocol to the Convention (Protocol of San Salvador) refers to the right to live in a healthy environment, as well as to the protection, preservation and

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<sup>569</sup> Strecker, *Landscape Protection in International Law* 129.

<sup>570</sup> Ibid.

<sup>571</sup> Francesco Francioni, 'Culture, Heritage and Human Rights: An Introduction', in F Francioni, and M Scheinin, (eds), *Cultural Human Rights* (M. Nijhoff, 2008) 7 and Boer and Gruber, 'Heritage Discourses', in Rubenstein and Jessup (eds), *Environmental Discourses in International and Public Law*.

<sup>572</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

<sup>573</sup> Strecker *Landscape Protection in International Law* 155.

improvement of the environment.<sup>574</sup> Article 14 of the Protocol of San Salvador provides for the ‘right to the benefits of culture’, which is similar in normative content to the right to participate in cultural life.<sup>575</sup>

Given the absence of landscape or cultural heritage in both these regional human rights treaties, Strecker has outlined the ‘substantive’ rights involved in cases dealing with landscape in human rights courts. Rights to landscape may include rights of access (for example to rights of way on public or private lands), usufruct rights (rights to fish, hunt or conduct other subsistence farming activities on public or private land); rights to enjoy sacred sites on public or private land, typified by cases involving indigenous communities and certain minorities); grazing rights on transhumance landscapes; rights to participate in planning decisions affecting the local landscape; and rights to a healthy environment. This latter right implies the right not to have landscape damaged to the extent that it will harm human health or well-being.<sup>576</sup>

Rights to landscape (envisaged as either the right to use or access a landscape, or as ‘landscape protection’) can therefore be indirectly achieved through the ECHR in a number of ways. First, the protection of other rights guaranteed in the ECHR (for example the right to life) might require the safeguarding of an environment of quality. This represents an indirect form of landscape rights. Second, the right to property might entail more than mere private ownership and include other usufructuary or customary rights, such as in the case of indigenous peoples. Third, the ‘general interest in a democratic society’ permits restrictions on the exercise of some rights and freedoms, such as the private right to property or those contained in Articles 8, 9, 10 and 11 of the ECHR<sup>577</sup> in favour of upholding the rights of others to access or enjoy landscapes of value.

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<sup>574</sup> Art 11. OAS Treaty Series No. 69 (1988) in Basic Documents pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 67 (1992).

<sup>575</sup> First enshrined in the Universal Declaration of Human Rights (art 27), followed by art 15(1)(a), International Covenant on Civil and Political Rights (16 December 1966, 999 UNTS 171. Entry into force: 23 March 1976) and art 27, International Covenant on Economic, Social and Cultural Rights (16 December 1966, 993 UNTS 3. Entry into force: 3 January 1976). See Strecker *Landscape Protection in International Law* 156.

<sup>576</sup> Strecker *Landscape Protection in International Law* 157.

<sup>577</sup> Ibid.

The Court has held that conservation of European cultural heritage is in the general interest and can justify restriction of private property rights in certain cases.<sup>578</sup> By extension, rights to landscape (framed as rights to the protection of environmental and cultural spaces) could thus supersede individual rights and freedoms.<sup>579</sup> However, where ethnic minorities have brought claims concerning access to landscapes for dwelling purposes, the Court applies a restrictive approach.<sup>580</sup> Where landscape protection is the object of an applicant's claim, often involving indigenous peoples' claims concerning the right to use certain lands or protect them from destructive development, rather than to acquire title in the lands in question, the stance of the Court is even more conservative.<sup>581</sup> Traditional use of the landscape has been not been accepted as sufficiently demonstrating the exercise of property rights, and in fact has been found to have no basis in law.<sup>582</sup> Notably, this caselaw postdates developments in indigenous rights in international law, such as the 2007 UN Declaration on the Rights of Indigenous Peoples.<sup>583</sup> This stands in contrast to the progressive approach of the Inter-American Court and Commission, which have recognised indigenous customary rights to lands despite lack of title (to be discussed below).

There is thus a restrictive pattern in the European Court of Human Rights's approach with regard to rights to landscape, except when those rights entail landscape protection or preservation in the 'general interest of society'. Strecker makes two observations: while landscape protection is significant enough to warrant derogation from other rights and freedoms in certain scenarios, this is incidental to the aim of the applicants. Secondly, non-traditional forms of property rights, such as rights of use or access, are not seriously considered by the Court, neither in the case of minorities nor indigenous peoples. The Court relies on an interpretation of landscape in its visual sense, as a pastoral, pristine tableau, as well as a narrow conceptualisation of property, in keeping with the scope of ECHR, which makes no reference to cultural rights, and the definition

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<sup>578</sup> *Kozacioglu v Turkey*, Grand Chamber Decision 19/02/09. Application No 2234/03; *Depalle v France*, Grand Chamber judgment 29/3/2010. Application No 34044/02.

<sup>579</sup> Strecker, *Landscape Protection in International Law* 159.

<sup>580</sup> *Chapman v the United Kingdom*. Grand Chamber judgment 18/01/2001. Application no 27238/95.

<sup>581</sup> *G and E v Norway*, Application No. 9278/81 & 9415/81 (joined). Decision of 03/10/1983.

<sup>582</sup> *Handölsdalen Sami Village and Others v Sweden*, Application No 39013/14. Judgment of 30 March 2010.

<sup>583</sup> 13 September 2007, A/RES/61/295.

of property which is limited to individual enjoyment of one's possessions.<sup>584</sup> This is somewhat different from the approach of the Inter-American Court in cases concerning the landscape of indigenous peoples.

#### The Inter-American Court of Human Rights

The context of the Americas is quite different from Europe, as the region is home to much larger populations of indigenous peoples than Europe, and their resource rich traditional lands attract large-scale logging, mining and hydroelectric projects approved by the state.<sup>585</sup> As a result, the Inter-American Court of Human Rights receives a high number of cases concerning rights to access or use of traditional lands and has had numerous opportunities to develop this area of law.

