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# **Aesthetics of Image in International Environmental Law**

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the degree of Doctor of Philosophy

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The Wurundjeri Peoples of the Kulin Nations are the traditional owners of the lands and waters that inspired this thesis. I recognise that sovereignty was never ceded to the territory called Australia and pay my respects to all Aboriginal and Torres Strait Islander Elders – past, present and emerging.

I would like to advise readers that the thesis contains the names of, and artwork by, deceased Aboriginal people.

## ABSTRACT

Environmental treaties often require judgements of aesthetic value yet how these judgements are made is not well understood. This thesis argues that images, particularly photographic images, are central to such judgements but that neither current practice nor scholarship properly account for the significance of images to decisions made under international law. Drawing on debates about aesthetic conceptions of the environment in the visual arts, and in the philosophy of environmental aesthetics, this thesis develops a critical understanding of image and aesthetic value in international law. My aim is to produce a jurisprudence of aesthetics adequate to the task of making image and aesthetic value meaningful in international environmental law.

In the thesis, I undertake doctrinal interpretations of aesthetic value for three international environmental treaties – the *World Heritage Convention*, the *Whaling Convention*, and the *Biodiversity Convention*. I find that aesthetic value is conflated and displaced with other environmental values in treaty practice. Aesthetic value is, for example, combined with natural beauty, cultural and ethical values, and overlooked in favour of scientific and economic values of the environment. I consider these practices to compromise reasoned decision-making and, ultimately, the protection of the environment under those treaties.

Referencing Anglo-American aesthetic philosophy, I engage visual art to reflect critically on the meaning of aesthetic value from photographs of the environment that I identify as artefacts used in treaty decision-making processes. I employ eco-critical perspectives to examine aesthetic values of natural beauty, the sublime and the picturesque in 19<sup>th</sup> century landscape art of Western Europe and Britain. Relying on the philosophy of environmental aesthetics, I conceive aesthetic value instead in terms of sensorial experiences of nature shaped by imagination, emotion and knowledge from different cultures. I maintain that this ‘now world’ aesthetic value of the environment can be understood from photographs as important, distinct and capable of protection in international law.

I contend that the interrogation of images by international bodies would facilitate the proper judgement of aesthetic and other environmental values to justify the cooperative efforts of a plurality of states in environmental protection. Yet I find that photographs are treated as records of fact in international decision-making processes. They are not formally recognised as representations with layered meanings. To ignore or refuse the place of representational images in international law is improper in jurisprudential terms and inconsistent with the good administration of justice. It also denies international legal practice the concepts and methods required to exploit images for their rhetorical purchase. I conclude that aesthetic methods for the visual arts must be repurposed to articulate meanings for images in the making, implementation and enforcement of international law.

In giving close attention to photographs used in treaty decision-making processes, I introduce the philosophy of environmental aesthetics to the interdisciplinary study of law and image, expanding the role of images in international law. I also make the environment’s aesthetic value visible to the practice of international environmental law in the face of indifference, from so many nation states, to the precious nature of the planet.

DECLARATION

I make the following declarations:

- i. The thesis comprises only my original work towards the degree of Doctor of Philosophy.
- ii. Due acknowledgement has been made in the text of this thesis to all other material used.
- iii. The thesis is fewer than 105,000 words in length, exclusive of the Table of Figures and the bibliography.
- iv. The thesis text is fewer than 80,000 words in length, exclusive of footnotes.
- v. The footnotes are over 20,000 words in length because they: conform to the *Australian Guide to Legal Citation 4* requiring long-form citations; are repeated for each individual Chapter; and include long titles of international legal materials.

.....  
Alice Dene Palmer

## PREFACE

The research for this thesis concluded on 1 December 2019.

The following publications include parts of the thesis:

- Alice Palmer, 'Legal Dimensions to Valuing Aesthetics in World Heritage Decisions' (2017) 26 (5) *Social & Legal Studies* 581
- Alice Palmer, 'Image and Art in the *Whaling in the Antarctic Case*' in Jani McCutcheon and Fiona McGaughey (eds), *The Research Handbook on Art and Law* (Edward Elgar, 2020) 408

I presented or otherwise discussed parts of my thesis at the following meetings:

- Paper, 'Aesthetic Borders in International Environmental Law' Borderlines: The Transnational and Domestic in Law and Legal Theory, Melbourne Doctoral Forum on Legal Theory, MLS (December 2014)
- Paper, 'Visualising Nature in World Heritage Decisions' Frontiers 3 Colloquium, National Environmental Law Association and CREEL, MLS (February 2017)
- Paper, 'Image and Art in the Whaling in the Antarctic Case', Art in Law in Art Conference, UWA Law School at Art Gallery of Western Australia (July 2017)
- Paper, 'Aesthetic Dissents in the *Whaling in the Antarctic Case*' and Session Chair, 'Dissents and Dispositions' Conference of the Law, Literature and Humanities Association of Australasia, La Trobe Law School and MLS (December 2017)
- Presenter, 'Valuing Aesthetics in World Heritage Decisions', Legal Theory and History Seminar Series, University of Tasmania, Faculty of Law (March 2018)
- Presenter, 'Wangechi Mutu, *The End of Carrying All* (2015)' at Workshop on Art and International Law, IILAH, MLS (May 2018)
- Participant, 'Art and Conflict: Investigating Cross-Disciplinary Methodology', Workshop, MLS (June 2018)
- Session Chair, 'Writing Place, Writing Laws: Laws and the Humanities in the 'Anthropocene'', MLS (May 2019)
- Participant, 'Law, Art and Politics', IILAH Interdisciplinary Masterclass with Professor Desmond Manderson, MLS (September 2019)

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I self-funded my research trips to Europe in 2015, 2017 and 2019.

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With my family have been friends. Sundhya Pahuja has deftly straddled the roles of long-time friend and professional mentor, and Emma Cornall and Carolina Lasén Diaz have been attentive and inquiring allies. They have each assured and accompanied me through this and other of life's conundrums. I thank the many other friends who have helped to shape my thoughts for the thesis. Some friends are colleagues. Sam Johnston has encouraged me with ideas and assisted me with introductions to people responsible for making international environmental law work. I am grateful to my other guides in international legal practice, Jacob Werksman and Philippe Sands QC, for teaching me the many ways in which law can be done.

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## CHAPTER 1 IN THE FRAME: AN INTRODUCTION

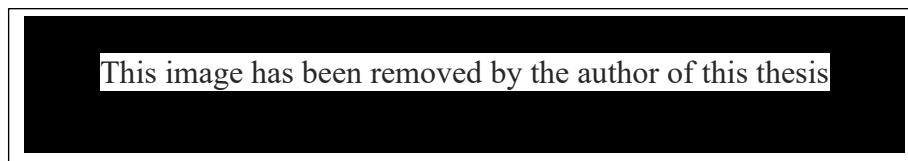


Figure 1.1: 'Picture 22. Ecotourism: ... H.R.H. Prince Philip visits Sierra Chincua' in Mexico, *Monarch Butterfly Biosphere Reserve*, Nomination file to World Heritage Committee (January 2007) 55. Photo: Carlos Gottfried, January, 1988

I've never seen swarming butterflies. I've been in fields with dozens about. I've picked my way cautiously over butterflies listing on the walkway in their enclosure at the Melbourne Zoo. But the winter destination for the Monarch Butterfly in Mexico looks to me, from this photograph (fig 1.1), to be another thing altogether. For here, I see them gathering in flocks, their iridescent wings making a deciduous autumn of evergreen firs. While still more, in their thousands, fly every which way. From this photograph, I feel the air pulsing from their festive movement, I hear the percussive rhythm of their wings and I inhale the coniferous scents stirred in their carnival. I imagine my enchanted self there, one of those people, in this photograph, hands on hips, gazing in wonder at those butterflies.

My response to this photograph describes an aesthetic appreciation of the natural environment that has been theorised in the philosophy of environmental aesthetics.<sup>1</sup> This is a form of aesthetic appreciation that has been distinguished from aesthetic value of the arts.<sup>2</sup> But the photograph comes from another discipline – international environmental law, a specialism of international law that includes treaties agreed between states to protect the environment.<sup>3</sup>

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<sup>1</sup> See Emily Brady, *Aesthetics of the Natural Environment* (Edinburgh University Press, 2003) ('*Aesthetics of Environment*'). Below in part 1, I discuss other vantages of aesthetic appreciation, including critical perspectives.

<sup>2</sup> Ibid.

<sup>3</sup> See generally Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press, 4<sup>th</sup> ed, 2018); cf Shawkat Alam, Sumudu Atapattu, Carmen G Gonzalez and Jona Razzaque (eds), *International Environmental Law and the Global South* (Cambridge University Press 2015).

Specifically, the photograph is one of several images contained in a document of the Mexican government nominating the Monarch Butterfly Biosphere Reserve for recognition under the *World Heritage Convention*.<sup>4</sup> The Mexican property was ultimately inscribed in the World Heritage List on the basis of the ‘aesthetic’ and ‘natural beauty’ values expressly identified in the treaty.<sup>5</sup> It is, however, not clear what, if any, bearing the photographs in Mexico’s nomination document had on the World Heritage Committee’s determination of aesthetic value.

The *World Heritage Convention* is one of three treaties studied in this thesis where images of the environment’s aesthetic value have been used in decision-making processes of international bodies. I also examine photographic images used in connection with the *Whaling Convention*<sup>6</sup> and the *Biodiversity Convention*.<sup>7</sup> In a dispute under the *Whaling Convention*, photographs of whales and whale parts were submitted by the parties to the International Court of Justice.<sup>8</sup> I maintain that those images invoked the aesthetic value of whales in the interpretation of the treaty. The *Biodiversity Convention* protects biodiversity values, expressed in the treaty to include aesthetic value.<sup>9</sup> Images of the environment appear in photographs used in documentation that informs decisions of the Conference of the Parties to that treaty.<sup>10</sup> None of the international bodies judging aesthetic value under those treaties explains the relevance of the photographs to their decisions.

#### Thesis questions

Against this background, I address two questions in this thesis. The first is specific to international environmental law. I consider how photographic images of the natural environment could be used to make aesthetic value meaningful in international environmental law. The second question for my thesis is relevant to international law more broadly. I ask what implications my attention to graphic images might have for the theory and practice of international law.

I find in relation to my first question that the environment’s aesthetic value is one of several environmental values, protected under international environmental treaties, that must be judged by international bodies. I maintain that aesthetic *judgement* is necessary to legal *judgments*, where those legal judgments are issued by a range of decision-makers authorised under treaties, including but not limited to judicial officers.<sup>11</sup> However, in practices of the international bodies

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<sup>4</sup> *Convention for the Protection of the World Cultural and Natural Heritage*, adopted 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) (*‘World Heritage Convention’*). See further Chapter 5.

<sup>5</sup> Ibid art 2. For inscription, see World Heritage Committee, *Monarch Butterfly Biosphere Reserve (Mexico)*, Decision 32 COM 8B.17, 32nd sess (2008), UN Doc WHC-08/32.COM/24Rev (31 March 2009) (*‘MBBR Inscription’*).

<sup>6</sup> *International Convention on the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) (*‘Whaling Convention’*).

<sup>7</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) (*‘Biodiversity Convention’*). See references to values in Conference of the Parties to the *Convention on Biological Diversity, The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets*, Decision X/2, 10<sup>th</sup> mtg, UN Doc UNEP/CBD/COP/DEC/X/2 (29 October 2010) annex (*‘Aichi Targets’*) [13].

<sup>8</sup> *Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Judgment)* [2014] ICJ Rep 226 (*‘Whaling in the Antarctic’*). See further Chapter 6.

<sup>9</sup> *Biodiversity Convention* (n7) preamble.

<sup>10</sup> Eg Secretariat of the *Convention on Biological Diversity* (2014) *Global Biodiversity Outlook 4* (*‘GBO-4’*).

<sup>11</sup> See generally Desmond Manderson, ‘Judgment in Law and the Humanities’ (2013) 1 *Revista Forumul Judecatorilor* 43.



making decisions under the three treaties studied for the thesis, aesthetic value has been conflated with, and displaced by, other environmental values. I consider these practices to have compromised the reasoned decisions of those bodies and, ultimately, the protection of aesthetic value under those treaties. On the broader thesis question concerning uses of image in international law, I identify ways in which photographic images are employed in treaty decision-making processes governed by international law. I maintain that international law has not developed methods for understanding graphic images as representations with meanings relevant to legal interpretation and judgement.

