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CULTURAL HERITAGE IMPACT ASSESSMENTS FOR DEVELOPMENT PROJECTS

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CULTURAL HERITAGE IMPACT ASSESSMENTS FOR DEVELOPMENT PROJECTS

*Amy Strecker*¹

Introduction

Impact assessment is a process that examines the potential impact that a proposed development will have on the environment. Cultural heritage is usually considered alongside other elements such as air, water, soil, flora and fauna to assess the likely positive and negative effects on (mostly physical) heritage. More recently, cultural impact assessment has emerged as a category in its own right, often in conjunction with social impact assessment, particularly in relation to Indigenous Peoples. The overall aim of an impact assessment is to inform planning and decision-making, and, if necessary, to avoid particularly important cultural heritage or at least mitigate the most negative impacts of a proposed development on such heritage. However, there is a substantial amount of discretion in this area of law, since the legal requirement relates to carrying out an assessment rather than the content of the assessment itself, and the notion of cultural heritage being applied is often considerably narrower than the cultural heritage affected in practice. There also exists an implicit power imbalance between development consortia and vested elites, on the one hand, and the interests of cultural heritage and attendant communities – who may not be in favour of the proposed development – on the other.

The relevant law mandating impact assessment includes not only administrative and environmental law,² including EU law on environmental impact assessment, but also cultural heritage and landscape conventions, which advocate for public participation in planning and decision-making, as well as international soft law norms. Cultural heritage impact assessment is therefore increasingly linked to procedural rights (the rights of access to information, participation in decision-making and access to justice). However, while cultural heritage law as a field has progressed significantly beyond a static interpretation of cultural heritage, in practice the idea of cultural heritage dominant within scholarship and policymaking focused specifically on “heritage impact assessment” is still predominantly a material one, heavily influenced by the fields of archaeology and architecture (scholars and heritage managers alike). Furthermore, while procedural rights are fundamental to impact assessments, extending participatory rights in national law to also include the informal and place-based dimensions of heritage remains a challenge in many states. This is because cultural heritage is still within the realm of public policy; in practice, it is often considered in preservationist terms rather than substantive ones dealing with peoples’ relationships to the

places where they live, and when participation is included in the process, it is often tokenistic, with community agency usually reduced to acts of compliance or resistance.

The first part of this chapter focuses on the cultural heritage dimension of environmental impact assessment – the most widely employed legal tool for assessing the impact of development projects in national contexts. It then addresses the policy framework for conducting heritage impact assessment in the context of World Heritage, before moving on to discuss norms for cultural and social impact assessment that do not employ the term “heritage” per se, but which have more normative relevance for affecting the substantive nature of heritage in development contexts, particularly intangible heritage, ways of life and people-place relations. The last section then takes up the role of state discretion, compliance, and legitimacy in the field of heritage assessment, where certain projects are exempt from assessment, or where it is difficult to challenge a decision made in the “public interest” or “national interest” even when that interest has been construed in favour of private investment. This section also considers the dissonance between heritage professionals and exogenous ways of thinking about impact assessment versus the lived experiences of people affected by development projects and endogenous ways of conceiving their own heritage. The chapter concludes with some observations on deliberative democracy, spatial justice and the legitimacy of state decision-making in the realm of development projects and their impact on heritage. Although much of the discussion is anchored in the EU context, parallels are drawn from other parts of the world as well.

Cultural Heritage as Part of Environmental Impact Assessment

The most widespread form of impact assessment for development projects at the national level is environmental impact assessment (EIA), which not only includes environmental factors such as human health, soil, water and air, but also cultural heritage and landscape. EIA emerged in the late 1960s in the United States and is now firmly embedded in most of the world’s legal systems. It was borne out of several disciplines, particularly land-use planning and environmental sciences, and seeks to minimise problems from the outset rather than address them once they emerge. EIA is therefore positivist in nature, since it operates on the assumption that impact can be assessed on the basis of objective scientific criteria, which in turn has influenced the approach to assessing cultural heritage. In Europe, the most far-reaching legal obligations for carrying out EIA stem from EU law. EU Directive 85/337/EEC of 27th June 1985 on the assessment of the effects of certain public and private projects on the environment has been amended four times, the most recent amendment in 2014 (Directive 2014/52/EU of 16 April 2014) following an extensive review process. The Directive specifically mentions “the protection and promotion of cultural heritage comprising urban historical sites and landscapes, which are an integral part of the cultural diversity that the Union committed to respecting and promoting in accordance with Article 167(4) TFEU”, as well as the fact that “the definitions and principles developed in relevant Council of Europe Conventions, in particular the European Convention on the Protection of the Archaeological Heritage of 6 May, the Convention on the Protection of the Architectural Heritage of 3 October 1985, the European Landscape Convention of 20 October 2000, and the Framework Convention on the Value of Cultural Heritage for Society of 27 October 2005, can be useful”.³ The latter two treaties deviate from previous approaches to heritage governance in so far as they espouse a more holistic conceptualisation of heritage, emphasising its relational character rather than espousing the notion of intrinsic, objective, value. Importantly, these two treaties emphasise public participation as fundamental in any heritage or landscape planning policy.