Many cases concerning rights to landscape in the Inter-American system concern legal challenges to the granting of logging or mining concessions on communal or ancestral lands, where a community has traditionally occupied the area but lacks proper title, and whose way of life would be drastically altered by these agro-forestry projects. The Inter-American Court first held in 2001 that the international human right to property, particularly as affirmed in the American Convention on Human Rights, includes the right of indigenous peoples to the protection of their customary land and resource tenure.<sup>586</sup> This was the first legally binding decision by an international tribunal to uphold the collective land rights of indigenous peoples in the face of the state's failure to do so.<sup>587</sup>

Similarly the Inter-American Commission has clarified that indigenous peoples' right to property is based in international law and does not depend on domestic recognition of property interests, being 'grounded in indigenous custom and tradition' and further stated that 'the distinct nature of the right to property as it applies to indigenous people whereby the land traditionally used and occupied by these communities plays a central role in their physical, cultural and spiritual vitality'.<sup>588</sup> Cases that indirectly require the safeguarding of the landscape, such as the right to

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<sup>584</sup> With the exception of some hunting and fishing rights as per *Könkäma*, mentioned previously. Strecker, *Landscape Protection in International Law* 167.

<sup>585</sup> Strecker, *Landscape Protection in International Law* 167.

<sup>586</sup> *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgment of 31/08/ 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

<sup>587</sup> Strecker, *Landscape Protection in International Law* 169 citing Anaya, J. and Grossman, C., 'The Case of Awas Tingni v Nicaragua: A New Step in International Law of Indigenous Peoples,' (2002) *AJICL* 19(1): 1-15.

<sup>588</sup> *Maya Indigenous Communities of Toledo District v Belize*, Case 12.053, IACtHR Report 40/04 (2004) at 155.

life, have also been adjudicated in the Inter-American system.<sup>589</sup> The Commission has explicitly made the link between environmental quality and the right to life in upholding these rights, and placed special emphasis on indigenous people's special relationship with the land, recognising it as the source of their identity and repository for their heritage, and affirming that ancestral ownership is not undermined by lack of formal title.<sup>590</sup> This has been affirmed in subsequent cases concerning landscape preservation and use.<sup>591</sup>

As Strecker has remarked, this is groundbreaking, as the Court recognises that the diversity of the concept of property includes indigenous landscape rights. This aligns more closely with the right to landscape as discussed in Chapter Two, before private property gained ascendancy, restricting the concept to abstract title or ownership of the property rather than the identification of the individual with the property through custom.<sup>592</sup> While this progressive approach to property restores landscape in substance, the Court does not extend this interpretation to protect the rights of non-indigenous applicants.<sup>593</sup> In the former cases, the Court and Commission viewed the right to property as inclusive of the customary right of indigenous communities to access and use the lands they had occupied but without title.

Thus the two main human rights courts have divergent approaches to protecting landscape rights. The European Court does not recognise non-traditional property rights such as rights of use or access. The Inter-American court adopts a much broader understanding of property that is defined by collective, customary and intangible aspects linked to a way of life, and transcends landscape preservation. This is partly due to the existence of a right to culture in the American Convention (Article 14, Additional Protocol) as well as right to healthy environment (Article 11, Additional Protocol).<sup>594</sup> But as Strecker notes, this collective approach has only been applied in relation to indigenous and tribal people. When it involves a case dealing with a nature reserve or public space, the Inter-American approach dovetails with the European system, where rights are construed restrictively and the required level of standing precludes the admission of public

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<sup>589</sup> *Moiwana Community v Suriname* (IACrTHR) Judgment of 15 June 2005, Series C No. 124.

<sup>590</sup> Strecker, *Landscape Protection in International Law* 170.

<sup>591</sup> *Case of Xákmok Kásek Indigenous Community v. Paraguay*, IACtHR Series C No. 214.

<sup>592</sup> On property, see N Graham *Landscape: Property, Environment, Law* (Routledge, 2010) 26.

<sup>593</sup> *Metropolitan Nature Reserve v Panama*, Case 11.533, Report no 88/03, IACtHR, OEA/SerL/V/II.118 Doc 70 Rev 2 at 524 (2003).

<sup>594</sup> Amy Strecker, 'The Law is at Fault? Landscape and Agency in International Law,' in Tim Waterman and Ed Wall (eds), *Landscape and Agency* (Ashgate, 2017) 60.

interest proceedings, even if the area is protected by law and is of significance for the citizens of the state.<sup>595</sup>

Strecker highlights that the implication is that indigenous landscape is to be protected because of its use and dependency value in supporting indigenous culture, while non-indigenous or ‘Western’ landscape is framed in terms of aesthetic or environmental values.<sup>596</sup> This mirrors the approach to landscape in the European context, where the narrow conceptualisation of rights and the required level of standing preclude the admission of public interest proceedings, even if the area is protected by law and is of significance for the citizens of the state.<sup>597</sup> Strecker points out that this may be a false dichotomy, as beyond the use and dependency value, both indigenous and non-indigenous cultures may share customary relationships with the land.<sup>598</sup>

International law has the capacity, as Strecker and O’Keefe have indicated, to engage human rights in a collective context where landscape is concerned. Strecker enumerates the following factors in support: first, landscape is a cultural entity, which means that applying objective or universal criteria is inappropriate and impractical.<sup>599</sup> Second, landscape, as a web of relationships representing community interaction with the land, is necessarily linked to the creation of group identity – whether regional or national.<sup>600</sup> Third, landscape can be interpreted as a collective good closely associated with cultural identity and common values, a ‘heritage community’.<sup>601</sup> Fourth, participation in public decision-making is defined in terms of group, not individual rights. Finally, where there is landscape damage or destruction, damage is to the community as a whole, and individual victims would be difficult to identify. Landscape, unlike property, has a collective dimension, so its destruction or degradation affects physical and mental well-being

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<sup>595</sup> Strecker *Landscape Protection in International Law* 172.

<sup>596</sup> *Ibid.*, 173-4.

<sup>597</sup> *Ibid.*, 172.

<sup>598</sup> *Ibid.*, 174.

<sup>599</sup> ‘World Heritage Centre, Cultural Landscapes: the Challenges of Conservation, World Heritage 2002, Shared Legacy, Common Responsibility’; Associated Workshops, 11-12 November 2002 (Ferrara), *World Heritage Papers* 7, 59.

<sup>600</sup> S Schama, *Landscape and Memory* (Knopf 1995).

<sup>601</sup> A ‘heritage community’, as defined by Article 3(b) Framework Convention on the Value of Cultural Heritage for Society, ‘consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations.’

which cannot be measured in terms of personal injury, damage to property or monetary loss.<sup>602</sup> None of these aspects are exclusive to indigenous communities.