I conclude that photographs of the environment presented in international decision-making processes should be used for international environmental law as a basis for articulating the environment's aesthetic value through aesthetic philosophy. This articulation could conceive aesthetic appreciation of the environment in ways important for all nation states – derived from a sensorial experience of the natural environment that is shaped by imagination, emotion and knowledge from different cultures.<sup>12</sup> However, it would also reflect critical perspectives that understand aesthetic value as related but distinct from other environmental values such as natural beauty, cultural value and ethical value.<sup>13</sup> I maintain that, interrogated through images, the aesthetic value of the natural environment could be judged properly, together with other environmental values, to justify the cooperative efforts of a plurality of states in environmental protection. I conclude that aesthetic methods must be repurposed to identify images in the decision-making processes of international law and to articulate their role and significance in the making, implementation and enforcement of international law.

#### Thesis approach

My thesis is inter-disciplinary. It draws from different philosophies of aesthetics to give significance to the aesthetic value of the environment in international environmental law.<sup>14</sup> I rely on common and civil law theories of image to develop a jurisprudence of aesthetics for international environmental law.<sup>15</sup> I exploit a distinction made in Western European and Anglo-American aesthetic philosophy between the arts and the natural environment to reflect critically on understandings of aesthetic value. With aesthetic philosophy, I construct reasoned meanings of aesthetic value for international environmental law. My findings also equip the practice of international law in general with aesthetic methods for making, and critically analysing, meanings from photographs in international decision-making. In so doing, I reorientate the contemplation of aesthetic value for jurists and practitioners of international environmental law.<sup>16</sup>

In this first Chapter, I describe what lies within the frame of my thesis research. I explain in part 1 different vantages from which to understand aesthetic value from the photograph of butterflies submitted by Mexico to the World Heritage Committee (fig 1.1). An understanding of the different aesthetic vantages provides context for my thesis question about the role of photographs in making aesthetic value meaningful in international environmental law. I then

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<sup>12</sup> Brady, *Aesthetics of Environment* (n1).

<sup>13</sup> Eg Alan C Braddock and Christoph Irmscher (eds), *A Keener Perception: Ecocritical Studies in American Art History* (University of Alabama Press, 2009).

<sup>14</sup> On theory and practice, see Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press, 2016).

<sup>15</sup> See Chapter 4. Cf Peter Goodrich, 'The International Signs Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 365.

<sup>16</sup> Cf Alexander Gillespie, *International Environmental Law, Policy and Ethics* (Oxford University Press, 2<sup>nd</sup> ed, 2014). See further Chapter 2.

provide in part 2 an outline of the thesis through a brief description of each chapter. My conception of the terms ‘aesthetic’, ‘image’ and ‘international environmental law’ are explained there. In part 3, I describe the materials examined for the thesis and, in part 4, I situate my thesis in the different scholarships that inform it.

## 1. AESTHETIC VANTAGES

The *World Heritage Convention* protects natural properties deemed by the World Heritage Committee to be of ‘outstanding universal value’ from four ‘points of view’: aesthetic, scientific, conservation or natural beauty.<sup>17</sup> As explained earlier, the Monarch Butterfly Biosphere Reserve was added to the World Heritage List on the basis of a criterion for evaluating properties that references the aesthetic and natural beauty points of view.<sup>18</sup> There are, however, different aesthetic vantages from which to understand these values. Below I consider vantages on aesthetic value in the philosophy of environmental aesthetics, aesthetic philosophy of visual art, and the theory and practice of international environmental law.

### 1.1 Environmental Aesthetics

Some philosophers of environmental aesthetics argue that knowledge, including scientific knowledge, is integral to the aesthetic value of the environment.<sup>19</sup> These ‘objectivists’ say that an aesthetic sensibility informed by scientific insight – a sense of awe arising from the knowledge of the migratory feat of the butterflies, for example – draws on objective information that is not personal to any one individual.<sup>20</sup> A Statement of Outstanding Universal Value explains the World Heritage Committee’s determination of aesthetic and natural beauty values for the Monarch Butterfly Biosphere Reserve. It articulates a scientific viewpoint that is consistent with the vantage of an aesthetic philosophy tied to science:

The overwintering concentration of the monarch butterfly in the property is the most dramatic manifestation of the phenomenon of insect migration. Up to a billion monarch butterflies return annually, from breeding areas as far away as Canada, to land in close-packed clusters within 14 overwintering colonies in the oyamel fir forests of central Mexico. The property protects 8 of these colonies and an estimated 70% of the total overwintering population of the monarch butterfly's eastern population.<sup>21</sup>

The superlatives, numbers and percentages in the Statement of Outstanding Universal Value speak to measures and comparison. But the statement makes no mention of the ‘aesthetic’ or ‘natural beauty’ points of view posited in the treaty and referenced in the criterion against which the property was assessed. The measured bureaucratic prose provides little insight into the aesthetic qualities of the natural phenomenon that has been afforded the World Heritage imprimatur.<sup>22</sup>

In contrast to the Statement of Outstanding Universal Value, the photograph submitted by Mexico (fig 1.1) is readily understood from the vantage of an aesthetic sensibility. My

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<sup>17</sup> *World Heritage Convention* (n4) art 2.

<sup>18</sup> *MBBR Inscription* (n5).

<sup>19</sup> Eg ‘The Natural Environmental Model’ in Allen Carlson, *Aesthetics and the Environment: The Appreciation of Nature, Art and Architecture* (Routledge, 2000) 6. On positive aesthetics, see *ibid* 72.

<sup>20</sup> On objectivist and subjectivist orientations, see *ibid* xix.

<sup>21</sup> World Heritage Committee, *Monarch Butterfly Biosphere Reserve (Mexico)*, Statement of Outstanding Universal Value in *MBBR Inscription* (n5) (‘MBBR OUV Statement’).

<sup>22</sup> Cf reference to sounds, *ibid*. See further Chapter 5.

understanding of the Monarch Butterfly Biosphere Reserve that introduced this Chapter articulates aesthetic value in terms of sensorial experience shaped by my imagination, emotion and my knowledge, informed by personal experiences and cultural influences. From the photographs, I imagine the sights, sounds, touch and scents of the place in ways personal to me. This is the aesthetic value of ‘subjectivists’ in the philosophy of environmental aesthetics.<sup>23</sup> For those philosophers, aesthetic value is a personal or intuited value understood differently by different people. My aesthetic imagining of swarming butterflies in terms of delight, for example, could be viewed by others with a sense of dread – the furtive movement of the insects a disquieting sign of looming disaster.<sup>24</sup>

## 1.2 Aesthetics of Visual Art

The photograph of butterflies submitted by Mexico (fig 1.1) introduces still further vantages in aesthetic philosophy: those on visual art and image. Environmental aestheticians work within a broader field of Western European and Anglo-American aesthetic philosophy that includes historians, theorists and critics of the arts.<sup>25</sup> Aesthetics of the arts, including visual art, has been the principal focus of aesthetic philosophy since the 19<sup>th</sup> century.<sup>26</sup> A resurgence in scholarship on aesthetics of the natural environment, as distinct from the arts, took hold in the 1960s.<sup>27</sup> Contemporary scholars of aesthetic philosophy interrogate the relationship between first-hand aesthetic experiences of the environment studied in environmental aesthetics, and the aesthetic appreciation of graphic images that is analysed in, for example, art theory and practice. Some environmental aestheticians argue that aesthetic concepts for the arts, such as ‘natural beauty’, can inform, but do not alone determine, aesthetic sensations in the natural environment.<sup>28</sup>

Analysed in terms of aesthetic philosophy of visual art, a photograph could be appreciated for its formal qualities, its signs and symbols, or the many ways in which the images can be contextualised.<sup>29</sup> As discussed below, an aesthetic appreciation of the photograph in Mexico’s nomination document – as opposed to the *in situ* appreciation of the environment depicted in the photograph – could interrogate any number of these elements of the image to identify a range of meanings arising from the image.<sup>30</sup>

In terms of formal qualities, for example, the photograph has a nostalgic, saturated hue. From this I might wonder if the butterflies are now lost to us, another casualty of the Anthropocene.<sup>31</sup>

<sup>23</sup> Also described as ‘non-cognitivist’, see Brady, *Aesthetics of Environment* (n1) 87. For non-cognitivist appreciation of butterflies, see *ibid* 135 cf 138.

<sup>24</sup> See generally Emily Brady, *The Sublime in Modern Philosophy: Aesthetics, Ethics and Nature* (Cambridge University Press, 2013).

<sup>25</sup> See generally Jerrold Levinson, ‘Philosophical Aesthetics: An Overview’ in Jerrold Levinson (ed), *The Oxford Handbook of Aesthetics* (Oxford University Press, 2003) 3.

<sup>26</sup> See eg Robert Stecker, *Aesthetics and the Philosophy of Art: An Introduction* (Rowman & Littlefield, 2<sup>nd</sup> ed, 2010) 3. See generally John A Fisher, ‘Environmental Aesthetics’ in Jerrold Levinson (ed), *The Oxford Handbook of Aesthetics* (Oxford University Press, 2003) 667.

<sup>27</sup> Ronald Hepburn, ‘Contemporary Aesthetics and the Neglect of Natural Beauty’ in Bernard Williams and Alan Montefiore (eds), *British Analytical Philosophy* (Humanities Press, 1966). See further Chapter 2.

<sup>28</sup> See eg Salim Kemal and Ivan Gaskell, ‘Nature, Fine Arts, and Aesthetics’ in Salim Kemal and Ivan Gaskell (eds), *Landscape, Natural Beauty and the Arts* (Cambridge University Press, 1993) 1. See further Chapter 2, part 2.3.

<sup>29</sup> See generally Stephen Davies and Philip Alperson, *The Philosophy of Art* (Wiley Blackwell, 2016).

<sup>30</sup> I describe here different aesthetic methods developed in Chapters 5–7.

<sup>31</sup> On threats, see eg World Heritage Committee, *Monarch Butterfly Biosphere Reserve (Mexico)*, Decision 43 COM 7B.27, 43<sup>rd</sup> sess, UN Doc WHC/19/43.COM/18 (23 July 2019). See also World Heritage Centre, ‘Sadness

Equally, I could question whether the image has been altered – a wash skilfully added, contrasts manipulated – to emphasise the supernatural powers of the insects. I might discover that the photograph has been cropped so that we do not see the crowd of tourists alighting a bus outside the frame. I could also consider the image in light of signs and symbols from art theory and practice. I might, for example, see it as a depiction of natural beauty, or of the sublime or even of the picturesque – all terms of art with particular meanings that have evolved in aesthetic philosophy in respect to landscape art.<sup>32</sup>



Figure 1.2: Diana Thater, *Untitled* (Butterfly Videowall 2), 2008. Courtesy of Artist and Hauser & Wirth, © Diana Thater. Photo: Mike Bruce

I could also assume a critical view of the image, including an eco-critical view informed by artworks and art history, as well as by natural history and socio-political critique.<sup>33</sup> A video installation by artist Diana Thater (fig 1.2), for example, shows monarch butterflies on screens underfoot. Her images speak to human constructions and framing of nature: recorded, dissected, enlarged and illuminated, nature is visible and resilient.<sup>34</sup> However, the technological intervention also isolates, divides and renders nature surreal and superficial. Referencing this artwork in my aesthetic analysis of the photograph submitted to the World Heritage Committee, I might note that the butterfly migration from Canada and the United

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and Concern at the Death of Mr Homero Gómez González', (News, 31 January 2020) <<https://whc.unesco.org/en/news/2080>>. On 'anthropocene', a contested term for a current geological era of human-induced change, see eg Jan Jagodzinski (ed), *Interrogating the Anthropocene: Ecology, Aesthetics, Pedagogy, and the Future in Question* (Palgrave Macmillan, 2018).

<sup>32</sup> See Brady, *Aesthetics of Environment* (n1) 32.

<sup>33</sup> Braddock and Irmscher, (n13). See further Chapter 4.

<sup>34</sup> Cf Lee Godden, 'Preserving Natural Heritage: Nature as Other' (1998) 22 *Melbourne University Law Review* 719.

States to Mexico is without regard for walls or political borders – this natural world is whole, undivided. But it is a natural world conceived in the photograph as being separate from humans. The people here gaze upon nature as a curiosity, visitors to an alien world. And, it could be observed that these are no ordinary people. The man to the right is Prince Philip, the British Queen’s consort. A monarch gazing on monarchs. His pate aglow with beneficence. What might he see when he looks down his upturned nose as Empire?<sup>35</sup>

### 1.3 International Environmental Law

An aesthetic vantage on the photograph submitted by Mexico, analysed from the perspectives of either environmental aestheticians or art theorists, can take me far from the facts and figures emphasised by the World Heritage Committee in the Statement of Outstanding Universal Value for the Monarch Butterfly Biosphere Reserve.<sup>36</sup> The vantages of aesthetic philosophers evident from an analysis of the photograph are different from each other – their perspectives on the environment and on images of the environment can differ – and they are also, to a greater or lesser extent, both different from the vantage of natural scientists apparent in the Statement of Outstanding Universal Value.<sup>37</sup>

It is, however, not clear that any of those views corresponds to the vantage point of international environmental lawyers in their understanding of the legal qualities and outcomes of World Heritage determinations of outstanding universal value from an ‘aesthetic’ point of view, for the purposes of article 2 of the *World Heritage Convention*.