However, despite referencing recent Council of Europe instruments, the concept of heritage in the EIA Directive itself appears to be narrowly construed in material terms (archaeology or

architecture), and the concept of landscape appears to be construed to mean ‘view’ or ‘scenery’: “In order to preserve historical and cultural heritage and the landscape, it is important to address the *visual impact* of projects, namely the change in the *appearance* or *view* of the built or natural landscape and urban areas, in environmental impact assessment” (emphasis added).⁴ Yet landscape’s legal identity has evolved from being conceptually tied to nature and aesthetics to a much broader, dynamic concept, emphasising the human dimension of landscape and the symbiotic relationship between people and place over time (Strecker 2018). The European Landscape Convention includes not only protection measures, but also an acknowledgement of the rights of communities to participate in the decisions affecting their landscapes (Council of Europe 2000), thereby bringing it closer to its early origins, when community justice, body politic, and custom were embedded in the concept of landscape (Olwig 1996). Likewise in the Framework Convention on the Value of Cultural Heritage for Society (Council of Europe 2005), cultural heritage is considered as a “group of resources inherited from the past, which people identify, independently of ownership, as a reflection and expression of their constantly evolving beliefs, knowledge, and traditions” (Article 2a). The incongruity of international norms advocating more localised versions of heritage is one of the paradoxes of our modern globalised world, where, as Saskia Sassen notes, global assemblages of territory, authority and rights cut across the binary of national versus global (Sassen 2008).

An assessment is obligatory for projects listed in Annex 1 of the Directive, deemed to have a significant effect on the environment due to their nature, size or location. They include public or private projects such as long-distance railway lines, large airports, motorways, express roads, roads of four lanes or more, waste or water treatment plants, and other installations. Projects listed in Annex II are not automatically assessed and are subject to an EIA on a case-by-case basis. However, the Directive obliges all relevant national authorities, local authorities, and national courts to ensure that projects likely to have a significant effect on the environment (including heritage) are subject to the assessment procedure (Article 2). All of the information gathered from the developer through consultation and assessment must be taken into account in the planning approval. The decision regarding the project must be a reasoned one and must include “a description, where necessary, of the main measures to avoid, reduce and if possible, offset the major adverse effects” (Article 12). Non-compliance can take two forms: either failure to carry out, or failure to properly carry out – which can lead to infringement proceedings by the Commission. The European Court of Justice has confirmed that, under certain circumstances, an individual is entitled to invoke before a national court the provisions of the Directive in relation to a failure to properly carry out an EIA.⁵ It is possible for the Commission to suspend the payment of EU funds where no EIA is undertaken for an EU-financed project. It is also possible for the Commission to seek interim relief, that is, to ask the European Court of Justice to halt a project being executed pending the completion of an EIA. The first time the Commission resorted to this option was in 2007, in order to halt the construction of the Augustow and Wasilkow bypasses through the Rospuda Valley in Poland (protected under the Habitats Directive and Natura 2000 network).⁶ By contrast, in a case concerning the failure to properly conduct an EIA in a highly valued cultural landscape in Ireland (Tara), infringement proceedings were initiated by the Commission but no further action was taken.⁷ The Commission did receive a complaint over Tara,⁸ and initiated infringement proceedings against Ireland for failing to properly carry out EIA on the approved motorway route, but no injunction was issued and the motorway proceeded nonetheless. Archaeological reports commissioned by the National Roads Authority as part of the EIA in that case stated “it is recommended that all archaeological sites and their environs be avoided” (Keeley 1999) and that “the monuments around Tara cannot be viewed in isolation or as individual sites, but must be seen in the context

of an intact archaeological landscape which should not, under any circumstances, be disturbed” (Kilfeather 2000). In addition to the EIA reports, all of which recommended a different motorway route than the one selected, the statutory consultation body under the National Monuments Act – the National Museum – issued an 18-page report to the competent minister (for Environment, Heritage and Local Government) at the time, in which it was made clear that Tara would be ‘demeaned’ by the impact of the selected motorway route:

Tara is a unique cultural landscape which has significance for our national heritage that extends beyond the sum of its individual components. . . . It is one of a small number of complexes that are of more than usual cultural importance from the standpoint not only of archaeology, but also of history, mythology, folklore, language, placenames study, and even of national identity.⁹

The most critical statements contained in the EIA were omitted from the final Environmental Impact Statement, and when as predicted, important monuments were unearthed during the excavation phase, including a large henge, no additional EIA was carried out as required by the EIA Directive, which led to infringement proceedings.