It has been argued by human rights scholars that the individualistic approach of human rights based on the principles of equality and non-discrimination no longer meets the current global issues relating to development and the environment, and the needs of communities.<sup>603</sup> Current debates over individuals' roles in society no longer dissociate the latter from the groups in which they live, and instead explore how an individual's presence within a group shapes their personality, aspirations, and ultimately rights formation. A nuanced view of individual human rights nowadays will necessarily take group-originated dimensions of an individual into consideration, referring to a 'socially-located individual', rather than merely an individual.<sup>604</sup> This by extension implicates space and spatial justice considerations.

While indigenous communities have a use and dependency value with landscape, this relationship is similar to Olwig's 'substantive nature of landscape',<sup>605</sup> and many similar conceptions, understandings and relationships with landscape can be found outside the context of indigenous peoples.<sup>606</sup> Lastly, in the absence of an international environmental court, human rights courts offer one of the few potential avenues for citizens to challenge governmental decisions and attempt to curtail state abuse of power. The approach by the Inter-American court demonstrates creative judicial activism in action, and could be an example for other systems where similar conditions exist. In addition, some Lesser Antillean states are parties to the ADHR, and are subject to the jurisdiction of the Inter-American Court (discussed later in this chapter). Strecker advocates for a broader interpretation of the content of property rights to include custom, use and access that would be adaptable to other communities and groups in relation to landscape rights.<sup>607</sup>

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<sup>602</sup> Strecker, *Landscape Protection in International Law* 143.

<sup>603</sup> Y Donders *Towards a Right to Cultural Identity* (Intersentia 2002) 94 in Strecker, *Landscape Protection in International Law* 175.

<sup>604</sup> Lixinski 150.

<sup>605</sup> See Chapter Two.

<sup>606</sup> Strecker, *Landscape Protection in International Law* 143.

<sup>607</sup> Strecker, 'The Law is at fault' 63.

Centering communities in landscape protection has received even more attention in international law than ever before with the entry into force of the European Landscape Convention<sup>608</sup> (ELC, now the Council of Europe Landscape Convention), the first international instrument solely dedicated to landscape, albeit at regional level.

### 3.3 Regional developments and landscape law

#### 3.3.1 The European Landscape Convention and beyond: Landscape as public space

While landscapes have secured their place in international law as a result of the evolution of cultural heritage law and the inclusion of ‘cultural landscapes’ within the scope of the WHC in 1992, the focus on ‘outstanding universal value’ placed undue emphasis on those landscapes that embody that ‘ideal’ balance of human-environment relations, which misconstrues the dynamic role of communities in landscape formation and misses the mark as far as landscape protection is concerned. The adoption of the European Landscape Convention sheds this hierarchical framing of heritage and ‘democratises’ landscape, leading to a paradigm shift in the understanding of landscapes as public spaces.<sup>609</sup>

Prior to the ELC, landscape was implicated in a number of treaties adopted under the auspices of the Council of Europe<sup>610</sup>, namely, the Berne Convention on the Conservation of European Wildlife and Natural Habitats (1979),<sup>611</sup> the European Convention on the Protection of the Architectural Heritage and the European Convention on the Protection of the Archaeological Heritage, also known as the Valletta Convention (Valletta, 16 January 1992).<sup>612</sup> In addition, a number of Council of Europe recommendations deal directly (and indirectly) with the issue of

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<sup>608</sup> Florence, 20 October 2000, 20/10/2000, ETS No.176.

<sup>609</sup> Amy Strecker, ‘Landscape as Cultural Heritage’ (in press) and see also Graham Fairclough, ‘New Heritage Frontiers’, in *Launching Colloquy of Heritage and Beyond: A Publication on the Contribution of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society*, Lisbon, 20 November 2009, 31, available at: <<http://www.coe.int/t/dg4/cultureheritage/heritage/identities/SpeechesLisbon/>> accessed 6 October 2019

<sup>610</sup> Amy Strecker, ‘Landscape as Cultural Heritage’ (in press).

<sup>611</sup> Council of Europe, Convention on the Conservation of the European Wildlife and Habitats (opened for signature 19/9/1979, entered into force 1/6/1982) ETS No. 104.

<sup>612</sup> Council of Europe, European Convention on the Protection of the Archaeological Heritage (opened for signature 16/1/1992, entered into force 25/5/1995) ETS No. 143.



landscape protection.<sup>613</sup> The most significant of these predecessor instruments of the ELC was Recommendation No. R(95)9 of 11 September 1995 on the integrated conservation of cultural landscape areas as part of landscape policies.<sup>614</sup> The Recommendation conceives of landscape broadly and proposes strategies for conservation, including sites that represent historic uses of land and distinctive activities, skills or traditions, or the artistic or literary representations inspired by them, or the significance of places for the historical events that took place there.<sup>615</sup> This would significantly influence the ELC's structure, scope and aims.

A number of proposals advocated for legal protection of Europe's landscapes, namely the IUCN's 'Parks for Life: Actions for Protected Areas in Europe' in 1994.<sup>616</sup> The driving force behind these proposals was the recognition that the implementation of EU directives had not been effective at the local level, where communities were absent in the decision-making process about local landscapes.<sup>617</sup> Landscape was now seen as the critical element in the collective well-being of these communities. The preamble to the ELC therefore states that the protection, management and planning of landscape entail 'rights and responsibilities for everyone', and Strecker and others have noted that the language embeds spatial justice, human rights and democracy in this concept of landscape.<sup>618</sup>

The ELC defines landscape as 'an area as perceived by people whose character is the result of the action and interaction of natural and/or human factors'.<sup>619</sup> Notably, there is no reference to aesthetic beauty or any visual feature to give the landscape its value. The ELC, contrary to the WHC, recognises landscape as a basic component of the European natural and cultural heritage

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<sup>613</sup> Recommendation No. R(95)9 of 11 September 1995 of the Committee of Ministers on the integrated conservation of cultural landscape areas as part of landscape policies; Recommendation 79 (9) of the Committee of Ministers concerning the identification and evaluation for the protection of natural landscapes; Recommendation No. R(89)6 of the Committee of Ministers of 13 April 1989 relating to the protection and enhancement of rural architectural heritage; and Recommendation No. R (80) 16 on the specialised training of architects, town planners, civil engineers and landscape designers.