Both the Statement of Outstanding Universal Value, and the photograph, are artefacts in a process for determining value that is governed by an international environmental treaty. The statement has been endorsed by the World Heritage Committee in its decision to inscribe the property.<sup>38</sup> The photograph is included in the state party nomination document,<sup>39</sup> and has been included under the ‘gallery’ tab dedicated to the property in the online World Heritage List.<sup>40</sup> I argue that both the text and image represent meanings of aesthetic value but only the written statement might qualify as a source of international law, or for interpretation in the doctrinal practice of international law:<sup>41</sup> the sources of international law and international treaty interpretation are commonly derived from written texts.<sup>42</sup> Consideration for the photograph in international legal practice would therefore first require an understanding of graphic images as a source of legal interpretation. It would also demand methods in international law for articulating the value of the environment represented in such images in aesthetic terms.

With this in mind, my thesis sets out to show why and how aesthetic method matters for meanings of aesthetic value in international environmental law.

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<sup>35</sup> See Chapter 7. See further John M MacKenzie, *The Empire of Nature: Hunting, Conservation, and British Imperialism* (Manchester University Press, 1997) 202.

<sup>36</sup> See Chapter 5.

<sup>37</sup> MBBR OUV Statement (n21).

<sup>38</sup> *MBBR Inscription* (n5).

<sup>39</sup> Mexico, *Monarch Butterfly Biosphere Reserve*, Nomination file to World Heritage Committee (January 2007).

<sup>40</sup> World Heritage List, *Monarch Butterfly Biosphere Reserve (Mexico)* available at <<http://whc.unesco.org/en/list/1290/gallery/>>.

<sup>41</sup> In accordance with the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*‘Vienna Convention’*). See discussion below part 2.1.2.

<sup>42</sup> See further Chapter 3, part 5.

## 2. THESIS OUTLINE

My thesis follows several tracks through eight chapters. This introductory Chapter 1 frames the issues for the thesis while the concluding Chapter 8 explains my findings and anticipates ways to develop those findings in practice. Different vantages on aesthetic value – described above in part 1 in terms of the philosophy of environmental aesthetics and of the arts, and the practice of international environmental law – are examined in Chapters 2 to 4 and then employed through case studies in Chapters 5 to 7. I begin each chapter with an artwork ‘exhibit’ that I analyse from an aesthetic perspective to introduce the themes addressed, and the methods of analysis applied, in the relevant chapter. Below, I explain the structure of the thesis through a detailed description of Chapters 2 to 4 and of Chapters 5 to 7.

### 2.1 Scholarship and practice on aesthetics and image

Chapters 2 to 4 situate my thesis in scholarship and international legal practice. Chapter 2 reviews the relevant literature on the philosophy of environmental aesthetics and the scholarship on environmental values in international environmental law. In Chapter 3, I analyse the meaning of ‘aesthetic’ value in accordance with doctrinal rules of treaty interpretation. I review the literature on aesthetic methods for visual art and on the jurisprudence of law and image in Chapter 4. Through these chapters, different approaches to understanding the term ‘aesthetic’ in aesthetic philosophy, and in the philosophy and practice of law, are explained and examined. Aesthetic philosophy, and the distinctions made in it between the environment and the arts, are important to my later analysis, in Chapters 5 to 7, of the meaning of aesthetic value through photographs of the environment used in treaty processes.

#### 2.1.1 *Aesthetic value of the environment*

Chapter 2 outlines the principal themes of the philosophy of environmental aesthetics before examining the ways in which scholars of international environmental law have characterised aesthetic value as an environmental value. As I explained above in part 1, environmental aesthetics is a field of aesthetic philosophy that has emerged in contemporary Western European and Anglo-American philosophy as a counterpoint to aesthetic understandings of the arts. In Chapter 2, I explain conceptions of the ‘natural environment’ and ‘nature’ in terms of environmental aesthetics. I also set out the distinctions made between objectivists and subjectivists that I discussed earlier,<sup>43</sup> describing philosopher Emily Brady’s ‘integrated’ theory of environmental aesthetics as sympathetic to both.<sup>44</sup> My characterisation of the aesthetic value of the environment through the remainder of the thesis relies principally on the scholarship of Emily Brady, a prominent philosopher of environmental aesthetics.<sup>45</sup>

The Chapter then addresses scholarship on international environmental law that has examined the ‘aesthetic’ value of the environment protected under the terms of several international environmental treaties. Scholars characterise ‘international environmental law’ as a specialism of ‘international law’ directed at the ‘environment’.<sup>46</sup> They recognise aesthetic value as one of

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<sup>43</sup> See above part 1.1.

<sup>44</sup> See Brady, *Aesthetics of Environment* (n1) 3.

<sup>45</sup> Professor Emily Brady is Susanne M and Melbern G Glasscock Director and Chair of the Glasscock Center for Humanities Research and Professor of Philosophy at Texas A&M University, formerly Professor of Environment and Philosophy, Institute of Geography and the Lived Environment, University of Edinburgh. For Brady’s scholarship, see further Chapter 2, part 2.2.

<sup>46</sup> See eg Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2010); cf Tim Stephens, ‘What Is the Point of International Environmental Law Scholarship in the



several environmental values motivating states in their international agreement to protect the environment. Several conflate aesthetic value with natural beauty and most conceive of environmental values in terms of the philosophy of environmental ethics as opposed to the philosophy of aesthetics that I employ in my thesis.<sup>47</sup> None of those identified in my research has relied on doctrinal methods of treaty interpretation to describe aesthetic value where it appears in the terms of treaties,<sup>48</sup> an exercise I undertake in Chapter 3.

### 2.1.2 Legal interpretation of aesthetic value

The practice of international environmental law, as a specialist discipline of international law, relies on customary rules of treaty interpretation to construct meanings for terms in international treaties.<sup>49</sup> In Chapter 3, I employ these doctrinal methods of treaty interpretation to define ‘aesthetic’ value for the three international treaties that form the basis of my case studies in Chapters 5 to 7: the *World Heritage Convention* and the *Biodiversity Convention*, in which ‘aesthetic’ value is an express term, and the *Whaling Convention* where, for reasons I explain, aesthetic value informs the interpretation of the treaty. Those methods of interpretation include identifying the ‘ordinary’ meaning of terms in treaties, as well as meanings intended by the negotiators of the treaty, and meanings that have emerged over time through the practice of the parties and the international community.<sup>50</sup> This orthodox approach to treaty interpretation is a ‘vantage’ point available in international environmental law to construct meanings for the environment’s ‘aesthetic’ value that is different from the vantages described in Chapters 2 and 4.

My analysis of the environment’s aesthetic value in accordance with doctrinal methods of treaty interpretation proposes different meanings of ‘aesthetic’ value. The ‘aesthetic’ value protected by international environmental treaties could have meanings associated with the sensorial appreciation theorised in environmental aesthetics. However, the practice of the states parties to the treaties is suggestive of aesthetic values that are conflated with natural beauty, cultural value and ethical concerns.<sup>51</sup>

As explained earlier, the orthodox sources contemplated in the service of treaty interpretation are written texts.<sup>52</sup> However, the practices of the parties that are suggestive of agreed meanings of aesthetic value include the processes by which international bodies make decisions under the treaties on the environment’s aesthetic value. These processes are replete with photographs of the environment.<sup>53</sup> In the case study Chapters 5 to 7, I analyse those photographs using aesthetic methods to interrogate the meaning of the environment’s aesthetic value. First, however, I explain in Chapter 4 the aesthetic and legal scholarship relevant to the analysis of meanings from graphic images that I reference in the case studies.

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Anthropocene?’ in Ole W Pedersen (ed), *Perspectives on Environmental Law Scholarship: Essays on Purpose, Shape and Direction* (Cambridge University Press, 2018) 121.

<sup>47</sup> See Chapter 2, part 3.2.

<sup>48</sup> Cf Alice Palmer, ‘Legal Dimensions to Valuing Aesthetics in World Heritage Decisions’ (2017) 26(5) *Social & Legal Studies* 581 (‘Aesthetics in World Heritage Decisions’).

<sup>49</sup> Codified in the *Vienna Convention* (n41). See generally Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2<sup>nd</sup> ed, 2015).

<sup>50</sup> Cf Jan Klabbers, ‘Virtuous Interpretation’ in Malgosia Fitzmaurice, Olufemi Elias, Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, 2010) 17, 37. Note I refer to records of meetings of the International Whaling Commission, but ICJ practices are analysed in Chapter 6; see below part 2.2.2.

<sup>51</sup> See Chapter 3.

<sup>52</sup> See above part 1.3.

<sup>53</sup> See below part 2.2.

### 2.1.3 Aesthetics of image in law

In contrast to the orientation of aesthetic philosophy known as ‘environmental aesthetics’ that I examine in Chapter 2, in Chapter 4 I engage the more prominent orientation of aesthetic philosophy as it concerns the arts. I consider the relevance of the arts to law in general, and to international environmental law in particular. Chapter 4 introduces the methods for analysing visual art that I described above in part 1 of this Chapter, and which I employ in my analysis of the photographs in treaty decision-making processes in Chapters 5 to 7. I explain in Chapter 4 the distinction made in aesthetic philosophy between graphic images and other visual images such as optical, verbal, mental or perceptual images.<sup>54</sup> Verbal images are, for example, created by written or spoken words, but it is images in graphic form that are the focus of my thesis. My conception of graphic image contemplates the photographs that are used in decision-making processes under my three case study treaties for their depictions of natural environments, as opposed to graphic characterisations of the environment in maps and diagrams.<sup>55</sup>

After reviewing the literature on aesthetic philosophy of the arts, Chapter 4 describes the legal scholarship on aesthetics, and the specific treatments of ‘image’ in what is known as visual jurisprudence, alternatively described by Desmond Manderson as ‘imaginal law’.<sup>56</sup> Jurisprudents of aesthetics maintain that the iconoclasm of the European Reformation shifted law’s authority from the emotionally encumbered graphic images of the Catholic Church to the dispassionate authority of the posited word.<sup>57</sup> Visual image, some of those scholars observe, is tolerated in domestic legal spheres today only in so far as it is seen to denote facts, rendering law blind to its aesthetic import.<sup>58</sup> Most of this theoretical work has been from the perspective of *domestic* law, specifically common and civil law, with only some jurisprudents addressing the relationship between *international* law and aesthetics.<sup>59</sup> Relatively few of these scholars have analysed aesthetics and international *environmental* law.<sup>60</sup> None of those identified in my research has combined understandings of image in the aesthetic philosophy for the arts, and of environmental aesthetics, to analyse the concept of aesthetic value as an expression of international environmental law.<sup>61</sup> This is the task I undertake in Chapters 5 to 7.

### 2.2 Aesthetic value of the environment in photographs

Chapters 5 to 7 examine understandings of aesthetic value from images used in decision-making processes of the three international environmental treaties that I examine for meanings of aesthetic value from a doctrinal perspective in Chapter 3. Images in the form of photographs are my focus. My analysis in the case study chapters is from the perspective of both the philosophy of environmental aesthetics and aesthetic theory as it relates to the arts. I consider

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<sup>54</sup> WJT Mitchell, *Iconology: Image, Text, Ideology* (University of Chicago Press, 1986) 10. See further Chapter 4.

<sup>55</sup> See generally Barbara Savedoff, *Transforming Images: How Photography Complicates the Picture* (Cornell University Press, 2000). See further Chapter 4.

<sup>56</sup> Desmond Manderson, ‘Introduction: Imaginal Law’ in Desmond Manderson (ed), *Law and the Visual: Representations, Technologies and Critique* (University of Toronto Press, 2018) 3, 4 citing Chiara Bottici, *Imaginal Politics* (Columbia University Press, 2014).

<sup>57</sup> See eg Costas Douzinas and Lynda Nead, ‘Introduction’ in Costas Douzinas and Lynda Nead (eds), *Law and the Image: The Authority of Art and the Aesthetics of Law* (University of Chicago Press, 1999) 1, 8.

<sup>58</sup> See eg Richard K Sherwin, *Visualizing Law in the Age of the Digital Baroque: Arabesques and Entanglements* (Routledge, 2011).

<sup>59</sup> See Chapter 4. Cf Ed Morgan, *The Aesthetics of International Law* (University of Toronto Press, 2007).