In a similarly high-profile case involving a highly valued cultural landscape in Turkey (Hasankeyf), the Turkish government introduced new regulations exonerating the project from the required EIA, despite the fact that Hasankeyf had been designated a Grade I archaeological site by the Turkish government in 1978, meaning a specific prohibition of any new construction in the area (Drazewska 2023). Despite the inevitable negative impact of the Ilisu Dam on the heritage of the 12,000-year-old town and landscape, the lands in Hasankeyf had already been earmarked for expropriation many years before project approval and a public interest declaration was published, followed by a decree enforcing the expropriation. In 2013, Turkey’s highest administrative court ordered construction to halt until an EIA was carried out. This was then overruled by another law passed by the Turkish Grand National Assembly to allow the dam construction to proceed without an EIA (Europa Nostra 2017). Mitigation measures were adopted including the removal of some of the most ancient elements to new Hasankeyf, where residents were forcibly relocated. However, residents themselves did not support the dam, as their homes would be submerged, and their livelihoods, particularly those linked to tourism, destroyed (Ronayne 2005). The site is now submerged with most of the material and cultural heritage buried under a thick layer of concrete. The Turkish government moved a number of structures to an “archaeological park” adjacent to a museum with artefacts excavated from Hasankeyf. The government also promoted the new Hasankeyf as a tourist destination offering nature walks, water sports and paragliding (Tezcur et al. 2021: 1349). It is worth remembering that Hasankeyf is a town in the predominantly Kurdish Batman province in south-eastern Anatolia, a marginalised area of Turkey, and the project was considered justified by imperative reasons of “general interest”, but whose general interest? The lifespan of the dam (estimated at between 50 and 70 years) pales in comparison to the town’s 12,000-year-old history and the wellbeing of its people. The profound importance of the Hasankeyf landscape to its inhabitants was not considered in the process.

These cases illustrate the level of state discretion applied in matters of land-use planning. Neither Tara nor Hasankeyf were designated World Heritage sites, which does offer some elevated level of international awareness for sites inscribed on the World Heritage List. Interestingly, however, the Tara landscape is now included in the Irish government’s current Tentative List (as a ‘Royal Complex’) for World Heritage status,¹⁰ advocating a proposed serial nomination of early Irish royal sites (as the seat of the ancient High King of Ireland). This essentially frames the

significance of Tara as ‘universal’, an incongruous twist since the very basis advocated for inscription on the Tentative List is the one that was rejected by the Irish state in the legal challenge to the motorway. During the campaign against the motorway, the druids and individuals who worshipped at Tara were openly ridiculed by local politicians and supporters of the route to diminish the heritage significance of the landscape and undermine the campaign’s credibility (Rountree 2012). It is all the more paradoxical, therefore, that the element of ritual is mentioned as a justification of integrity for World Heritage status:

Ritual uses of the sites still occur on a small scale today, including celebrations of the Winter and Summer Solstices as well as Bealtaine and Samhain, and the tradition of agricultural use of the landscapes continues. The sites are located in largely pastoral landscapes and include hilltop locations with dramatic panoramic views, which contribute to a unique sense of character, spirit and feeling.

‘Spirit and feeling’ were not qualities appreciated by the Irish state during the campaign against the motorway!

The intangible or immaterial dimension of heritage is often overlooked in impact assessment when conducted as part of the EIA process. In a comparative study of the way in which cultural heritage was being considered in EIA back in 2004, Bond et al. noted that cultural heritage is mainly restricted to built heritage, that cultural heritage needs to be considered earlier in the process, and that it should include greater public participation (Bond et al. 2004). The cases of Tara and Hasankeyf both substantiate this view, as do many others. An example is provided by Thomas F King in the US context, where an ethnographer was awarded a contract to study an area being affected by a large development, and interviewed Native Americans with cultural connections to the area to identify possible traditional cultural places (King 2016). Upon arriving at the first place, they were surprised and asked, “Where is our school?” There had been a small public school on the site which meant that Native American children did not have to go to the distant Indian boarding school where they would be punished if they used their native language or practiced their traditions. The local school was treasured. It transpired that the school had been demolished because neither the archaeologist nor the architectural historian (who conducted the initial surveys) had considered it significant for the purposes of the National Register. The local Native Americans had not been consulted in the early stages of the process and the belated consultation took place as a form of mitigation. King (2016) advocates talking to local people as the first step in any assessment.