<sup>614</sup> Adopted by the Committee of Ministers, 11 September 1995 at the 543rd meeting of the Ministers' Deputies.

<sup>615</sup> Art 1.

<sup>616</sup> IUCN Commission on National Parks and Protected Areas (CNPPA), Parks for Life, Action for Protected Areas in Europe (IUCN, 1994), at: <<https://portals.iucn.org/library/sites/library/files/documents/1994-023.pdf>> accessed 10 September 2019

<sup>617</sup> Report on the Preliminary Draft European Landscape Convention. Strasbourg, 5 May 1997, CG (4) 6 Part II.

<sup>618</sup> Shelley Egoz et al. (eds), *The Right to Landscape: Contesting Landscape and Human Rights* (Ashgate, 2011), and Amy Strecker, 'The 'Right to Landscape' in International Law', 57-71. *Defining Landscape Democracy*, International Conference, Centre for Landscape Democracy, Norwegian University of Life Sciences, Oslo, 3-6 June 2015.

<sup>619</sup> ELC art 1.

and makes no reference to maintaining a certain interaction between these resources according to set criteria. It is the first legal text to explicitly recognise the dualism inherent in landscapes: the physical environment as well as the associative values as perceived by people. As the explanatory report on the ELC points out, '[i]t is not confined to either the cultural, man-made or natural components of the landscape: it is concerned with all of these and how they interconnect.'<sup>620</sup> The ELC recognises that 'our environment has a cultural dimension, which cannot be separated from nature'.<sup>621</sup>

Landscape is a people's landscape in the ELC and therefore provides for the active participation of the public in the formulation of plans and policies.<sup>622</sup> It not only focuses on outstanding places, but also on the everyday and degraded landscapes where most people live and work. The ELC states that it includes 'natural, rural, urban and peri-urban areas. It includes land, inland water and marine areas. It concerns landscapes that might be considered outstanding as well as every day or degraded landscapes'.<sup>623</sup> This appears to return landscape to its earliest origins as described by Olwig, in which landscape reflected the interaction between people and the land, and this has a number of implications for human rights and democracy.<sup>624</sup> Here landscape transitions to public space, not only heritage,<sup>625</sup> and recognises processes of landscape change as intrinsic to their existence. In this case, protection from a purely conservationist angle could disrupt the rhythms of landscape essential to its functioning, and encompassing degraded as well as outstanding landscapes promotes a holistic approach to landscape management and protection.

In this regard, the ELC acknowledges the 'cultural, ecological, environmental and social' dimensions of landscape and obliges each State party: 'to recognise landscapes in law as an essential component of peoples' surroundings, as an expression of the diversity of their shared cultural and natural heritage, and as a foundation of their identity';<sup>626</sup> and to establish and

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<sup>620</sup> Council of Europe 'European Landscape Convention: Explanatory Report', para 26, <<http://conventions.coe.int/Treaty/EN/Reports?Html/176.htm>> accessed 13 December 2017

<sup>621</sup> Kate Clark, 'From Regulation to Participation: Cultural Heritage, Sustainable Development and Citizenship', in Council of Europe, *Forward Planning: the Function of Cultural Heritage in a Changing Europe* (Council of Europe, 2000) 106, as cited by Last, 'Article 1 – Cultural Landscapes' in the *WHC- A Commentary* 61.

<sup>622</sup> Art 5(c).

<sup>623</sup> Art 2.

<sup>624</sup> Strecker, 'Landscape as Cultural Heritage' (in press).

<sup>625</sup> Ibid.

<sup>626</sup> Art 5 (a).

implement landscape policies aimed at landscape protection, management and planning through the adoption of the specific measures.<sup>627</sup> To ensure that people are centred in the landscapes to which they belong, article 5(c) of the ELC underscores that “each party undertakes to establish procedures for the participation of the general public, local and regional authorities, and other parties with an interest in the definition and implementation of landscape policies”. Landscape-quality objectives are defined after public consultation in accordance with article 5(c).<sup>628</sup> Reference is made to the Aarhus Convention in this regard.

While the ELC has been ambitious, transformative and innovative, its provisions are difficult to enforce. Its strengths lie in integrating landscape considerations within landscape quality objectives, national spatial strategies and planning processes, and ensuring public participation at each of these critical stages. But as Strecker has noted, its broad definition, which could be interpreted as ‘environment’, ‘cultural heritage’ or indeed ‘economic development’ by decision-makers), and lack of any criteria or list means that it is legally very difficult to prove a breach of the ELC’s obligations, as it is presumed that local populations will actively engage in the formulation of policies and that this will work in favour of landscape protection and avoidance of disputes in the long term.<sup>629</sup>

In addition, Strecker notes, since public participation is restricted to participation in plans and policies, it does not address other procedural rights, such as access to justice or judicial review, despite reference to the Aarhus Convention. This limits the capacity of the ELC to resolve disputes which may arise at later stages in the planning process when the above-mentioned obligations have not been sufficiently provided for. This is critical as communities may not be aware of a project or its impact on the landscape until this later stage, nor does it account for situations in which stakeholders may be ‘invisible and only materialize at this stage in the planning process.’<sup>630</sup>

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<sup>627</sup> Art 5(b).

<sup>628</sup> Art 6(d).

<sup>629</sup> Strecker, ‘Landscape as Cultural Heritage’ (in press) has also noted that not a single case to date has included reference to the ELC. Nor has the ELC been referenced by the judiciary in many high profile landscape disputes in national courts.

<sup>630</sup> Strecker, ‘Landscape as Cultural Heritage’ (in press).

Nevertheless, the ELC has had an enormous influence on raising awareness of the landscape, as well as on trans-frontier cooperation. These include joint projects for ecotourism, landscape conservation, restoration and development through protected areas or parks, protection against floods, sustainable forest and land management and tackling the cross-border impact of pollution, as well as pilot activities for improving the integrity of transboundary watersheds and ecosystems.<sup>631</sup> Because of its impact on landscape law, the ELC has transcended its regional influence. In 2016 a protocol was introduced to amend the European Landscape Convention.<sup>632</sup> Article 1 of the Protocol amends the title of the Convention to ‘Council of Europe Landscape Convention’, so as not to restrict the Convention’s scope to ‘European landscape’. A new paragraph in Article 2 of the Protocol to the text of the ELC states that the Protocol is “to enable the application of the values and principles formulated in the Convention to non-European States who so desire.”<sup>633</sup>

The success of the ELC has inspired other initiatives,<sup>634</sup> and spurred calls for a global instrument on landscape protection. In 2011, the International Federation of Landscape Architects requested that UNESCO consider the feasibility of a global landscape convention.<sup>635</sup> While the experts at the meeting affirmed that such an instrument was needed, IFLA’s resolution for a Global Landscape Convention was not adopted by UNESCO’s Executive Board. Stakeholders were encouraged to integrate best practices regarding conservation and planning into wider goals for the urban environment.<sup>636</sup> Nevertheless, this forum stimulated further debate on the issue.