<sup>60</sup> See Chapter 4. Cf Alice Palmer, ‘Image and Art in the *Whaling in the Antarctic Case*’ in Jani McCutcheon and Fiona McGaughey (eds), *The Research Handbook on Art and Law* (Edward Elgar, 2020) 408.

<sup>61</sup> Cf Palmer, *Aesthetics in World Heritage Decisions* (n48).



the treaties in a chronological order relevant to their adoption or amendment: the 1972 *World Heritage Convention*; the 1982 amendment to the 1946 *Whaling Convention* to ban commercial whaling;<sup>62</sup> and the 1992 *Biodiversity Convention*. Also relevant to my aesthetic analysis of the photographs, is the object of aesthetic appreciation under the treaties. The environments valued for their aesthetic qualities under the treaties represent an evolution in international environmental law from species and spaces to systems.<sup>63</sup> That the parties to the treaties represent a diverse range of aesthetic traditions is also relevant to my analysis of different cultural appreciations of the environment's aesthetic value: each treaty has a large number of states parties from different regions of the world.<sup>64</sup> In my concluding Chapter 8, I consider ways of working with aesthetic method in the practice of the three treaties and in international law more widely. I describe each of the case study chapters below.

### 2.2.1 World Heritage Convention

In Chapter 5 of the thesis, I analyse from the perspective of environmental aesthetics and art theory, two forms of image created in the process of inscribing natural properties in the World Heritage List for their aesthetic value under the *World Heritage Convention*: verbal images in the Statements of Outstanding Universal Value endorsed by the World Heritage Committee; and photographs submitted by states parties in nominations of natural properties to the World Heritage List. I find that descriptions common to notions of 'beauty', the 'sublime' and the 'picturesque' from art theory are evident in official Statements of Outstanding Universal Value. In some cases, such concepts are also projected in the photographs of aesthetically-valued sites. However, some photographs, including the photograph of butterflies at the Monarch Butterfly Biosphere Reserve (fig 1.1), also connote aesthetic values as a sensorial experience of the environment consistent with the philosophy of environmental aesthetics.

In Chapter 5, I maintain that the World Heritage Committee is uncritical in its use of concepts and methods associated with aesthetic theory and unclear about the role of photographs in determinations of aesthetic value under the *World Heritage Convention*. I argue that a reasoned determination of aesthetic value should engage concepts and methods developed in aesthetic philosophy to evaluate the aesthetic value of natural properties nominated for inscription on the World Heritage List. Recourse to aesthetic philosophy would include understanding and accounting for the role of photographs as representations of aesthetic value in the decision-making process under the treaty as well as providing a basis for interpreting those representations.

### 2.2.2 Whaling Convention

Chapter 6 of the thesis undertakes an aesthetic analysis of the photographic images submitted by the parties to the International Court of Justice (ICJ) in *Whaling in the Antarctic*.<sup>65</sup> That dispute, between Australia and Japan, concerned an exception to bans on whaling for scientific

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<sup>62</sup> *Whaling Convention*, Schedule, clause 10(e). See 'Verbatim Record', International Whaling Commission, 34<sup>th</sup> Annual Meeting (19-24 July 1982) *Agenda item 6 Ending of Commercial Whaling* 72, 86.

<sup>63</sup> See eg 'History' in Sands and Peel (n3) 21.

<sup>64</sup> As at 31 December 2019, the *World Heritage Convention* and *Biodiversity Convention* have near universal membership of 193 and 196 parties respectively: United Nations Educational Scientific and Cultural Organization, 'Resources: Conventions' <<https://en.unesco.org>>; United Nations Treaty Collection, 'Depositary: Status of Treaties', <<https://treaties.un.org/>>. The contracting members of the *Whaling Convention* have fluctuated, made up from July 2019 of 88 states (following withdrawal of Japan): see <<https://www.state.gov/depositary-status-lists/>>.

<sup>65</sup> *Whaling in the Antarctic* (n8).

research under the *Whaling Convention*.<sup>66</sup> The Chapter identifies the photographs of whales used in the ICJ proceedings before considering their potential role as evidence and as rhetoric. For this purpose, I characterise rhetoric as a legitimate means of legal argument.<sup>67</sup> I explain that the formal practice of the ICJ is limited to conceptions of graphic images as evidence. To appreciate the rhetorical significance of the photos, I argue that aesthetic theory must be employed first to understand the photographs as representations of aesthetic values rather than records of fact. Aesthetic method can then be engaged to articulate the relevance of those representations to legal argument and judgment. I undertake an aesthetic analysis of the whale photographs in the case, with reference to art history in Australia and Japan, to suggest ways in which the images support or undermine the parties' arguments.

Like my analysis in connection with the *World Heritage Convention*, my findings in Chapter 6 show again that the capacity for photographs to convey meanings relevant to decisions made under international treaties is not acknowledged in the formal practices of the international bodies authorised to make those decisions. I argue from a jurisprudential perspective that reasoned submissions from parties to the ICJ, and decisions of the ICJ, should engage aesthetic methods to articulate the significance of photographs to findings of law in international disputes.

### 2.2.3 Biodiversity Convention

In Chapter 7 of the thesis, I consider the extent to which photographs used in the work of the *Biodiversity Convention* contribute to an understanding of aesthetic value and its relationship to the cultural value of biodiversity also protected under the treaty. The Chapter revisits and expands on legal constructions of the meanings of aesthetic value developed in Chapter 3 using the orthodox sources and methods of treaty interpretation. It then proceeds with an aesthetic account of the photographs used in the *Global Biodiversity Outlook*, a report that informs the states parties' implementation of the *Biodiversity Convention* through the governing body, the Conference of the Parties. I find that the representations of biodiversity values in the photographs are incoherent, suggesting fragmented meanings of aesthetic values as scenic beauty, wilderness, culture and subsistence.

Expert advisors to the parties to the treaty have recognised that the aesthetic value of biodiversity cannot be reduced to the economic valuations of biodiversity common to parties' assessments of biodiversity values.<sup>68</sup> I argue that a critical aesthetic analysis of photographs of biodiversity can serve to articulate pluralised appreciations of biodiversity in terms not associated with economic gains for the state. This would, I maintain, assist understandings of biodiversity values that the parties have identified through their Aichi Targets as fundamental to implementing the *Biodiversity Convention*.<sup>69</sup> I close Chapter 7 with a discussion of possible applications of the aesthetic analysis of photographs in two areas relevant to interpretation of the *Biodiversity Convention*: formal guidance on images; and methods for valuing biodiversity.

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<sup>66</sup> *Whaling Convention* (n6) art VIII.

<sup>67</sup> See generally Iain Scobbie, 'Rhetoric, Persuasion, and Interpretation in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP, 2015) 61. See further Chapter 6.

<sup>68</sup> See eg Paul W Leadley et al, *Progress Towards the Aichi Biodiversity Targets: An Assessment of Biodiversity Trends, Policy Scenarios and Key Actions* (Technical Series 78) (Secretariat of the Convention on Biological Diversity, 2014) 12.

<sup>69</sup> *Aichi Targets* (n7).

### 3. RESEARCH MATERIALS AND METHODS

The materials examined in this thesis pertain to the decision-making processes of international bodies under international environmental treaties that are governed by international law. I also use artworks as materials for my aesthetic analysis. As explained below, my methods of research vary, depending on the nature of the research material.

#### 3.1 Materials from decision-making

The principal objects of my inquiry are the photographs used in processes of international bodies that judge the environment's aesthetic value under international environmental treaties. My case studies in Chapters 5 to 7 examine a combination of the written treaty texts, the formal rules governing the processes established for making judgements of aesthetic value under the treaties, and the legal decisions arising from those judgements.

The judgements of aesthetic value analysed for each treaty are made in the context of decisions authorised by each treaty. The decisions are made for different juridical purposes: administration, enforcement, and implementation. In the case of the *World Heritage Convention*, the determination of aesthetic value is made in the administration of the treaty for the decisions of the World Heritage Committee to inscribe natural properties on the World Heritage List.<sup>70</sup> A selection of inscriptions made at different times but all justified on the basis of aesthetic importance – either alone or in conjunction with other ‘points of view’<sup>71</sup> – are considered in the thesis. My analysis of understandings of aesthetic value relevant to the *Whaling Convention* centres on the enforcement of the treaty by the ICJ in *Whaling in the Antarctic*.<sup>72</sup> For the *Biodiversity Convention*, my focus is a decision of the Conference of the Parties in 2010 agreeing to the ‘Aichi Targets’ for the implementation of the treaty.<sup>73</sup> The Aichi Targets include targets relevant to biodiversity values – values which, I argue in the thesis, are those expressed in the treaty’s preamble to include aesthetic value.

I identify photographs of those aspects of the ‘environment’ that are protected by the treaties – respectively natural areas, whales and biological diversity – in the processes leading to judgements of aesthetic value under the three treaties. World Heritage inscriptions are made following the submission and commission of different documentation, including the files of the states parties nominating natural properties to the World Heritage Committee for inscription.<sup>74</sup> These files include photographs of the nominated properties.<sup>75</sup> As is typical in proceedings before the ICJ,<sup>76</sup> the Judgment in *Whaling in the Antarctic* was delivered after written and oral submissions from the states parties to the dispute. These submissions included photographs of whales.<sup>77</sup> Progress in the implementation of the Aichi Targets was the subject

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<sup>70</sup> *World Heritage Convention* (n4) art 11.

<sup>71</sup> Ibid art 2 refers to aesthetic, scientific, conservation or natural beauty points of view as elements of ‘outstanding universal value’; properties can be listed on the basis of multiple criteria, and as a mix of natural and cultural heritage: World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc WHC.19/01 (10 July 2019) (‘*WHC Operational Guidelines*’) [46] (mixed properties) and [77] (criteria).

<sup>72</sup> *Whaling in the Antarctic* (n8).

<sup>73</sup> *Aichi Targets* (n7).

<sup>74</sup> *WHC Operational Guidelines* (n71).

<sup>75</sup> See Chapter 5.

<sup>76</sup> International Court of Justice, *Rules of Court* (adopted 14 April 1978) arts 44 and 54.

<sup>77</sup> See Chapter 6.

of the fourth *Global Biodiversity Outlook* in 2014 (*GBO-4*),<sup>78</sup> a report that is periodically commissioned for the Conference of the Parties from scientific and policy experts.<sup>79</sup> The published version of *GBO-4* contained photographs of the environment.<sup>80</sup>

Finally, I identify and examine the institutional rules of procedure on the use of photographs in the documentation that supports the determinations of aesthetic value under the three treaties. In the case of the *World Heritage Convention*, there are rules of procedure governing the decisions of the World Heritage Committee.<sup>81</sup> My focus, however, is the *Operational Guidelines* developed and periodically reviewed by the World Heritage Committee which include guidance to states parties on the use of photographs in nomination documents.<sup>82</sup> For the use of photographs in submissions of parties to the ICJ in the proceedings under the *Whaling Convention*, I examine the ICJ rules and practices for the admission and evaluation of evidence.<sup>83</sup> My research did not find formal rules developed under the auspices of the *Biodiversity Convention* on the use of photographs in the *Global Biodiversity Outlook* or publications in general.<sup>84</sup> I note, however, that the front pages of the *Global Biodiversity Outlook* identify the provenance of the photographs and permit re-use of the photographs subject to conditions.<sup>85</sup> The following table summarises the features of the research materials examined in the three case studies for the thesis.

| RESEARCH MATERIALS AND THEIR FEATURES |                                                 | CASE STUDY 1                                                             | CASE STUDY 2                                           | CASE STUDY 3                             |
|---------------------------------------|-------------------------------------------------|--------------------------------------------------------------------------|--------------------------------------------------------|------------------------------------------|
|                                       | International environmental treaty              | 1972 <i>World Heritage Convention</i>                                    | 1982 amendment to 1946 <i>Whaling Convention</i>       | 1992 <i>Biodiversity Convention</i>      |
|                                       | Aesthetic value as a treaty term                | Express in article 2 definition of ‘natural heritage’                    | Informs ban on commercial whaling in Schedule          | Express in preamble                      |
|                                       | Decision under treaty                           | Inscriptions of natural properties to World Heritage List, various years | Judgment in <i>Whaling in the Antarctic</i> case, 2014 | Decision agreeing to Aichi Targets, 2010 |
|                                       | International body making decisions             | World Heritage Committee                                                 | International Court of Justice                         | Conference of the Parties                |
|                                       | Supporting documentation containing photographs | Nomination files of parties                                              | Written and oral submissions of parties                | Fourth Global Biodiversity Outlook, 2014 |
|                                       | Institutional rules on use of photographs       | Guidelines of the World Heritage Committee                               | Rules of evidence                                      | None identified from the public record   |

<sup>78</sup> *GBO-4* (n10).