What these cases illustrate is that, in practice, cultural heritage is often narrowly construed in the assessment process as discrete, physical heritage, something that can be enumerated, measured and mitigated against via excavation or removal, separate from social and cultural impact. Statements such as the following from a recent article in a well-known heritage management journal belie the inherent bias behind many such endeavours: “cultural heritage is a primary result of the science of archaeology. . . . cultural heritage is the final product of the transfer of knowledge of archaeology – and other disciplines, and it is therefore an outstanding contribution for society as a whole” (Reher 2020: 430). The idea that heritage is an extension of the transfer of knowledge of archaeology and that this is presumed to be beneficial to the whole of society is almost imperial in its assumption and aspirations. As noted by King (2016: 227), “this can result in systematically failing to analyse the most important impacts on the most culturally sensitive aspects of the environment”. Cultural heritage law itself has moved beyond the idea that cultural heritage amounts to physical, material, culture and now recognises the intangible, associative and human rights

dimensions of cultural heritage (Francioni and Vrdoljak 2020; Lixinski 2013). However, the law is only as effective as the institutional actors wielding it, and, as seen above, even though the state is supposed to be acting in the public interest, the public interest can be construed conveniently depending on the situation. These cases highlight the importance of including the social and cultural aspects within the assessment process, which are central to cultural heritage as a whole, a fact recognised in the updated guidelines on impact assessment in a World Heritage context.

Heritage Impact Assessment in the Context of World Heritage

The most formalised heritage impact assessment policy globally produced thus far is the Guidance and Toolkit on Impact Assessments in a World Heritage Context (UNESCO et al. 2022), a joint publication of UNESCO and its advisory bodies, ICOMOS, IUCN and ICCROM. Many World Heritage sites face pressure from different types of development projects within and around the sites. “Assessing the impacts of such projects – before deciding to proceed with their implementation – is essential to both prevent damage to World Heritage and identify sustainable options” (UNESCO et al. 2022, 3). The 2022 World Heritage guidelines expand on and make a number of important updates to the previous policy document issued by ICOMOS in 2011 (on Heritage Impact Assessment for World Cultural Heritage Properties). The rationale behind the original guidelines was that the UNESCO World Heritage Committee had addressed considerable numbers of state of conservation reports related to threats to World Heritage properties from various forms of large-scale development. The cited developments included roads, bridges, tall buildings, ‘box’ buildings (e.g. malls), inappropriate, acontextual or insensitive developments, renewals, demolitions and new infrastructure typologies like wind farms, as well as land-use policy changes and large-scale urban frameworks, as well as excessive or inappropriate tourism. However, while the 2011 guidelines acknowledged that development projects may have negative and positive impacts, the whole focus rested on the impact of proposed developments on Outstanding Universal Value (OUV), when in fact OUV itself is increasingly contested (Meskell 2013, 2018; Fogarty 2022). Threats from development appeared to be measured in terms of their impact solely on material heritage or visual impact and appearance, such as key views and skylines: “Many of these projects have had the potential to impact adversely on the appearance, skyline, key views and other different attributes that contribute to Outstanding Universal Value” (ICOMOS 2011). Patiwael et al. (2018) argue, based on their analysis of 100 heritage impact assessments conducted upon request by UNESCO, that the assumptions in the 2011 ICOMOS Guidelines derived from the ‘preservation’ discourse in heritage management and that this framing resulted in miscommunication and misunderstanding amongst the different stakeholders concerning their perceptions of the nature of heritage value, the perceived purpose of impact assessment, the way impacts are assessed, and the differing agendas of stakeholders. In another article, dealing specifically with case of the Maritime City of Liverpool, the same authors noted that due to discursive differences in heritage management and different priorities amongst stakeholders, “decision making about spatial development projects is bound to include stakeholders with contrasting if not contradictory views” (Patiwael et al. 2020). Key to the effectiveness of HIAs, they maintain, is a more transparent impact assessment process in which local stakeholders are involved, which the recent guidelines are more attuned to.

It is interesting that of the three World Heritage sites delisted to date, two of those – Dresden and Liverpool – were delisted essentially because of aesthetic and urban fabric considerations brought about by proposed development, a bridge in the former and an urban regeneration project in the latter. The third, the onyx sanctuary in Oman, was delisted because of the discovery of oil

on site, the consequent extraction of which would in effect reduce the size of the protected area by 90%. Beyond the delisted sites, numerous other World Heritage sites are facing substantial threats due to resource extraction, logging or pollution, which arguably carry more profound implications. As recorded through the monitoring of the state of conservation reports, there were 411 reports on 79 World Heritage sites in 47 states parties concerning mining, oil or gas, or quarrying issues in the years 1984–2015 (<https://whc.unesco.org/en/extractive-industries/>). This is despite a ‘no-go’ commitment issued by the International Council on Mining and Metals in 2003 not to explore, or exploit for oil, gas or minerals in World Heritage. The aforementioned Guidance document reiterates the World Heritage Committee’s position that extractive industries and the construction of dams and reservoirs are incompatible with World Heritage status (UNESCO et al. 2022, 33).