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<sup>631</sup> Committee on Social Affairs, Health and sustainable Development, Draft Protocol Amending the European Landscape Convention, B. Explanatory memorandum by Mr Schennach, Rapporteur, Report, Doc. 13989, 18 February 2016, para 6.

<sup>632</sup> Protocol Amending the European Landscape Convention, ETS. No 219.

<<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/219>> accessed 18 September 2018

<sup>633</sup> New paragraph 13.

<sup>634</sup> See the Latin American Landscape Initiative (LALI), a transdisciplinary partnership formed to implement the activities described in the Medellin LALI Declaration signed by the partners the 19th October, 2012. LALI is a declaration of guiding principles to promote the recognition, valuation, protection, management, and sustainable planning of Latin American landscapes by means of binding and soft law agreements that recognise local, regional, and national diversity and values, as well as principles and processes to safeguard it. LALI explicitly references the ELC as a source of inspiration, as well as developments promoting a global landscape convention: The LALI Initiative, at p 6, <<http://lali-iniciativa.org/>> accessed 9 October 2019

<sup>635</sup> Expert meeting on 'The International Protection of Landscapes', Paris, UNESCO Headquarters, Room IV, 18 April 2011, Agenda.

<sup>636</sup> The aforementioned 2011 Recommendation on the Historic Urban Landscape was promulgated in this regard.

In the ensuing years, dialogue has continued on how best to address landscape issues at regional and international scales. At the UNESCO conference ‘The International Protection of Landscapes: A Global Assessment’, held in Florence in 2012, partners were sought to help build a strategy for its development and implementation. The Global Assessment highlighted core values in the WHC’s approach to landscape, demonstrating its evolution: to commons and people not heritage, dynamism, rather than preservation in stasis, everyday life not outstanding value, and protecting landscapes to promote communities.<sup>637</sup> This culminated in the Florence Declaration, affirming respect for communities and promoting participatory approaches, as well as calling for the creation in 2013 of an International Forum for the safeguarding of landscapes as a tool for sustainable development, with the aim of advancing proposals for the reflection on the Post-2015 International Development Agenda and ‘to initiate the process for the creation of relevant international mechanisms.’<sup>638</sup>

Nevertheless, as Amy Strecker has observed, in order for a new global instrument to be effective, must protect landscape as a process, and offer robust mechanisms to address the ongoing degradation of landscapes beyond designating them as models of human activity and interaction with the environment.<sup>639</sup> The success of the ELC stems in part from regional commonalities, which facilitate the design of strategies that coordinate the many issues influencing landscape: land use, food security, which are becoming more important in the face of climate change and impacts from globalisation. Landscape has come to represent all those diverse interests in land not accommodated by property, and the involvement of people in heritage and environmental policies.<sup>640</sup> Bearing in mind these challenges, how this may be adapted in the context of the Lesser Antilles is discussed in the next section.

### 3.3.2 The Lesser Antilles and regional developments: The OECS and the Escazú Agreement

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<sup>637</sup> UNESCO, ‘The International Protection of Landscapes: A Global Assessment on the occasion of the 40th Anniversary of the World Heritage Convention and To Promote the UNESCO International Traditional Knowledge Institute (ITKI)’, Florence, Italy, September 19-21, 2012 at 7.

<sup>638</sup> The Florence Declaration on Landscape, September 19-21, 2012 on the occasion of the 40th Anniversary of the World Heritage Convention.

<sup>639</sup> Strecker, ‘Landscape as Cultural Heritage’ (in press).

<sup>640</sup> Strecker, *Landscape Protection in International Law* 185.

The Revised Treaty of Basseterre, the constituting treaty of the Organisation of Eastern Caribbean States (OECS) contains principles addressing the protection of the cultural and natural heritage.<sup>641</sup> This treaty applies to the Lesser Antillean states with the exception of Barbados and Trinidad and Tobago. Article 23 of the treaty, on ‘human and social development’, addresses the promotion of sustainable, social and cultural development that would ensure societies are stable, safe and just and are based on the promotion and protection of human rights, non-discrimination, respect for diversity, equality of opportunity, solidarity, security, and participation of all people. Member states agree to promote respect for cultural expression (material and non-material), cultural rights and diversity and recognise the significance of such for development; the rights of indigenous peoples and the cultivation of shared values to facilitate overall development are also addressed.

Article 24 of the treaty concerns environmental sustainability and calls on Member States to implement the St. George's Declaration of Principles for Environmental Sustainability (SGD), in order to minimise environmental vulnerability, improve environmental management and protect the region's natural (including historical and cultural) resource base so that social and economic benefits for Member States may be optimised.<sup>642</sup> The SGD is originally a soft law document, outlining a regional framework for sustainable environmental management, with 21 principles grouped under four main goals. Each Member State is expected to implement the SGD via its national environmental management strategies (NEMS).

The preamble of the SGD acknowledges that the marine and terrestrial ecosystems of small islands states constitute a single unit, and that the impact of human intervention on them requires an integrated approach. The SGD also recognises ‘the value and importance of the deeply embedded social connections between the region’s culture and history and the ways in which

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<sup>641</sup> *Revised Treaty of Basseterre Establishing the Organisation of Eastern Caribbean States Economic Union*, signed 18<sup>th</sup> June, 2010.