<sup>79</sup> Conference of the Parties to the *Convention on Biological Diversity*, Decision II/1 *Report of the First Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice*, 2<sup>nd</sup> mtg, UN Doc UNEP/CBD/COP/2/19 (30 November 1995).

<sup>80</sup> See further Chapter 7.

<sup>81</sup> *Rules of Procedure of the World Heritage Committee*, WHC-2015/5 (July 2015).

<sup>82</sup> *WHC Operational Guidelines* (n71) [137].

<sup>83</sup> International Court of Justice, *Rules of Court* (1978); International Court of Justice, *Practice Directions* (as amended on 20 January 2009 and 21 March 2013).

<sup>84</sup> Cf *Rules of Procedure for the Conference of the Parties*, Decision I/1 adopted by the Conference of the Parties to the *Convention on Biological Diversity*, 1<sup>st</sup> mtg, UNEP/CBD/COP/DEC/I/1 (28 February 1995), annex (amended by Decision V/20).

<sup>85</sup> *GBO-4* (n10).

### 3.2 Artworks for analysis

Throughout the thesis chapters, I use artworks to illustrate aesthetic concepts or interrogate the meaning of aesthetic value.<sup>86</sup> As explained earlier in relation to the thesis outline,<sup>87</sup> each chapter begins with an analysis of an artwork ‘exhibit’ to demonstrate methods or develop concepts that I later reference in the relevant chapter. The artworks used as ‘exhibits’, and within the chapters, have been executed in different visual media. For example, I use two-dimensional reproductions of paintings, drawings, prints and sculptural installations as well as photographic stills from audio-visual works. The artworks include historical and contemporary works in different genres from artists born and working in countries in Africa and Europe and from Australia, Colombia, India, Japan, the United Kingdom and the United States.

### 3.3 Research methods

My research methods for identifying and selecting legal materials included desk-based research of treaty texts and institutional rules, records and resources in the online and hard copy archives of treaty secretariats, as well as a formal face-to-face interview with an employee of the World Heritage Centre.<sup>88</sup> As discussed below in the context of describing the scholarly orientation of my research, I also researched a range of legal academic literatures adopting doctrinal and jurisprudential perspectives on international law, international environmental law and English common law.

For my aesthetic analysis, I have relied on philosophical literature on environmental ethics, environmental aesthetics and aesthetic theory of the arts. I identified many of the artworks used for my analysis through attending and speaking with people at art events and exhibitions over seven years in Australia, Britain and Europe, including exhibitions of both historical and contemporary art made by artists from around the world, in a range of media and genres.<sup>89</sup> I also identified artworks through my research of academic literature on visual art. My research methods have aimed to engage good visual art. There is extensive debate among aesthetic philosophers as to what constitutes ‘art’, and what amounts to ‘good’ or ‘high’ art.<sup>90</sup> There is, for example, discussion of the aesthetic merits of ‘sensational’ art, and of art made with a political purpose.<sup>91</sup> In identifying and analysing artworks for this thesis, I have been guided by the expert opinion of art historians and critics, evident from academic literature and from curatorial choices for exhibitions in major art museums, galleries and festivals.

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<sup>86</sup> See artworks in ‘List of Figures’.

<sup>87</sup> See above part 2.

<sup>88</sup> Alessandro Balsamo, Nominations and Tentative Lists Manager, Policy and Statutory Implementation Section, World Heritage Centre, Paris, interview on 5 May 2015.

<sup>89</sup> Including: *May You Live in Interesting Times*, Biennale Arte 2019 (58th International Art Exhibition) Venice, Italy; *Viva Arte Viva*, Biennale Arte 2017 (57th International Art Exhibition) Venice, Italy; *All the World's Futures*, Biennale Arte 2015 (56th International Art Exhibition) Venice, Italy; *Skulptur Projekte Münster 2017*, Münster, Germany; *Learning From Athens*, Documenta 14, Kassel, Germany, 2017. I attended exhibitions at a range of museums and galleries in Europe and Britain (Berlin, Edinburgh, Paris, London, Marseille, Venice) and in Australia and New Zealand (Adelaide, Brisbane, Hobart, Perth, Melbourne and Greater Victoria, Sydney, Auckland, Wellington).

<sup>90</sup> On ‘high art’, see eg Stephen Davies, *The Philosophy of Art* (John Wiley & Sons, 2<sup>nd</sup> ed, 2016) 23. See also Jerrold Levinson, ‘Artistic Worth and Personal Taste’ in Jerrold Levinson, *Aesthetic Pursuits: Essays in Philosophy of Art* (Oxford Scholarship Online: December 2016); Simon Schama, *Wordy: Sounding off on High Art, Low Appetite and the Power of Memory* (Simon & Schuster, 2019).

<sup>91</sup> See eg Claire Bishop, *Artificial Hells: Participatory Art and the Politics of Spectatorship* (Verso, 2012); see further Chapter 4.

## 4. SCHOLARLY CONTEXTS

As suggested by my research sources and methods, I speak the languages of different disciplines in this thesis. I also assume different accents within those disciplines and sometimes it is hard to place my disciplinary heritage.<sup>92</sup> In this section, I describe the different scholarly disciplines and approaches that intersect my thesis. I also anticipate the contribution that my thesis makes to scholarly inquiry.

### 4.1 Disciplinary orientations

My thesis provides a jurisprudential account of aesthetic method and aesthetic meaning for international environmental law.<sup>93</sup> I develop a method for interpreting graphic image as representation and I articulate meanings of the environment's 'aesthetic' value. In this task, I assume an interdisciplinary orientation in law and the humanities,<sup>94</sup> using aesthetic philosophy to examine the forms, conduct and methods of international environmental law, a specialism of international law. My subject of inquiry is international law with a focus on international environmental law, and my method of inquiry is aesthetic philosophy. In part, I take up for international law the challenge articulated by Kreitner, Rosenberg and Tomlins: 'Use of arts as sources and as theory in legal history awaits explanation, theorization, even introduction.'<sup>95</sup> But I also engage the less prominent field of the philosophy of environmental aesthetics which, I explained earlier, concerns the natural environment, as distinct from the aesthetic theories on representations of the environment in the arts that are more commonly referenced in legal scholarship on aesthetics.<sup>96</sup>

In the thesis, I address matters of international law with a focus on the international law of the 'environment', a contested term that is understood variously by scholars and practitioners for the purposes of international environmental law.<sup>97</sup> When I refer in the thesis to 'international environmental law', I am referring to the specialism of international law that includes as a source the written treaties agreed between states to protect the environment.<sup>98</sup> I describe these treaties for my purposes as 'international environmental treaties'.<sup>99</sup> The making,

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<sup>92</sup> See generally, Ole Pedersen, 'The Limits of Interdisciplinarity and the Practice of Environmental Law Scholarship' (2014) 26 *Journal of Environmental Law* 423.

<sup>93</sup> On concepts of 'jurisprudence' in both modern and postmodern terms, see Costas Douzinas and Ronnie Warrington with Shaun McVeigh, *Postmodern Jurisprudence: The Law of the Text in the Texts of the Law* (Routledge, 1991).

<sup>94</sup> See eg Austin Sarat, Matthew Anderson and Cathrine O Frank (eds), *Law and the Humanities: An Introduction* (Cambridge University Press, 2010). Cf Costas Douzinas, 'A Short History of the British Critical Legal Conference or, the Responsibility of the Critic' (2014) 25(2) *Law and Critique* 187.

<sup>95</sup> Roy Kreitner, Anat Rosenberg, and Christopher Tomlins, 'Arts and the Aesthetic in Legal History' 2 (2) *Critical Analysis of Law* (2015) 315.

<sup>96</sup> See above part 1.1.

<sup>97</sup> See eg Daniel Bodansky, 'What is International Environmental Law' in Bodansky (n46) 1, 9-11; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3<sup>rd</sup> ed, 2009) 4-6.

<sup>98</sup> See eg Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law: A Modern Introduction* (Cambridge University Press, 2<sup>nd</sup> ed, 2018) 39.

<sup>99</sup> See Chapter 3. Cf Rak E Kim and Klaus Bosselmann, 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements' (2013) 2 *Transnational Environmental Law* 285.



implementation and enforcement of international environmental law is itself governed by international law.<sup>100</sup>

Within the discipline of international law, I move between doctrine and theory, shifting from dogmatic law as a system of legal sources, to jurisprudence as a normative endeavour that relates to the proper conduct of law.<sup>101</sup> I am, as I stated at the outset of this Chapter, bringing theories of law and aesthetics to the practice of international law. Inevitably, I come up against tensions between those approaches.<sup>102</sup> I am aware of international legal theory critical of international environmental law as a statist vehicle that promotes the economic interests of the minority of rich states over environmental protection in the majority of poorer, often formerly colonised, developing states that constitute the Global South.<sup>103</sup> I nevertheless maintain normative aspirations for an international law capable of protecting the environment on a global and fair basis.<sup>104</sup> In this sense, I advocate for an aesthetic value of the environment valued in equal measure by all the world's states – albeit on a relative, pluralised basis.<sup>105</sup>

#### 4.2 Contributions to scholarship

Having assumed a range of disciplinary orientations in my research, I seek to make contributions to the scholarship relevant to those orientations, including the philosophy and practice of international environmental law, visual jurisprudence, and the philosophy of environmental aesthetics.

My thesis attends to 'aesthetic' value as an environmental value at a time when it has received relatively little attention in the scholarship on international environmental law.<sup>106</sup> As explained earlier, that scholarship has focussed on environmental ethics.<sup>107</sup> For scholars of environmental values in international environmental law, I conceive of 'aesthetic' value as a term of law to be interpreted in accordance with the international rules of treaty interpretation in a manner sensitive to environmental aesthetics and eco-critical theory. In contrast to most philosophers of international environmental law,<sup>108</sup> my theoretical foundation for this purpose is aesthetic philosophy rather than environmental ethics.

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<sup>100</sup> See eg Jan Klabbers, *An Introduction to International Institutional Law* (CUP, 2015). See further Chapter 3, part 2.1 and Chapter 5, part 5.3.

<sup>101</sup> On the relationship between practice and theory, see generally Anne Orford and Florian Hoffmann, 'Introduction: Theorizing International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 1. See also Deborah Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law' (1996) 65 *Nordic Journal of International Law* 341.

<sup>102</sup> See generally Bianchi (n14).

<sup>103</sup> See generally Usha Natarajan, 'Third World Approaches to International Law (TWAIL) and the Environment' in Andreas Philippopoulos-Mihalopoulos and Victoria Brooks (eds), *Research Methods in Environmental Law: A Handbook* (Edward Elgar Publishing, 2017) 207.

<sup>104</sup> See Mario Prost and Alejandra Torres Camprubí, 'Against Fairness? International Environmental Law, Disciplinary Bias, and Pareto Justice' (2012) 25 *Leiden Journal of International Law* 379. See generally Jean d'Aspremont, *International Law as a Belief System* (Cambridge University Press, 2018).

<sup>105</sup> See Jonathan Maskit, 'On Universalism and Cultural Historicism in Environmental Aesthetics' in Martin Drenthen and Jozef Keulartz (eds), *Environmental Aesthetics: Crossing Divides and Breaking Ground* (Fordham University Press, 2014) 41.

<sup>106</sup> Cf Gillespie (n16). See further Chapter 2.

<sup>107</sup> Note I do not engage theories of wild law relevant to 'intrinsic' values, eg Michelle Maloney and Peter Burden (eds), *Wild Law: In Practice* (Routledge, 2014). See discussion of 'Wild Law' as a function of 'ecolegality' in Margaret Davies, *Asking the Law Question* (Thomson Reuters, 4<sup>th</sup> ed, 2017) 451 cf Margaret Davies, 'Consciousness of Trees' (2015) 27 (2) *Law & Literature* 217.

<sup>108</sup> Eg Gillespie (n16) but see further Chapter 2.

My thesis also extends jurisprudential scholarship on law and aesthetics – specifically visual jurisprudence or ‘imaginal law’ – to international law, as opposed to domestic legal contexts.<sup>109</sup> But in contrast to scholars of visual jurisprudence, I develop a theory of image for law that relies not only on aesthetic understandings of art but which also borrows from the aesthetic philosophy of environmental aesthetics to interrogate images of the environment.<sup>110</sup> Visual jurists might wonder at my conception of image as ‘record’ for the purposes of doctrinal approaches to evidence: they might conceive of images as always ‘representation’ regardless of the purpose served by an image in legal process.<sup>111</sup> I maintain, however, that the very particular confluence of the three aesthetic vantages addressed in this thesis – aesthetics of art, environmental aesthetics and the environment’s aesthetic value as a term of law – requires me to entertain different roles for image in light of those different vantages in the practice of international environmental law.

