NOTES ON NEW BOOKS

Editorial note

Landscape Protection in International Law
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Once the exclusive prerogative of domaine réservé, landscape has gained increasing importance in international law in recent years. Since the introduction of cultural landscapes within the UNESCO World Heritage Convention, and particularly since the adoption of the European Landscape Convention, emphasis has shifted beyond a scenic, preservationist approach towards a more dynamic, human-centred one. The focus is not only on outstanding landscapes, but also on the everyday and degraded landscapes where most people live and work. Landscape is land shaped by people, after all, and its protection, management, and planning have a number of implications for democracy, human rights, and spatial justice. Despite these links, however, there has been little legal scholarship on the topic. How does international law, which deals for the most part with universality, deal with something so region-specific and particular as landscape? What is the legal conception of landscape and what are the various roles played by international law in its protection? These are the questions Amy Strecker attempted to answer in her book, *Landscape Protection in International Law*, published by Oxford University Press in late 2018, as part of its series on International Cultural Heritage Law and Policy.

The book assesses the institutional framework for landscape protection; analyses the interplay between landscape and human rights; and links the etymology and theory of landscape with its articulation in the law. Strecker has shown that the term "landscape" has evolved from being conceptually

tied to nature and aesthetics to a much broader and dynamic concept, emphasizing the human dimension of landscape and the symbiotic relationship between people and place over time. She argues that this brings landscape closer to its early etymological origins, to what Kenneth Olwig terms the "substantive nature" of landscape, when elements of territory and community, community justice, body politic, and custom were inherently embedded in landscape (or the Norse conception of *landskapr*).[1]

In international law, landscape can mean one or a combination of three things: a) it can be a culturally significant landscape with associative importance articulated in terms of memory, identity, and a sense of place; b) it can be a naturally significant landscape, important both for the ecosystems that inhabit it as well as for the respite it offers to humans; and c) it can be an ordinary, lived-in landscape and have significance for the way of life of its inhabitants. Emphasis in the first and second types of landscapes is on their heritage value, whether natural or cultural, whereas in the third type landscape is tied to ideas of democracy and spatial justice. In all cases, landscape can be conceived as public space, or a common good. It is also evidenced in Strecker's book that landscape protection refers not only to the safeguarding of landscapes themselves, but also – and perhaps more importantly – to the safeguarding of the relationships between people and the places that matter to them. Importantly, protection does not mean the freezing of certain areas (a preposterous notion), but rather the sensitive consideration of development in places that have special significance.

The book *Landscape Protection in International Law* illustrates that there now exists an emergent landscape law which places an obligation on States to protect landscapes of "outstanding universal value", as well as to implement democratic policies aimed at landscape protection, management, and planning, including for everyday landscapes. This is evidenced by the international treaty movement discussed through Chapters 3-7 (World Heritage Convention, European Landscape Convention, International Covenant on Economic, Social and Cultural Rights, Framework Convention on the Value of Cultural Heritage for Society, United Nations Declaration on the Rights of Indigenous Peoples, Aarhus Convention, Convention on Biological Diversity). It is also evidenced in an indirect way through the case law of the human rights courts, discussed in Chapters 8 and 9, where in numerous cases the Court has upheld measures by the state authorities which impinged upon individual rights to property in favour of the "general interest" in protecting the landscape. Thus, it would seem that landscape protection is deemed to be of such importance that it may, or even should, necessarily impinge upon the rights of individuals relating to property.

[1] K. Olwig, *Recovering the Substantive Nature of Landscape*, "Annals of the Association of American Geographers" 1996, Vol. 86(4), pp. 630-653.

However, claims for substantive rights to landscape, while based on real issues of concern – and sometimes on genuine violations of national law – are not a viable means of accessing justice for violations of land rights or for preventing destructive development in local landscapes. This is due to two reasons: first, in most of the cases where landscape protection has been dealt with by regional human rights courts, it usually plays a "negative" role, in the sense of its interpretation as a legitimate restriction on other rights, especially the right to possess and enjoy property.[2] In these cases, particularly in the European context, landscape is pitted against property, and it still retains a scenic connotation and is not associated with use and dependency. Second, when applicants attempt to argue for landscape protection, the lack of a specific vocabulary of environmental or cultural rights means that they must argue on the basis of other rights, such as the right to private and family life and home, or the enjoyment of property, but property is narrowly defined in the European context and cases are often dismissed on inadmissibility grounds due to the lack of standing or identifiable victims.[3] Human rights are by nature limited by their focus on individual rights. Yet landscape is a collective good, and as such cannot be measured in terms of personal injury in the same way that the loss of property can.

An exception to this rule is the interpretation in the Inter-American context of the rights to culture and, in particular, the right to property in the case of indigenous peoples. In many cases dealing with violations of indigenous peoples' land rights, the Inter-American Court has held that the international human right to property, particularly as affirmed in the American Convention on Human Rights, includes the collective right of indigenous peoples to the protection of their customary land and resource tenure, as well as spiritual and cultural links with the land, even in the absence of title.[4] A form of landscape rights therefore exists, but only in relation to indigenous peoples, and even then it is not explicitly stated in landscape terms, but rather derives from the rights to culture and property.

While landscape is recognized as having a strong human rights dimension, claims for rights to landscape are not – even if based on real issues of concern and sometimes on genuine violations of national law – a viable means of accessing justice for violations of land rights or for preventing destructive development in cultural landscapes.

[2] See the cases discussed in Chapter 9 of the book.

[3] For example, the European Court of Human Rights (ECtHR), *Konkäma and 38 other Sami villages v. Sweden*, Application No. 27033/95, Decision of 25 November 1996; ECtHR, *Hingitaq 53 and Others v. Denmark*, Application No. 18584/04, Decision of 12 January 2006; ECtHR, *G. and E. v. Norway*, Application No. 9278/81 & 9415/81 (joined), Decision of 3 October 1983. In ECtHR, *Handölsdalen Sami Village and Others v. Sweden*, Application No. 39013/04, Judgment of 30 March 2010, the Court found that the right to access private property for the purposes of reindeer grazing had no basis in law and was inadmissible.

[4] See, in particular, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, IACHR Series C No. 79; *Maya Indigenous Communities of Toledo District v. Belize*, Case 12.053, IACHR Report 40/04 (2004) at 153, 194; *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010, IACHR Series C No. 214, para. 86.

What landscape can do, however, is act as an umbrella term, integrating environmental and cultural values in what Strecker has termed elsewhere "public space", and raise awareness of the non-proprietary interests in land outside of private property and ownership – which are diverse. Landscape represents not abstract standards of beauty, but the rich and diverse relationships that people have with places that matter to them. Adrian Phillips once stated that "landscape is more likely to concern the man in the street or the woman in the field, than is biodiversity".[5] This is why landscape, as an integrating tool for sustainable development, has such potential. Landscape is the visual result of our treatment of the earth and it is this powerful perception that engenders a demand amongst people for better quality landscapes everywhere. These are some of the arguments put forward in *Landscape Protection in International Law.*

[5] A. Phillips, *Practical Considerations for the Implementation of the European Landscape Convention*, in: *Landscape Conservation Law: Present Trends and Perspectives in International and Comparative Law*, IUCN Publications, Gland 2000, p. 18.