The 2022 guidelines include a number of important changes in language and approach when compared to the 2011 document, a fact evident in the acknowledgement of local communities and Indigenous People throughout. The document contains several guiding principles, one of which states that “impact assessments should promote and encourage the effective, inclusive, and equitable participation of rights-holders, including Indigenous peoples, local communities, and other stakeholders” (UNESCO et al. 2022, 8). Principle 8 goes on to note that one of the World Heritage Convention’s strategic objectives is to enhance the role of communities in the implementation of the World Heritage Convention, and that all rights holders should be identified early and consulted, to allow their views to be meaningfully considered in the assessment. It encourages states parties to adopt human rights approaches, particularly as regards free, prior and informed consent (as per Operational Guidelines para. 12, 14bis, 39, 119). Importantly, the 2022 guidelines go into much greater depth about the steps to be taken in the assessment procedure and not only refers to OUV but also extends the scope of the assessment to include the relevant geographical, ecological and landscape areas around the heritage, while also considering any direct, indirect and cumulative impacts. Examples of ‘direct impacts’ include the demolition of a historic building, a road-widening project leading to habitat loss, the development of a visitor centre in a World Heritage property where it affects access, layout or spatial planning, or a significant increase in noise levels at a spiritually or ecologically sensitive World Heritage property, for instance. Examples of ‘indirect impact’ include changes in natural flow of water downstream from a new dam, roads which increase vehicular access to a World Heritage sites, or land-use plans leading to increased population density in historic towns. Finally, examples of ‘cumulative impact’ include multiple projects leading to the progressive loss of habitat, or increased construction of one-off buildings with the cumulative effect of reducing green space in a historic site.

Moreover, the 2022 policy document provides a step-by-step guide for carrying out heritage impact assessment, drawing a distinction between different types of assessment (Strategic Impact Assessment, Environmental and Social Impact Assessment, and Heritage Impact Assessment). Participation with local communities along with environment and heritage authorities is mentioned as a first step in the whole process. Several options for considering the impact of development are provided, including the use of ethnographic studies, site visits, socio-economic surveys, engagement activities, alongside landscape character assessments and other more traditional methods. The guidelines reiterate the spirit of “UNESCO Declarations, Conventions and Recommendations that contain important provisions regarding human rights, participation, community stewardship and customary practices governing access to culture and benefit sharing” and reference the 2018 UNESCO Policy on Engaging with Indigenous Peoples. It is worth remembering, however, that many World Heritage sites are home to Indigenous Peoples who were historically deprived of their cultural heritage – both tangible and intangible – and in some cases removed from their lands not because of development projects but by the state in order to facilitate World Heritage designation

itself. Worse still, there have been many natural nominations put forward by states that do not consider the culture of the local communities living in these places. For example, the Kaeng Krachan Forest Complex (Thailand) was inscribed on the World Heritage List in 2021 under criterion x (important natural habitats for in situ conservation of biodiversity),¹¹ despite the concerns over human rights violations against the Karen People. The state-centric nature of the World Heritage Convention has for a long time prevented Indigenous Peoples from being considered as genuine rights holders, although recent changes to the Operational Guidelines have begun to address this: in 2015, Indigenous peoples were referred to as stakeholders for the first time and in 2019, their status was enhanced to ‘rights holders’. This represents an attempt to bring World Heritage governance into greater symbiosis with human rights standards, in particular, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP 2007), which is mentioned by the new Guidance document in several places. One of the central tenets of UNDRIP is the need for states to consult Indigenous peoples and to obtain their free, prior and informed consent when making decisions that affect their lives and their lands, including development projects (article 19 and 32). There is also a slow move towards recognising Indigenous-led nominations for World Heritage status, where designation itself is perceived as a form of buffer from destructive development (see, for example, the emerging successful practice of community-led nominations of Pimachiowin Aki (Canada),¹² Budj Bim (Australia)¹³ and Murujuga (Australia, Tentative List)).¹⁴

Although World Heritage sites represent a fraction of the world’s cultural heritage, the standard-setting nature of the Convention means that the acknowledgement in the Guidelines of Indigenous Peoples and local communities, with concomitant rights to free, prior and informed consent and meaningful participation, should be read as a positive step towards improving the credibility of the World Heritage system and setting global standards for the conduct of heritage impact assessment elsewhere.