Finally, my thesis speaks to philosophers of environmental aesthetics. As noted earlier, philosophers of environmental aesthetics generally assert that the aesthetic value of the environment is different from the aesthetic appreciation of art. As such, my analysis of the environment’s aesthetic value from photographs of the environment, in ways analogous to the aesthetic appreciation of visual art, would likely be problematic for environmental aestheticians. Philosophers of environmental aesthetics are, however, interested in identifying opportunities for their theories to be applied in institutional practices of environmental evaluation.<sup>112</sup> My thesis invites those philosophers to adapt their theories to the practice of using photographs of the natural environment in international legal processes that judge aesthetic value.<sup>113</sup> It is to this philosophy of ‘environmental aesthetics’ that I now turn in Chapter 2.

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<sup>109</sup> Note I do not address legal theory of materiality, see eg: Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge, 2017); Jessie Hohmann and Daniel Joyce (eds), *International Law’s Objects* (Oxford University Press, 2019). Nor do I engage scholarship on visual image in environmental activism, see eg Finis Dunaway, *Seeing Green: The Use and Abuse of American Environmental Images* (University of Chicago Press, 2015).

<sup>110</sup> Cf Oren Ben-Dor (ed), *Law and Art: Justice, Ethics and Aesthetics* (Routledge 2011).

<sup>111</sup> Eg Peter Goodrich argues that images cannot be ‘depictions of the real’, Peter Goodrich, ‘Imago Decidendi: On the Common Law of Images’ (2017) 1(1) *Art and Law* 1, 14.

<sup>112</sup> Described as ‘empirical’ and ‘speculative’ aesthetics in Martin Drenthen and Jozef Keulartz, ‘Introduction’ in Drenthen and Keulartz (n105) 1. See also Yrjö Sepänmaa ‘From Theoretical to Applied Environmental Aesthetics: Academic Aesthetics Meets Real-World Demands’ in Drenthen and Keulartz, *ibid*, 87.

<sup>113</sup> Eg extending environmental hermeneutics for physical environments to photographs. On physical environments, see Martin Drenthen, ‘Environmental Hermeneutics and the Meaning of Nature’ in Stephen M Gardiner and Allen Thompson (eds), *The Oxford Handbook of Environmental Ethics* (Oxford University Press, 2017) 162.



## CHAPTER 2 EXPRESSIONS OF THE ENVIRONMENT'S 'AESTHETIC' VALUE

EXHIBIT: TARYN SIMON, *PAPERWORK, AND THE WILL OF CAPITAL* (2015)



Figure 2.1: Taryn Simon, 'Agreement between Switzerland and the United States of America for Cooperation to Facilitate the Implementation of FATCA, Bern, Switzerland, February 14, 2013, Press XII' from *Paperwork, and the Will of Capital*, 2015, pigmented concrete press, dried plant specimens, archival inkjet prints, text on herbarium paper, and steel brace, 11.1x56.4x78.1cm, Courtesy of Gargosian Gallery. Source: Artist

American artist Taryn Simon's mixed media work *Paperwork, and the Will of Capital* (2015) comprises three elements: text, photographs and flowers.<sup>1</sup> There is the text of instruments that effected the adoption of treaties on a range of matters with economic consequence. Different texts are displayed on multiple plinths under vitrines positioned around a room. One vitrine (fig 2.1) shows the text for the adoption of the *Agreement between Switzerland and the United States of America for Cooperation to Facilitate the Implementation of FATCA* [Foreign Account Tax Compliance Act]. The subjects of other treaties featured in the installation range from sport to refugees. In addition to the texts, there are photographs of floral arrangements recreated from archival photographs of the ceremonial signings of the adoption instruments. Finally, there are the flowers themselves – pressed, dried and sewn to the page opposite the texts.

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<sup>1</sup> Luz Gyalui (ed), *La Biennale di Venezia: 56th International Art Exhibition: All the World's Futures = 56* (Marsilio Editori, vol 1, 2015) 406.

The pressed blooms stand out, literally, from their herbarium paper, the processed plant matter on which they have been displayed. Flattened yet raised, appreciable assemblages, in some cases heads without stems or leaves without stalks, the flowers have colour and texture to draw the eye, where they flutter and waft. Their dusky tones remember a springtime gone. And not just whimsy. You can see the insects they mimic. And they are arranged on the page like a botanical drawing, not a true likeness but truth itself, caught and categorised in scientific stagecraft.

The photograph opposite has caught the flowers too. Yet there they have been styled for pageantry. A florist, an artist no less, has used colour, form and shape to determine their position in the ‘impossible bouquet’.<sup>2</sup> The flowers still shine brightly there, in the here and now, a crest to the fêted text. A text as dull as they come. Paperwork piled high, an archive emblematic of law’s drudge. A testament to a pact between sovereigns, united adherents to progress, consumption and wealth. All on a pedestal of concrete – not clay – framed and contained, such that the economic project that is international law may never falter.

Taryn Simon’s work presents many of the themes debated among philosophers of environmental aesthetics.<sup>3</sup> The work leaves me thinking about science and sensation as grounds for aesthetic judgement. I wonder whether my appreciation of the flower display is all the better for knowing that a flower imitates insects to attract them in the task of pollination. But I not only *see* the dried flowers; in my mind’s eye, I also hear them rustle and smell their dusty stamens; their faded hues remind me of times past, flowers pressed between the pages of books from my childhood. Then I ponder the distinctions between aesthetic judgement of the environment and of art. The arrangement to the left is creative, the arrangement to the right is botanical. They are also created, constructed, fabricated. Perhaps neither is environmental if the environment is none of those things. Then I contemplate artifice in nature, with the ceremonial endeavour of humans to one side of the vitrine and the ‘other’ nature on the paper pile opposite.

There is more though. Simon’s work reveals the sharp edges between international law and the natural environment: the stacked paper is working or worked or work, rendering the environment – a tree – a resource for the printed word of law, celebrated with flowers, preserved on the page.

## 1. INTRODUCTION

My analysis of Taryn Simon’s *Paperwork, and the Will of Capital* (2015) (fig 2.1) speaks to ways of understanding the aesthetic value of the natural environment and the different orders of nature constructed through science, economics, law and, indeed, art. In this Chapter, I contemplate constructions of the environment’s aesthetic value as an expression of international environmental law, including as an express term of the *World Heritage Convention* and *Biodiversity Convention*.<sup>4</sup> I examine scholarly characterisations of the

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<sup>2</sup> See Taryn Simon, *Paperwork, and the Will of Capital*, 2015, available at <<http://tarynsimon.com/works/pwc/#1>>.

<sup>3</sup> See eg Martin Drenthen and Jozef Keulartz (eds), *Environmental Aesthetics: Crossing Divides and Breaking Ground* (Fordham University Press, 2014).

<sup>4</sup> *Convention for the Protection of the World Cultural and Natural Heritage*, adopted 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) (‘*World Heritage Convention*’); *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) (‘*Biodiversity Convention*’).

environment's 'aesthetic' value in international environmental law. Noting that this legal scholarship has generally adopted a philosophical approach informed by environmental ethics and its attendant theories of value,<sup>5</sup> I examine the characterisations of aesthetic value by international environmental lawyers in light of another philosophical approach known as 'environmental aesthetics'.<sup>6</sup>

Environmental aesthetics is a field of aesthetic philosophy that has emerged in contemporary Western European and Anglo-American philosophy as a counterpoint to aesthetic understandings of the arts.<sup>7</sup> It is with this field of philosophy that I begin the Chapter, providing an overview of the literature on the philosophy of environmental aesthetics in part 2, before addressing scholarly treatment of the expressions of the environment's aesthetic value in international environmental law in part 3. In part 4, I consider issues arising for international environmental law from the philosophical characterisations of aesthetic value. I conclude with the observation that none of the legal scholars has analysed the meaning of 'aesthetic' value in accordance with international legal rules of treaty interpretation, an exercise I undertake in Chapter 3. In Chapter 4, I return to the philosophy of aesthetics as it relates to the arts. It is there that I address scholarship on law and aesthetics, including characterisations of 'image' and photographs of the environment.

## 2. AESTHETIC VALUE IN ENVIRONMENTAL AESTHETICS

Anglo-American philosophers typically describe the contemporary philosophy of environmental aesthetics as having developed through stages from the 18<sup>th</sup> century to the present.<sup>8</sup> The Western European philosophical school of 'aesthetics' that emerged in the 18<sup>th</sup> century distinguished the Platonic conception of beauty inherent in the object from the sensorial appreciation of objects by the human subject.<sup>9</sup> Immanuel Kant was influential in the development of an aesthetic philosophy that inquired into such subjective appreciation of objects, including objects from the natural environment.<sup>10</sup> However, Georg W F Hegel's early 19<sup>th</sup> century *Ästhetik* is described as having largely displaced nature from the field of aesthetic philosophy, putting the objective appreciation of the arts at the core of philosophical scholarship.<sup>11</sup> So began what Jonathan Maskit facetiously calls the 'dark ages', where nature

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<sup>5</sup> Eg Alexander Gillespie, 'An Introduction to Ethical Considerations in International Environmental Law' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2010), 117. See below part 3.2.

<sup>6</sup> See John A Fisher, 'Environmental Aesthetics' in Jerrold Levinson (ed), *Oxford Handbook of Aesthetics* (Oxford University Press, 2003) 667.

<sup>7</sup> Emily Brady, *Aesthetics of the Natural Environment* (Edinburgh University Press, 2003) ('*Aesthetics of Environment*') 1.

<sup>8</sup> Jonathan Maskit, 'On Universalism and Cultural Historicism in Environmental Aesthetics' in Drenthen and Keulartz (n3) 41. Cf Allen Carlson, 'Ten Steps in the Development of Western Environmental Aesthetics' in Drenthen and Keulartz, (n3) 13 ('*Ten Steps*').

<sup>9</sup> See Paul Guyer, 'History of Modern Aesthetics' in Jerrold Levinson (ed), *Oxford Handbook of Aesthetics* (Oxford University Press, 2003) 25; see also Allen Carlson, *Nature and Landscape: An Introduction to Environmental Aesthetics* (Columbia University Press, 2008) 8.

<sup>10</sup> Immanuel Kant, *Critique of Judgment*, tr and introduction Werner S Pluhar (Hackett Publishing, 1987[1790]). See further Brady, *Aesthetics of Environment* (n7) 8.

<sup>11</sup> Georg Wilhelm Friedrich Hegel, *The Introduction to Hegel's Philosophy of Fine Art*, tr Bernard Bosanquet (Taylor and Francis 2015[1905]), first published 1905 from lectures compiled in 1835. See Allen Carlson, *Nature and Landscape: An Introduction to Environmental Aesthetics* (Columbia University Press, 2008) 4 ('*Nature and Landscape*').

and the environment had a limited place in aesthetic philosophy.<sup>12</sup> It is this conception of aesthetic philosophy that has dominated since, focussed on theoretical, critical and historical accounts of the arts.<sup>13</sup>

A further phase in the evolution of environmental aesthetics came with a re-conception of aesthetics in Anglo-American philosophical literature, fuelled by the publication of Ronald Hepburn's 'Contemporary Aesthetics and the Neglect of Natural Beauty' in 1966.<sup>14</sup> Hepburn was concerned that the focus of aesthetic philosophy on art objects had neglected the different form of aesthetic appreciation that comes from the immersive experience of the natural environment. Contemporary philosophers, working under the mantle of 'environmental aesthetics', have since examined the multi-sensory appreciation of the environment, one that is dynamic and extends beyond the visual to all senses – sight, sound, smell, touch and taste.<sup>15</sup> Yet Maskit observes a common normative premise to the scholarship on environmental aesthetics: 'there are better and worse ways to approach natural environments and that one requires something more than just what meets the senses in order to judge well.'<sup>16</sup> As I will address later, he criticises much of this scholarship for failing to account for cultural perceptions of the environment beyond the English-speaking world.<sup>17</sup>

The positions of environmental aestheticians developed through the literature are many and varied, leading to efforts by some scholars to group environmental aesthetic theories into categories that speak to their common points of departure.<sup>18</sup> A close reading of the scholarship of two philosophers of environmental aesthetics, Emily Brady<sup>19</sup> and Allen Carlson,<sup>20</sup> provides an illustrative account of the convergences and divergences in the field. Both provide comprehensive reviews of the philosophical literature while also positing their own models of environmental aesthetics. Their respective models highlight some of the tensions among philosophers of environmental aesthetics concerning characterisations of 'objective' criteria grounded in such things as scientific knowledge and 'subjective' impressions of non-expert individuals. Yet both scholars maintain that the aesthetic appreciation of the environment is distinct from that of the arts.<sup>21</sup> They also seek a formulation of environmental aesthetics that has something as its basis that can be communicated in common terms rather than being

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<sup>12</sup> Exceptions include Arthur Schopenhauer, Friedrich Nietzsche, and Martin Heidegger, see Maskit (n8) 42. Other exceptions include George Santayana, RG Collingwood, John Dewey, Paul Ziff, Frank Sibley and JO Urmson, see Brady, *Aesthetics of Environment* (n7) 48.