<sup>642</sup> Signed April 2001. At the OECS Environment Policy Committee (EPC) in September 1999, OECS Ministers of the Environment requested that the OECS Secretariat prepare an “OECS Charter for Environmental Management” setting out a regional strategy and framework for environmental management. In accordance with the Ministers’ request, the OECS Natural Resources Management Unit (now the Environment and Sustainable Development Unit, ESDU) developed the St. George’s Declaration of Principles for Environmental Sustainability in the OECS. The Declaration sets out the broad framework to be pursued for environmental management in the OECS region. See the St George’s Declaration, at <<https://www.oecs.org/en/lsu-resources/st-george-s-declaration>> accessed 16 September 2018

its people perceive and make use of their environment’<sup>643</sup> and makes reference to multilateral environmental agreements, the Rio Declaration and other soft law documents on sustainable development, as well as international conventions addressing the protection of sites of cultural, historic and ecological significance.<sup>644</sup>

Goal 3 concerns the protection and sustained productivity of the region’s natural resource base, and Goal 4 addresses the contribution of natural resources to economic, social and cultural development. The corresponding principles are Principle 12, which specifically addresses the protection of the cultural and natural heritage, and principle 17, which exhorts states to engage the international community to negotiate and implement multilateral environmental agreements. Each goal is accompanied by targets, indicators and supportive actions. There is one supportive action specifically for cultural sites. This requires ‘the implementation of legal and other measures to document, protect, and where necessary rehabilitate, sites and areas of natural, cultural, and historic value, and avoidance of measures or acts which may harm them.’<sup>645</sup> There is therefore recognition of the relationship between communities and their environment, and the contribution to the cultural heritage, but no mechanisms for participation of these communities in processes to meet the goals outlined. This is not unexpected of soft law.

In recent developments, the adoption of the text of the Escazú Agreement<sup>646</sup> heralds the potential for a shift in environmental decision-making that could support the goals of the SGD and indirectly buttress the protection of landscapes. In June 1992 the United Nations Conference on Environment and Development adopted a declaration to strengthen the concept of countries’ rights and responsibilities in the environment and development field. Principle 10 of the Rio Declaration on Environment and Development,<sup>647</sup> adopted in 1992, clearly emphasises the importance of public participation (active participation, access to information and access to justice) for addressing environmental issues.

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<sup>643</sup> Preamble, SGD.

<sup>644</sup> Preamble, SGD.

<sup>645</sup> SGD, Goal 3, at 17.

<sup>646</sup> See <[https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf)> accessed 9 October 2019

<sup>647</sup> Rio Declaration on Environment and Development, Rio de Janeiro, 14 June 1992, UN Doc.A/CONF.151/26.

Initiated twenty years later at the United Nations Conference on Sustainable Development (Rio+20) in 2012, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean was adopted in Escazú (Costa Rica) on 4 March 2018 after two years of preparatory meetings and four years of negotiations, which involved significant public participation. This is the only binding agreement to emerge from Rio+20 and the first environmental agreement adopted by the Latin America and Caribbean region.<sup>648</sup> Based on the principle of sustainable development, the agreement underlines the interdependence between human rights and the environment, and represents a significant regional variation of Rio Principle 10.<sup>649</sup>

In 2012, The Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development provided the rationale for such an agreement:

Twenty years after the Earth Summit, we reiterate that, as recognized in Principle 10 of the Rio Declaration, environmental issues are best handled with the participation of all concerned citizens. To this end, each individual should have appropriate access to information, the opportunity to participate in decision-making processes and effective access to judicial and administrative proceedings. We thus affirm that to comply with this Principle, States should facilitate and promote education, awareness-raising and public participation by making information widely available and providing effective access to the proceedings outlined above.<sup>650</sup>

The objective of the present Agreement is to guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development. The adoption of the text reflects a

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<sup>648</sup> Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development 27 June 2012 <<https://www.cepal.org/rio20/noticias/paginas/8/48588/Declaracion-eng-N1244043.pdf>> accessed 9 October 2019

<sup>649</sup> Stephen Stec and Jerzy Jendroska, 'The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings'. 2019 *Journal of Environmental Law*, 2019, 0, 1–13, 4.

<sup>650</sup> Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development 27 June 2012.



willingness of the countries in the region to act in a coordinated way for greater environmental protection and stronger environmental rights, especially for the most vulnerable populations.

Among its main provisions, the Escazú Agreement recognises the right of every person to live in a healthy environment, and the obligation to ensure that the rights defined in the Agreement are freely exercised. Article 4(1) states:

Each Party shall guarantee the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement. It provides for the adoption of legislative, regulatory, administrative and other measures to ensure the implementation of the Agreement, the provision of information to the public to facilitate the acquisition of knowledge on access rights, and the duty to provide guidance and assistance to the public, especially to vulnerable people and groups.

Stephen Stec and Jerzy Jendroska point out the significance of this language. The guarantee of the right to a healthy environment is independent of the relationship between the right to a healthy environment and the access rights under Principle 10. In addition, the Parties include within this the obligation to guarantee ‘any other universally-recognized human right related to the present Agreement.’ This provides evidence that the right to a healthy environment is ‘universally-recognized’<sup>651</sup> which concerns the human rights dimension of landscape as discussed earlier, and in addition, recalls Strecker’s analysis of landscape protection above, that the near universal ratification of the World Heritage Convention and caselaw invoking its provisions point to a general *opinio juris* on the binding character of the principles prohibiting the deliberate destruction of landscapes of significant importance for humanity.<sup>652</sup> This potentially establishes an obligation between Escazú parties and landscape protection.

Eleven guiding principles are recited in Article 3, many of which are well known, such as the precautionary principle and preventive principle, while others are not established norms of international environmental law.<sup>653</sup> Of note are the ‘principle of non-regression and principle of

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<sup>651</sup> Stec and Jendroska 6. The authors also note that almost simultaneous to the adoption of the Escazú Agreement, the Inter-American Court of Human Rights issued an advisory opinion on the environment and human rights confirming that a right to a healthy environment exists under the American Convention on Human Rights. See Advisory Opinion OC-23/17, Inter-Am Ct HR (ser A) No 23 (15 November 2017).

<sup>652</sup> Strecker, *Landscape Protection in International Law* 85, at n 160 above.

<sup>653</sup> Stec and Jendroska 6.

progressive realization.’<sup>654</sup> They are not defined, but Stec and Jendroska highlight their similarity to the ‘antibacksliding’ provision in Article 4(7) of the Aarhus Convention, which is meant to establish Aarhus as a floor, and not a ceiling, for progressive development of the law.<sup>655</sup> This may bode well for landscape protection in the future as communities continue to strengthen their participation in environmental matters, and place pressure on governments to avoid rollback of progressive language in legislation, which has occurred in the Lesser Antilles (to be discussed in later chapters).