Akwé: Kon Voluntary Guidelines on Cultural, Environmental and Social Impact

While the World Heritage Guidelines now espouse a more human rights-based approach to impact assessment, the focus nevertheless rests on the World Heritage sites, which represent a fraction, albeit an important one, of the world’s cultural heritage. The norms developed in the context of the Convention on Biological Diversity (Article 8(j) dealing with traditional knowledge) espouse a more encompassing form of assessment, taking into account not only the material and immaterial aspects of cultural heritage but also cultural life in a broad sense. The Akwé: Kon Voluntary Guidelines for the conduct of cultural, environmental, and social impact assessments 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 were adopted in 2012 (Secretariat of the Convention on Biological Diversity (CBD) 2004). These Guidelines are geared towards parties and governments as well as international financial and development agencies, who are invited to take into consideration the need to incorporate and implement the guidelines within the framework of bilateral and multilateral cooperation efforts and to provide funds, as appropriate, for the *prevention* and mitigation of negative impacts and risk factors of proposed projects and policies (emphasis added). They were designed to be applied in conjunction with the guidelines for incorporating biodiversity-related issues into environmental impact assessment legislation and in strategic environmental assessment endorsed by the Conference of the Parties of the CBD. The Akwé: Kon Guidelines, albeit voluntary, provide a ten-step process and define cultural impact assessment as a process of evaluating the likely impacts of a proposed development on the

way of life of a particular group or community of people, with full involvement of the group or community of people including the option of the assessment being undertaken by the community themselves:

A cultural impact assessment will generally address the impacts, both beneficial and adverse, of a proposed development that may affect, for example, the values, belief systems, customary laws, language(s), customs, economy, relationships with the local environment and particular species, social organization and traditions of the affected community.

Cultural heritage impact assessment is defined as “a process of evaluating the likely impacts, both beneficial and adverse, of a proposed development on the physical manifestations of a community’s cultural heritage including sites, structures, and remains of archaeological, architectural, historical, religious, spiritual, cultural, ecological or aesthetic value or significance”. Although they are soft law norms, and although they were designed with traditional communities in mind, the tenets of Akwé: Kon could be applied in many contexts, especially since they approach impact assessment from a more culturally and socially minded standpoint. Their espousal of prevention rather than mere mitigation, and the mention of communities themselves conducting the assessment, makes them a worthy standard at the level of policy.

Heritage Impact Assessment, Public Interest and Legitimacy

The legislature has clearly provided that the desirability of preservation must yield to the exigencies of the common good including public interest in socio-economically beneficial development in the context of approved road development. This is the solution that the legislature chose in preference to making the preservation of national monuments an overriding objective.

(Smith J, *Salafia v. Minister for Environment, Heritage & Local Government*,
Meath County Council, Ireland and the Attorney General)

This statement, made by the presiding judge in the aforementioned Tara case brought before the Irish High Court challenging the motorway through the Tara cultural landscape, displays the belief that the planning process and EIA are fair, transparent and based on sound procedure (and that the completion of a motorway in this instance was in the public interest). The legislature sets out the terms of what constitutes a decision in the ‘public interest’, but this presupposes a functioning representative democracy where decision-making is deliberative. Like many comparable cases, Tara involved a large infrastructural intervention in an area important not only for tangible but intangible heritage and living beliefs. The development received substantial objection through the process of participation, including a public hearing with the most submissions ever made in the history of the Irish state. The EIA raised serious concerns over the project’s impact on the cultural landscape in question, and yet the project was approved nonetheless. This raises questions about the legitimacy of sovereign decision-making when that decision is not in the public interest, is portrayed as a binary heritage versus development issue, and masks more sinister links between vested interests and politics. There are many cases where the conservation of heritage sites is not in the general interest and should not trump other concerns, but this was not one of them. The extraordinary cultural significance of the Tara landscape, the lack of transparency in relation to the route selection, the violation of EU law in relation to the EIA, the complete disregard for international heritage standards, and on a practical level, the existence of alternative viable routes that would

not have been as damaging to the landscape of Tara as the one ultimately selected, made this a fact. The question is whether the law foresees a mechanism for challenging decisions of the state when impact assessment fails to prevent the wholesale destruction of important cultural heritage. What legal remedy is there in those cases where the EIA is clearly flawed or omitting crucial information, or where consultation took place but was tokenistic? Who determines what constitutes public interest? Is the route selection, which appears to have been based on a cost-benefit analysis favouring a maximising of returns for private investors, in the common good (Strecker and Newman 2023)?