<sup>13</sup> See Yuriko Saito, 'Environmental Directions for Aesthetics and the Arts' in Arnold Berleant (ed), *Environment and the Arts: Perspectives on Environmental Aesthetics* (Ashgate, 2002) 171. The conception of aesthetics as related to the arts is maintained in jurisprudential scholarship on law and aesthetics, as explained in Chapter 4.

<sup>14</sup> Ronald Hepburn, 'Contemporary Aesthetics and the Neglect of Natural Beauty' in Bernard Williams and Alan Montefiore (eds), *British Analytical Philosophy* (Humanities Press, 1966) 285.

<sup>15</sup> See eg Malcolm Budd, 'Aesthetics of Nature' in Jerrold Levinson (ed), *Oxford Handbook of Aesthetics* (Oxford University Press, 2003); Emily Brady, 'Aesthetic Value, Nature, and Environment' in Stephen M Gardiner and Allen Thompson (eds), *Oxford Handbook of Environmental Ethics* (Oxford University Press, 2017) 186 ('*Environmental Ethics*').

<sup>16</sup> Maskit (n8) 44.

<sup>17</sup> Ibid 41-42.

<sup>18</sup> Cf ibid.

<sup>19</sup> Brady, *Aesthetics of Environment* (n7). See also Emily Brady, 'Imagination and the Aesthetic Appreciation of Nature' (1998) 56(2) *Journal of Aesthetics and Art Criticism* 139; Emily Brady, *The Sublime in Modern Philosophy: Aesthetics, Ethics, and Nature* (Cambridge University Press, 2013).

<sup>20</sup> Allen Carlson, *Aesthetics and the Environment: The Appreciation of Nature, Art and Architecture* (Routledge, 2000) ('*Aesthetics and Environment*'). See also Carlson, *Nature and Landscape* (n11).

<sup>21</sup> Carlson, *Aesthetics and Environment* (n20) 129. Brady, *Aesthetics of Environment* (n7) 69-70.

peculiar to an individualised appreciation of the environment.<sup>22</sup> The work of Brady and Carlson in the tradition of Anglo-American aesthetic philosophy is the focus of the following review of the literature in the philosophical field of ‘environmental aesthetics’.<sup>23</sup>

## 2.1 Aesthetic value as sensibility or sense

Aesthetics philosopher Emily Brady has described the theories of scholars in environmental aesthetics as falling on a spectrum between ‘non-cognitive’ and ‘cognitive’ appreciation of the natural environment.<sup>24</sup> Her categorisation conforms, to some extent, to Allen Carlson’s ‘subjectivist’ and ‘objectivist’ groupings of the scholarship.<sup>25</sup> As explained in the following section, the categories of both correspond in a very general way to, on the one hand, intuited impressions (a subject’s sensibility) and reasoned explanation (an object’s sense) on the other.<sup>26</sup>

### 2.1.1 Non-cognitive and cognitive appreciation

For Emily Brady, non-cognitive theories describe a range of sensory responses to the natural environment, placing the human subject’s response to the environment to the fore.<sup>27</sup> Brady describes Ronald Hepburn, and other philosophers who are sympathetic to his theories, as falling under the banner of ‘non-cognitive’ environmental aesthetics.<sup>28</sup> She includes philosophical models developed respectively by Arnold Berleant, Noël Carroll, Stan Godlovitch and Yuriko Saito in this category.<sup>29</sup> She applauds them for ‘their awareness that aesthetically valuing nature involves bringing ourselves to the natural world as *cultural* beings.’<sup>30</sup>

Brady contrasts the so-called non-cognitive models in environmental aesthetics with those that rely on ‘cognitive’ understandings of the human experience of the environment. For these scholars, the human subject’s knowledge of the environmental ‘object’ informs appreciation.<sup>31</sup> They seek to develop a rational basis for understanding aesthetic value that inheres in the environment rather than in the person having the aesthetic experience of the environment. Allen Carlson is a notable philosopher of environmental aesthetics whose ‘natural

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<sup>22</sup> Brady, *Aesthetics of Environment* (n7) 191; Carlson, *Aesthetics and Environment* (n20) 54. As explained below, Maskit does not characterise their scholarship in these terms, see Maskit (n8) 51. The capacity for communicating aesthetic value in common terms is addressed below part 2.2.3.

<sup>23</sup> I do not explore here the differences between analytic and continental philosophy, see Maskit (n8) 47. Maskit highlights the work of scholars working in languages other than English, mostly German language scholars. Cf Fuxing Xue, ‘Two Types of a Doctrine of Objectivity in the Aesthetic Appreciation of Nature’ (2018) 6 *Contemporary Aesthetics* 13.

<sup>24</sup> Brady, *Aesthetics of Environment* (n7) 86.

<sup>25</sup> Carlson, *Aesthetics and Environment* (n20) xviii-xix. The dichotomy is also described as: ‘narrative’ (knowledge) and ‘ambient’ (perception), see Cheryl Foster, ‘The Narrative and the Ambient in Environmental Aesthetics’ (1998) 56 *Journal of Aesthetics and Art Criticism* 2; non-conceptualists and conceptualists, see Ronald Moore, ‘Appreciating Natural Beauty as Beautiful’ in Allen Carlson and Arnold Berleant (eds), *The Aesthetics of Natural Environments* (Broadview Press, 2004) 215, quoted in Maskit (n8) 45.

<sup>26</sup> Maskit offers an alternative to dichotomous categories, see Maskit (n8) 46.

<sup>27</sup> Brady says it is a misconception that non-cognitive models are weighted towards the subject, Brady, *Aesthetics of Environment* (n7) 111.

<sup>28</sup> Ibid 87.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid, 115-6. Jonathan Maskit characterises Yuriko Saito’s scholarship as addressing culture, Maskit (n8) 54, discussed below part 2.2.4. On relevance to international law, see below part 4.3.

<sup>31</sup> See generally Brady, *Aesthetics of Environment* (n7) 87-8.

environmental model' is in Brady's cognitive category of environmental aesthetics.<sup>32</sup> Carlson understands nature to be appreciated in light of our knowledge of it, particularly knowledge gained through the natural sciences.<sup>33</sup> Information about glacial forces that form rock, biological processes that turn leaves from green to orange, or the genetic coding of migration routes in animals, could be knowledge that is significant to aesthetic appreciation.<sup>34</sup> In Brady's view, other philosophers of environmental aesthetics informed by science or objective 'cognitive' processes include Holmes Rolston III and Marcia Eaton.<sup>35</sup>

### 2.1.2 Human subject and environmental object

Allen Carlson is critical of 'subjectivist' scholars of environmental aesthetics identified by Brady as 'non-cognitive' theorists.<sup>36</sup> For him, subjectivist conceptions of aesthetic experiences of the environment are problematic for their attachment to the individual, rendering aesthetic appreciation 'trivial and fanciful'.<sup>37</sup> A scientific basis for the aesthetic appreciation of the natural environment is, by contrast, 'serious'.<sup>38</sup> Betraying his frustration with philosophical models that are so deferential to personal experience as to be arbitrary or 'subjective whims',<sup>39</sup> Carlson praises aesthetics philosopher Yrjö Sepänmaa for recognising that 'not all nature either can or should be all things to all human beings'.<sup>40</sup> Emily Brady is also not satisfied with non-cognitive theories as they are difficult to communicate or describe in terms of 'shared' features.<sup>41</sup> She says, '[i]f beauty is in the eye of the beholder, then it could be argued that there is no way to arbitrate between personal opinions.'<sup>42</sup>

Brady is, however, also concerned about theories at the other extreme of her imagined spectrum that rely on cognitive or objective characterisations of aesthetics.<sup>43</sup> Brady considers, for example, that Carlson goes too far in giving priority to Western science over other forms of knowledge, such as traditional or indigenous knowledge and inexpert knowledge,<sup>44</sup> and in wrongly characterising science as being objective.<sup>45</sup> Philosopher Malcolm Budd is even more emphatic in his condemnation of what could be variously described as cognitive, objectivist or science-centric models of environmental aesthetics: 'even someone who realizes that the structure of a bat's head is extraordinarily well-suited to the task of sonar emission and detection is unlikely to derive much, if any, aesthetic satisfaction from simply looking at such a head with this knowledge in mind'.<sup>46</sup>

<sup>32</sup> Carlson, *Aesthetics and Environment* (n20) 11. On Carlson's 'natural environmental model', see Brady, *Aesthetics of Environment* (n7) 89.

<sup>33</sup> Carlson refers to 'common sense' but the natural sciences are more typically his reference for 'knowledge': Carlson, *Aesthetics and Environment* (n20) 11-12, 72.

<sup>34</sup> Carlson refers to knowledge of 'categories of nature': *ibid* 62, 89 and 90.

<sup>35</sup> Brady, *Aesthetics of Environment* (n7) 87.

<sup>36</sup> Carlson, *Aesthetics and Environment* (n20) xviii-xix.

<sup>37</sup> *Ibid* 11. Brady describes Carlson's objection to 'empty' appreciation, *Aesthetics of Environment* (n7) 111. Cf Ronald W Hepburn, 'Trivial and Serious in Aesthetic Appreciation of Nature' in Salim Kemal and Ivan Gaskell (eds), *Landscape, Natural Beauty and the Arts* (Cambridge University Press, 1993).

<sup>38</sup> Carlson, *Aesthetics and Environment* (n20) 9.

<sup>39</sup> *Ibid*, 12.

<sup>40</sup> *Ibid*, 10.

<sup>41</sup> Brady, *Aesthetics of Environment* (n7) 94ff.

<sup>42</sup> *Ibid*, 111-2.

<sup>43</sup> *Ibid*, 112.

<sup>44</sup> *Ibid* 100.

<sup>45</sup> *Ibid* 94.

<sup>46</sup> Malcolm Budd, 'Objectivity and the Aesthetic Value of Nature: Reply to Parsons' (2006) 46(3) *British Journal of Aesthetics* 267, 270; see also Malcolm Budd, *The Aesthetic Appreciation of Nature* (Clarendon Press, 2005).



Concerned that philosophical models wedded to one or other extreme of the subjective and objective binary are misplaced, Emily Brady develops a hybrid understanding of the environmental aesthetics that she names the ‘integrated aesthetic’ model.<sup>47</sup> The features of her model and the way in which it addresses the tension between objective and subjective bases for aesthetic evaluation of the environment, is discussed in the next section.

## 2.2 Integrated aesthetic model: aesthetic value as exquisite and profound

Emily Brady integrated aesthetic model of environmental aesthetics for natural environments is defined by a multi-sensory experience and ‘disinterested’ engagement with the surrounding environment shaped – though not determined – by imagination, emotion and knowledge.<sup>48</sup> With her model, Brady promotes a conception of the natural environment’s aesthetic value as an engaged, relational, contextual and non-instrumental appreciation that can be communicated among people.<sup>49</sup>

Ultimately, I understand Brady to be describing an aesthetic value that is, what I am calling for the thesis, ‘exquisite’ and ‘profound’. Exquisite in the sense that an environment’s aesthetic value connotes a distinctive and, to some extent, ineffable affect in a person that is distinct from a natural beauty conceived for the arts;<sup>50</sup> profound in the sense that its apprehension is sincere, it is a value that is significant, meaningful, or important to a community of people – as opposed to merely trivial, hedonistic, empty or superficial.<sup>51</sup> As such, it is an environmental value that is meaningful, in the sense that it has meaning and the meaning is one that matters – although different environments might be meaningful in aesthetic terms in different ways, and for different reasons, for different people and communities.

As I explain in subsequent chapters, Brady’s approach is useful to my consideration of the environment’s aesthetic value in law. Her theory is conceived with a view to being applied in public decision-making under laws that require assessments of the environment’s aesthetic value.<sup>52</sup> To the extent that it also incorporates pluralised understandings of aesthetic value,<sup>53</sup> Brady’s theory is relevant to my examination of that value in international law. As I argue through the later chapters of this thesis, legal conceptions of the environment’s aesthetic value are not currently adapted to pluralized understandings of aesthetic value among the many parties to international environmental treaties.<sup>54</sup>

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Cf Holmes Rolston III, ‘Does Aesthetic Appreciation of Nature Need to be Science-Based?’ (1995) 35 *British Journal of Aesthetics* 374. See also Patricia Matthews, ‘Scientific Knowledge and the Aesthetic Appreciation of Nature’ (2002) 60 *Journal of Aesthetics and Art Criticism* 37.