Article 2 does not restrict the meaning of ‘public’ to minorities or indigenous communities, encompassing one or more persons, so potentially any group or community, and provides for vulnerable members of the public:

(d) “Public” means one or more natural or legal persons and the associations, organizations or groups established by those persons, that are nationals or that are subject to the national jurisdiction of the State Party;

(e) “Persons or groups in vulnerable situations” means those persons or groups that face particular difficulties in fully exercising the access rights recognized in the present Agreement, because of circumstances or conditions identified within each Party’s national context and in accordance with its international obligations.

Environment is not defined, but in requiring each state to prepare an environmental information system, the sources of information reference only natural resources.<sup>656</sup> However, in publishing a national report on the state of the environment, each Party’s report may contain information on collaboration agreements among public, social and private actors, and ensure that such reports are prepared ‘in different formats and disseminated through appropriate means, taking into account cultural realities’,<sup>657</sup> which suggests an understanding of the dimensions of community life, even if it is not an outright endorsement of landscapes.

Where the right of access to information is concerned, each Party is expected to promote access to information contained in concessions, contracts, agreements or authorisations granted, which

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<sup>654</sup> Escazú Agreement, art 3(c).

<sup>655</sup> Stec and Jendroska 7.

<sup>656</sup> Escazú Agreement, art 6(3).

<sup>657</sup> Art 6(7).

involves the use of public goods, services or resources, in accordance with domestic legislation.<sup>658</sup> This has implications for the use and protection of landscape, as a public space.

In addressing the right to participation in decision-making, Escazú goes beyond the European Landscape Convention (although the ELC is not the treaty dealing with procedural rights) when it ensures participation not only in planning processes:

Each Party shall guarantee mechanisms for the participation of the public in decision-making processes, revisions, reexaminations or updates with respect to projects and activities, and in other processes for granting environmental permits that have or may have a significant impact on the environment, including when they may affect health.<sup>659</sup>

The information to be provided to the public concerns ‘environmental matters of public interest’ such as land-use planning, policies, strategies, plans, programmes, rules and regulations, which have or may have a significant impact on the environment.<sup>660</sup> Public participation cannot merely be an attempt to appease the public; each party is expected to establish conditions that are favourable to public participation in environmental decision-making processes that are appropriate given the social, economic, cultural, geographical and gender characteristics of the public.<sup>661</sup> There is therefore scope here for considering the needs of specific local communities.

Throughout the text of the Escazú Agreement, environmental rights are rooted in the protection of human rights. The preamble contains several references to international human rights law.<sup>662</sup> In fact, Belén Olmos Giupponi notes that the right to public participation as prescribed in the Escazú Agreement is markedly influenced by the work of the OAS on the freedom of expression, as well as the 2010 Inter-American Model Law on Access to Public Information.<sup>663</sup> This has

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<sup>658</sup> Art 6(9).

<sup>659</sup> Art 7(2).

<sup>660</sup> Art 7(3).

<sup>661</sup> Art (10).

<sup>662</sup> Recital five of the Preamble, Escazú Agreement: Reaffirming the importance of the Universal Declaration of Human Rights and recalling other international human rights instruments that underscore that all States have the responsibility to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind, including those related to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...

<sup>663</sup> Belén Olmos Giupponi, ‘Fostering environmental democracy in Latin America and the Caribbean: An analysis of the Regional Agreement on Environmental Access Rights’ (2019) *RECIEL* 28:136–151, 143, and see E Lanza, ‘The Right to Access to Public Information in the Americas: Specialized Supervisory and Enforcement Bodies. Thematic Report included in the 2014 Annual Report of the Office of the Special Rapporteur for Freedom of Expression of

practical implications, since the Escazú Agreement could be invoked and enforced through the human rights protection system of the OAS, which aims to defend and promote fundamental rights and individual freedoms in the Americas. This is noteworthy given the case law referred to earlier in this chapter concerning indigenous and local communities and landscape rights, the judicial activism of the Inter-American Court, and that some Lesser Antillean States are States parties to the ACHR.<sup>664</sup>

SDGs are also considered in the preamble, Goal eleven of which concerns sustainable cities and communities, and target 11.3 concerns enhancing the capacity for participatory, integrated and sustainable settlement planning and management. Target 11.4 aims at strengthening efforts to protect and safeguard the world's cultural and natural heritage, and target 11.7 addresses providing universal access to safe, inclusive and accessible, green and public spaces, while target 11.A supports positive economic, social and environmental links between urban, peri-urban and rural areas by strengthening national and regional development planning by 2030.<sup>665</sup> Nevertheless, while the preamble acknowledges the cultural dimension of environmental rights when it references the multiculturalism of Latin America and the Caribbean and their peoples, Olmos Giupponi observes that this was a missed opportunity to incorporate more direct references to land rights, cultural rights and even the jurisprudence of the IACtHR on indigenous rights.<sup>666</sup>

The Escazú Agreement was opened for signature on 27<sup>th</sup> September 2018. It was signed by 16 countries in the following days and weeks, and Guyana became the first ratifying state in April 2019. Saint Vincent and the Grenadines signed it in July 2019. During a high-level ceremony on the sidelines of the general debate of the 74th UN General Assembly (UNGA), on 26 September 2019, in New York, US, two additional countries signed the Agreement (Grenada and Jamaica) and five countries ratified it (Bolivia, Jamaica, St Kitts and Nevis, St Vincent and the Grenadines, and Uruguay). The next day, it was also signed by Nicaragua and Saint Lucia. Of

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the Inter-American Commission on Human Rights' (March 2015)

<<http://www.oas.org/en/iachr/expression/docs/reports/access/thematic%20report%20access%20to%20public%20information%202014.pdf>>. OAS, 'AG/RES. 2607 (XL-O/10) Model Inter-American Law on Access to Public Information' (2010) <[https://www.oas.org/dil/AG-RES\\_2607-2010\\_eng.pdf](https://www.oas.org/dil/AG-RES_2607-2010_eng.pdf)> accessed 9 October 2019

<sup>664</sup> Barbados, Dominica, Grenada, and Trinidad and Tobago. See <[https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm)> accessed 28 October 2019

<sup>665</sup> <<https://www.un.org/sustainabledevelopment/cities/>> accessed 9 October 2019