In the EU context, compliance and legitimacy surrounding EIA became touchstone issues in controversies concerning major projects across the EU in the 1990s, particularly in states undergoing a phase of rapid infrastructural development, such as Ireland, Spain, Portugal and Greece. Among the environmental complaints submitted to the European Commission and the European Parliament at that time, the EIA Directive was the most cited EU instrument (Kramer 1997). As a result of the developing case law of the Court of Justice and international developments, the Directive was amended in 1997, clarifying and reinforcing a number of key provisions such as those concerning the selection of individual projects to undergo EIA. Directive 2003/35/EC then introduced provisions on public participation for the EIA process and the European Union became party to the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters in May 2005 (Decision 2005/370/EC). Articles 6–8 of the Aarhus Convention identify three occasions for the participation of the public: participation in decisions on specific activities; participation concerning plans, programmes and policies; and participation during the preparation of executive regulations and/or generally applicable legally binding regulatory instruments. Parties to the Convention must “inform people of decisions taken on proposed activities of all kinds which are likely to affect them” as well as “ensure that, when the final decision is taken on any proposed activity, the results of the public participation procedure are taken into consideration by the competent authorities”. The fact that cultural heritage is included within the scope of environmental factors and that a key requirement of procedural rights is integrating prior assessment with the decision-making process is significant. It means that there is a legal requirement to provide access to information, procedures for public participation and possibilities for judicial review for breaches involving cultural heritage. However, much of the operation of procedural rights in relation to cultural heritage will depend on the scope and definition of cultural heritage within national law, as well as the nature of standing requirements in various jurisdictions. In Ireland, for example, standing requirements are quite restrictive, whereas in the Netherlands public interest proceedings are often entertained before national courts (van den Broek and Enneking 2014). In practice, therefore, definitional issues, compliance and legitimacy of decision-making are still problems facing heritage impact assessment at the national level in practice.

There also exists a Corporate Social Responsibility dimension to assessment in the private sphere. Often referred to as the “social licence to operate” (Parsons et al. 2014), extractive industries have begun to develop their own guidelines including cultural heritage assessments (see for example, www.riotinto.com/sustainability/communities/cultural-heritage), yet these developments must always be seen as mitigation rather than proper assessment, and research from anthropology suggests that they may actually entrench power relations (Parsons et al. 2014). In addition, the language of cultural heritage management policy proffered by industry often conflicts with actual practice. In Northern Ireland at present, a Canadian Gold Mining Company, Dalradian Gold, is actively attempting a divide-and-rule approach in an effort to discredit widespread local opposition to the mine and carry favour with local politicians. Its website reads: “Dalradian plans to build a mine that benefits the local community, boosts the economy, and respects the Sperrins’ unique

landscape” (<https://dalradian.com/>). Despite the EIA process already having been completed, it has been critiqued by community groups and environmental NGOs as inadequate and erroneous in several respects (www.belfastlive.co.uk/news/belfast-news/public-inquiry-announced-dalradian-golds-18506985). The community have also felt completely excluded from the process, in violation of the Aarhus Convention, and the conduct of the mining company’s officials was the subject of a recent BBC Spotlight investigation (BBC Spotlight: Gold Rush in the Sperrins 2021). The idea that a local community operates on a level playing field as a large multinational belies the power relations and asymmetries involved in these types of extractive projects, which are increasingly being seen in the context of continued ecological collapse, sacrifice zones and the need for regenerative, post-extractive futures (Cirefice et al. 2022).

Concluding Observations

This chapter has shown how cultural heritage impact assessment is a fragmented area of law and policy that traverses national and international legal norms. At the national level, particularly in Europe, heritage impact assessment is predominantly undertaken as part of the EIA process. As noted, European EIA directives include consideration of the effects of development projects not only on environmental elements but also on cultural heritage and the landscape. In addition, EU law now acknowledges that conservation is increasingly becoming more people-centred (Directive 2014/52/EU of 16 April 2014). However, despite the influence of recent Council of Europe treaties on EU law, the conceptualisation of cultural heritage in EIA legislation is still a material one, where tangible heritage is often given prominence over the use and access to cultural heritage, and where landscape is still equated with view rather than substantive relationships between people and place. The emphasis on material heritage and aesthetics was also visible in the 2011 ICOMOS Guidance on Heritage Impact Assessment for World Cultural Heritage, which was linked to the Outstanding Universal Value of particular sites and their authenticity and integrity, rather than the relationships, needs and desires of the people living in or near those sites. The new guidelines for impact assessment in a World Heritage context issued in 2022 place much greater emphasis on community participation and the wider impact of development projects, not only on OUV but also on local communities and the wider landscape, a welcome development since, traditionally, World Heritage had been dominated by top-down approaches, necessitating experts and heritage managers, even though the substantive law governing cultural heritage itself has evolved into a more holistic notion of cultural heritage emphasising the importance of human rights and participatory governance.