<sup>666</sup> Olmos Giupponi, 141 referring to Recital Ten of the Preamble, Escazú Agreement.

the Lesser Antillean states, Barbados, Dominica and Trinidad and Tobago are not signatories. Currently, the Escazú Agreement has acquired 21 signatory countries and six ratifications. Eleven ratifications are required for entry into force by September 2020.<sup>667</sup>

While the Escazú Agreement is not a landscape treaty, and does not use that term anywhere in its text, it is the first regional binding agreement on the environment to delineate a framework for enhancing local governance and achieving full implementation of procedural environmental rights. This lays the preconditions for landscape protection by strengthening the mechanisms by which local communities can engage state authorities on issues affecting the natural resources that they rely on for their way of life, and provides a route to environmental justice as it aligns with the practices and legislative and judicial developments of the Inter-American system. Because public is expansively defined, including the most vulnerable populations, and information concerning land use and development must be culturally, socially, geographically appropriate, the nuances of the landscape are accounted for in the Escazú Agreement, even if it is not referred to by name. The potential effect of Escazú is that while it is not intended to substantively protect the landscape, it implicitly contributes to landscape protection in ensuring procedural environmental rights for communities while explicitly requiring States parties to uphold all related universally recognised human rights, which includes the human rights and cultural rights dimensions to landscape. This should make landscape protection a key consideration in the future, as these states grapple with environmental and climate change induced events that threaten local livelihoods and landscapes.

As Arif Bulkan has noted, the influence of international law is likely to be substantial - not immediately or dramatically, but incrementally over time. These treaties and their resulting jurisprudence have contributed to common global standards, which have been invoked and applied by a variety of international bodies, such as the OAS. The proliferation of international bodies applying these various treaties provide opportunities for indigenous and local communities to exchange ideas and strategies, which in turn has heightened consciousness and reinvigorated their struggles for recognition of rights in both domestic and international

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<sup>667</sup> Leila Mead, 'Escazú Agreement on Rio Principle 10 Gains Signatures, Ratifications' <<http://sdg.iisd.org/news/escazu-agreement-on-rio-principle-10-gains-signatures-ratifications/>> accessed 9 October 2019; 'In Key Week for Sustainable Development at the UN, Latin American and Caribbean Authorities Sign and Ratify the Escazú Agreement', ECLAC Press release, 26 September 2019.

forums.<sup>668</sup> The Escazú Agreement has the potential to act as another platform for institutions, communities and individuals to engage in this regard.

### 3.4 Conclusion

This chapter has shown that advancements in international law have catapulted landscape from its position as a concept in soft law to an emerging area of law, international landscape law. The recognition and inclusion of landscape is a reflection of the evolution of international cultural heritage law, which no longer approaches heritage as artefact-centred and alienated from communities, but embedded in a dynamic process that is community-driven, enriched by the diverse customs, relations and lived-in experiences embodied in the landscape that generates it. The protection of landscape is therefore critical to the protection of heritage as a living, dynamic resource.

The category of cultural landscapes within the World Heritage Convention first recognised the importance of people in the management of World Heritage sites and proved influential in the developments leading to a more people-centred approach to landscape protection. Cultural landscapes were included within the scope of the WHC to give recognition to the intangible dimension to landscapes, including sacred sites, customary land use practices, and communities living in harmony with their environments. A significant aspect of landscapes that challenges World Heritage classification as well as State discourses on heritage is that there can be a multiplicity of uses competing and in contention with one another. In addition, the World Heritage system relies on States parties to implement its provisions, which often undercut any real participation of communities, even if their heritage was now recognised.

It is the European Landscape Convention that truly ‘democratises’ landscape, by distinguishing landscape not for its aesthetic qualities but for its significance in the daily life of its inhabitants.

<sup>669</sup> The ELC situates people at the heart of landscape, regardless of that landscape’s features, without distinguishing its cultural dimensions from the natural. The ‘landscape approach’ is now

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<sup>668</sup> Bulkan 477.

<sup>669</sup> Strecker, *Landscape Protection in International Law* 100.

synonymous with involving people in heritage and environmental policies.<sup>670</sup> By highlighting spatial justice, human rights and democracy, the ELC has raised the profile of landscape and spurred efforts to create a global convention. While there are challenges with this concept, regional initiatives such as LALI in Latin America have developed regional principles to guide both soft law and binding instruments in the protection of landscape.

Focusing on people and their communities shows that international law has become more attuned to human rights issues, even bypassing the State where necessary to protect local communities in the face of State inaction or abuse. Human rights courts appear to be the fora of necessity for indigenous communities in lieu of appropriate mechanisms to address their needs, while local communities continue to face hurdles where landscape protection is concerned. While the European Court of Human Rights has assumed a more conservative stance, the Inter-American Court of Human Rights continues to demonstrate the capacity to be innovative in protecting rights beyond private property, though this has been so far confined to indigenous communities. Nevertheless, this is relevant for the Lesser Antilles as post-colonial states in the Americas and OAS member states. For the Lesser Antillean states that are WHC parties, WHC implementation is addressed through capacity building for local institutions to nominate landscapes. While landscape protection is not yet a distinct priority, UNESCO's Caribbean Capacity Building Programme and regional action plans have tailored strategies to the small island context for enhancing domestic heritage frameworks, which does call for recognition of landscapes.

Looking to the future, the Escazú Agreement, the first regional environmental treaty for Latin America and the Caribbean, holds much promise for landscape protection though this is not obvious at first. It builds on OAS legislative developments, enhancing local institutions to strengthen local governance capacity, and providing access to environmental information, participation in environmental decision-making and access to environmental justice. There is awareness of landscape in Escazú even if it is not identified as such. Having regard to the geographic, social and cultural circumstances of communities indicates a realisation that private property has occluded understanding of the relationships communities have with land, and cannot provide information on practices with local resources that may be crucial to the formation of sustainable development strategies for the future. In this regard, the Escazú Agreement,

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<sup>670</sup> Strecker, *Landscape Protection in International Law* 185.

should it enter into force, equips the region with the mechanisms and tools to effect participatory governance of natural resources, which involves landscape.

Having examined landscape protection in international law, we now turn to a discussion of the domestic legislative framework for heritage protection in the Lesser Antilles. The next chapter examines the current laws for antiquities protection, museums and National Trusts, and is followed by chapters on planning law and finally parks and protected areas legislation.