The tide is therefore changing as regards the substance of heritage impact assessment, but as the cases discussed in this chapter illustrate, the practice is lagging behind. Cultural heritage is still viewed as something separate from social and cultural impact and even when cultural heritage is included in material form, issues of compliance and legitimacy persist. In many cases, development perceived to be of national or public interest is approved irrespective of the predicted negative impact on cultural heritage, and public participation made no substantive difference to the outcome of planned development. This substantiates research from cultural geography illustrating how participation is often equated with box ticking and rarely includes the very people likely to be most affected by the development in question (Jorgensen et al. 2016; Jones 2007). This is why access to information is a necessary prerequisite for meaningful participation, and access to justice is a necessary means to enforce the rights of access to information and participation. While preventative and precautionary measures, including an informed and participative debate, are much more favourable than litigation, it is not always the case that authorities act in the best interests

of cultural heritage protection, particularly when that heritage is important for a marginalised community living in an area earmarked for development or resource extraction. If heritage is ultimately linked to use, access and participation, assessment needs to prioritise the impact of the proposed development on the people most affected. In that regard, the assessment guidelines with perhaps the most resonance for a holistic notion of heritage are actually those drafted within the framework of the Convention on Biological Diversity, that is, the Akwé Kon Guidelines, which not only recommend participation but also contain more community agency by including the possibility for communities to conduct part of the assessment process itself.

In the meantime, public awareness and pressure campaigns are often an effective means to highlight the potentially negative impact of development on cultural heritage (in a broad sense) and raise information about the case so that people can participate. A recent example from Dublin is telling in this regard: a planning application was submitted for a large multi-story hotel complex on North King Street that would absorb the Cobblestone public house, Dublin's most famous music pub, an important cultural site for the traditional music scene in Dublin, where Irish language classes, dancing, impromptu sessions and other activities take place. The planned hotel envisaged reducing the space considerably, essentially keeping the façade of the building but obliterating the possibility of functioning as a social and cultural space. An information and awareness campaign was launched by a group of musicians and gained public traction, including guidelines for how to make a public submission as part of the planning process. As a result of the overwhelming number of third-party submissions received from members of the public (in the region of 700), the hotel development was refused planning permission (Dublin City Council Application No. 3617/21). Interestingly, Dublin City Council based its rationale for refusal on the grounds that the “proposed nine-storey over basement development would be overbearing and significantly out of scale and character with the prevailing architectural context, and would represent substantial over-development of this highly sensitive site” and that it “would be unduly dominant in the streetscape and visually incongruous” (<https://planning.agileapplications.ie/dublincity/application-details/146422>). This disconnect between the official reasons for refusal, emphasising the visual and architectural impact, compared to the perceived impact of the campaigners, which focused on the intangible cultural and social aspects, is directly related to the EIA carried out for the planning application. The impact assessment process included consideration of archaeological and architectural heritage, “townscape and visual impact assessment”, as well as water and waste management plans and design statements (ibid). It did not include an assessment of the intangible cultural heritage, which was the centre of concern in the protest campaign, third-party submissions and petition. The Cobblestone campaign was successful in this instance due to the public awareness campaign and open public consultation, but in the absence of a possibility to participate in the planning process, the main cultural (and social) importance of the site might not have been picked up. This highlights the fundamental need for intangible cultural heritage, as well as participation, to be included as part of the heritage impact assessment process from the outset.

Notes

- 1 This research has received funding from the European Research Council (ERC), under the EU's Horizon2020 research and innovation programme, grant agreement no. 853514.
- 2 See the chapter by Cittadino in this volume for a more in-depth discussion on heritage and environmental law.
- 3 OJ L 124, 25 April 2014, at 16.
- 4 OJ L 124, 25 April 2014, at 3, 16.
- 5 Case C-201/02, *Delena Wells* [2004] ECR I-723.

- 6 Case C-193/07 *Commission v. Republic of Poland* (Order of the President of the Court of 18 April 2007).
- 7 Case C-50/09, *Commission v. Ireland* (Judgment of the Court of 3 March 2011).
- 8 Meath Archaeological and Historical Society, Petition 546/2005 to the European Parliament Petitions Committee, supporting Petition No. 840/2004.
- 9 Report to the Minister of the Environment, Heritage and Local Government on the Archaeological Excavations along the M3 Navan-Dunshaughlin Route, March 2005.
- 10 Tentative List available at <https://whc.unesco.org/en/tentativelists/state=ie>.
- 11 Decision 44COM 8B.7.
- 12 Decision 42COM 8B.11 – Pimachiowin Aki, “The Land that Gives Life” (Canada).
- 13 Decision 43COM 8B.14 – Budj Bim Cultural Landscape (Australia).
- 14 Murujuga Cultural Landscape (Australia), Tentative Lists, available at <https://whc.unesco.org/en/tentativelists/6445/>, last accessed 15 January 2023.

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