<sup>47</sup> Brady, *Aesthetics of Environment* (n7) 120-123; on objectivity and subjectivity, *ibid* 231.

<sup>48</sup> *Ibid* 120, 146, 185.

<sup>49</sup> *Ibid* 3-4.

<sup>50</sup> On ineffability in philosophy, see Silvia Jonas, *Ineffability and its Metaphysics: The Unspeakable in Art, Religion, and Philosophy* (Palgrave Macmillan, 2016).

<sup>51</sup> Brady, *Aesthetics of Environment* (n7) 111.

<sup>52</sup> *Ibid* 224ff. On applied philosophy generally, see Yrjö Sepänmaa, ‘From Theoretical to Applied Environmental Aesthetics: Academic Aesthetics’ in Drenthen and Keulartz (n3) 87. See also description of ‘speculative’ aesthetics by Martin Drenthen and Jozef Keulartz ‘Introduction’ in Drenthen and Keulartz (n3) 1. I do not in this thesis examine the literature on landscape assessments in planning policy, see eg J Douglas Porteous, *Environmental Aesthetics: Ideas, Politics and Planning* (Routledge, 1996).

<sup>53</sup> See Brady, *Aesthetics of Environment* (n7) 185.

<sup>54</sup> Cf Werner Scholtz, ‘Animal Culling: A Sustainable Approach or Anthropocentric Atrocity: Issues of Biodiversity and Custodial Sovereignty’ (2005) 2(2) *Macquarie Journal of International and Comparative Environmental Law* 9, 16.



Below I elaborate on aspects of Emily Brady's integrated aesthetic model.

### *2.2.1 Hybrid of subject and object*

Emily Brady is sympathetic to non-cognitive (subjectivist) approaches in environmental aesthetics. However, she appreciates that aesthetic value must be capable of expression in a public policy context with reference to relatable concepts rather than singular experiences. For this, she sees merit in the intentions of scholars who have developed cognitive models. So, for Brady, the situations of object *and* subject guide appreciation. Her account of aesthetic value is a hybrid theory bringing together 'the particularity of individual aesthetic appreciation with a distinctive kind of objectivity of justification.'<sup>55</sup> Brady wants to describe the environment's aesthetic value in terms that can be adopted, for example, in the management of national parks, or the development of land, where aesthetic value might be one of several environmental values identified for protection in public policy. She is concerned that in British policy on the environment, 'aesthetics appears to be given less attention because it is simply considered less important.'<sup>56</sup> The environment's aesthetic value is considered in policy terms, Brady observes, to be 'lightweight, less 'serious' than the scientific or the ethical, and associated with, in some sense, luxury, or what we do in our leisure time.'<sup>57</sup> She wants to address a tendency to dismiss aesthetic value in public policy as unimportant because it is subjective, which she maintains is not how Britons, for the purposes of her example, typically understand their aesthetic encounters with the environment.

### *2.2.2 Multisensory and contextualised engagement*

Brady acknowledges a range of meanings for natural environments and nature, referencing Kate Soper's distinction between understandings of nature as 'real' and inclusive of humans, and understandings of nature as a cultural construct, apart from humans.<sup>58</sup> For her theory, natural environments comprise non-human life and surrounds but they are not exclusive of humans or necessarily free from human impacts or intervention.<sup>59</sup> Brady's aesthetic value of such natural environments by the humans in it is multisensory. She maintains that people appreciate their environments in aesthetic terms through all their senses. She considers that '[v]isual qualities, sounds, tactile qualities, olfactory and gustatory qualities, all may enable us to identify the aesthetic feel of a place.'<sup>60</sup>

What Brady calls 'human ocularcentrism' in government evaluations of aesthetic appreciation of the environment is linked to the quest for objectivity in aesthetic judgements of the environment (for seeing-is-believing).<sup>61</sup> But a focus on visual qualities in the environment fails, Brady says, to comprehend the complexity of an immersive aesthetic appreciation. To limit aesthetic appreciation to the visual leaves aesthetic value vulnerable to claims of triviality – aesthetic value as a superficial and dispensable value.<sup>62</sup>

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<sup>55</sup> Brady, *Aesthetics of Environment* (n7) 231.

<sup>56</sup> Ibid 225.

<sup>57</sup> Ibid.

<sup>58</sup> Ibid 52, citing Kate Soper, *What is Nature?* (Blackwell, 1995). See also Lee Godden, 'Preserving Natural Heritage: Nature as Other' (1998) 22 *Melbourne University Law Review* 719.

<sup>59</sup> Brady, *Aesthetics of Environment* (n7) 53, 58- 59.

<sup>60</sup> Ibid 237.

<sup>61</sup> Ibid 227-8.

<sup>62</sup> On 'environmentalism of the poor', see below section 4.3.

To the sensory channels of appreciation, Brady adds context – of imagination, emotion and knowledge – as informing the aesthetic experience of the environment.<sup>63</sup> Imagination, she says, ‘enables us to adopt several different perspectives, as well as entirely new ones’,<sup>64</sup> reaching ‘beyond the beliefs and knowledge that we rely upon for day-to-day living’.<sup>65</sup> Associated with expressive qualities in the environment, emotion is not, Brady suggests, an idiosyncratic element of environmental appreciation.<sup>66</sup> Finally, knowledge is understood for Brady’s purposes as a cultural construct that includes scientific, traditional and inexpert knowledge.<sup>67</sup>

### 2.2.3 Shared and disinterested appreciation

Emily Brady’s aesthetic value is shared and can be communicated.<sup>68</sup> Although Brady considers subjectivity to be important to capturing the significance and pluralised appreciation of the environment’s aesthetic value, she acknowledges that it is problematic in a policy context where a shared or common basis for understanding the environment’s aesthetic qualities is required in the public management of the environment. Brady observes that environmental values characterised as objective – such as the ecological value of habitat for rare species – are given more weight in environmental management.<sup>69</sup>

Brady tempers subjective elements in her environmental aesthetic with the aid of the Kantian concept of ‘disinterestedness’.<sup>70</sup> This is the idea that if an object is appreciated with no sense of it being useful to the subject, the subject can undertake an assessment of environmental experience that is not driven by self-interest.<sup>71</sup> Brady maintains that disinterestedness ‘supports appreciation that is sensitive to the particularities of the experience [of the environment] and works positively to shift focus away from the self and towards aesthetic qualities for their own sake, rather than as a means to fulfilling some personal or practical goal.’<sup>72</sup> Allen Carlson’s model also relies on disinterestedness to make a case for objective appreciation.<sup>73</sup> However, Brady does not see the concept as inimical to pluralised, place-based appreciations of the environment.<sup>74</sup> She acknowledges and considers significant subjective inputs to the aesthetic experience,<sup>75</sup> but maintains that disinterestedness filters out idiosyncratic appreciation that is anathema to consensus.<sup>76</sup>

So, for Brady, sensorial perception of the natural environment informed by an individual’s imagination, emotion and knowledge is the basis for describing aesthetic value. However, ‘disinterestedness’ extracts from the subjective appreciation elements that can be communicated to other people. Once communicated, people can agree on which elements are shared among a community of people. These, in turn, form the basis of public decisions

<sup>63</sup> Brady, *Aesthetics of Environment* (n7) 146.

<sup>64</sup> Ibid 147.

<sup>65</sup> Ibid 149.

<sup>66</sup> Ibid 183.

<sup>67</sup> Ibid 183-186.

<sup>68</sup> Ibid 206. Cf discussion of landscape tastes, Chapter 4, part 2.1.2.

<sup>69</sup> Brady, *Aesthetics of Environment* (n7) 225. See also John Benson, ‘Aesthetic and Other Values in the Rural Landscape’ (2008) 17(2) *Environmental Values* 221.

<sup>70</sup> Brady, *Aesthetics of Environment* (n7) 34, 128ff, citing Kant (n10).

<sup>71</sup> Ibid.

<sup>72</sup> Ibid 141.

<sup>73</sup> Carlson, *Aesthetics and Environment* (n20) 120.

<sup>74</sup> Brady, *Aesthetics of Environment* (n7) 132; Carlson, *Aesthetics and Environment* (n20) 7, 23ff.

<sup>75</sup> Brady, *Aesthetics of Environment* (n7) 185-186.

<sup>76</sup> Ibid 6. The relevance of disinterestedness to the thesis is addressed in Chapter 8, part 2.2.

informed by assessments of aesthetic value. It is not clear from Brady's theory how, as a practical matter, disinterestedness can be institutionalised in public decision-making, a point to which I return when I come to consider the application of her theory to decision-making in international law.<sup>77</sup>

#### *2.2.4 Plural and relative values informed by culture*

Aesthetic scholar Jonathan Maskit is critical of Emily Brady and several other philosophers of environmental aesthetics for failing to account for cultural relativism in the aesthetic appreciation of the environment. He describes the theories of the majority of philosophers in environmental aesthetics, including Brady, as proponents of universalism in the Kantian tradition.<sup>78</sup> He distinguishes those philosophers from those whom he calls 'cultural historicists'; a minority of philosophers who are aware of the temporal and cultural constructions of concepts – such as 'human' and 'nature' – in their theories of environmental aesthetics.<sup>79</sup> He identifies in this minority Finnish, German and two America-based scholars who have looked at aesthetic questions relevant to Japan.<sup>80</sup> As noted above, however, Brady maintains that her integrated aesthetic model and other non-cognitivist models of environmental aesthetics allow for cultural pluralism.<sup>81</sup> In trying to marry the tensions between the non-cognitivist (subjectivist) and cognitivist (objectivist) models, she emphasises that common approaches to understanding the aesthetic value of the environment need not come at the expense of culturally-situated appreciations of place.

#### *2.2.5 Distinct and non-instrumental value*

Emily Brady distinguishes aesthetic value of the environment from other environmental values. She characterises aesthetic value as a non-instrumental value, different from, for example, instrumental environmental values such as scientific value.<sup>82</sup> In her critique of Allen Carlson's model of environmental aesthetics, Emily Brady is concerned that if aesthetics is tied so intimately to science, it becomes indistinguishable from the scientific or 'ecological' values identified by governments as also relevant in conservation policy.<sup>83</sup> She is also determined to distinguish aesthetic value from 'hedonistic' amenity or a form of recreational value.<sup>84</sup> The Kantian conception of disinterestedness, she maintains, allows for an understanding of aesthetic value that is not tied to human self-interest and, as such, is different from instrumental environmental values.<sup>85</sup>

However, Emily Brady's work to distinguish aesthetic value from other environmental values also extends to drawing distinctions within the sphere of non-instrumental environmental values. Specifically, she examines the relationship between aesthetic value and ethical value. Ethical value in this sense is an object of inquiry in moral philosophy that includes normative understandings of right and wrong.<sup>86</sup> Ethical questions concerning the environment have been

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<sup>77</sup> See Chapter 8, part 2.2.

<sup>78</sup> Maskit (n8) 48-51.

<sup>79</sup> Ibid 47.

<sup>80</sup> Ibid 51-54.

<sup>81</sup> Brady, *Environmental Ethics* (n15); on knowledge as culture, see also Brady, *Aesthetics of Environment* (n7) 100-101.

<sup>82</sup> Brady, *Aesthetics of Environment* (n7) 23.

<sup>83</sup> Ibid 99.

<sup>84</sup> Ibid 129.

<sup>85</sup> Ibid 101; see also ibid 23.

<sup>86</sup> Ibid 246, 254. See generally Stephen M Gardiner and Allen Thompson (eds), *Oxford Handbook of Environmental Ethics* (Oxford University Press, 2017).

addressed under the mantle of environmental ethics, ‘the study of the ethics of human interactions with and impacts on [nature’s] systems’, including normative ethics and meta-ethics.<sup>87</sup> As explained in part 3 of this Chapter, the study of environmental ethics is often engaged in the philosophical inquiry of international and domestic environmental law.<sup>88</sup>

Brady argues that aesthetics and ethics are distinct, but related.<sup>89</sup> She promotes aesthetic philosophy as an alternative to moral philosophy concerned with ethics but says that the differences between ethics and aesthetics can be exaggerated, with ethics associated with ‘abstract rules and universal principles’ and aesthetics pitched as ‘reactive’, ‘subjective and particular’.<sup>90</sup> Brady entertains a role for aesthetic value in environmental ethics whereby an aesthetic appreciation of the environment can lead to a sense of care for the environment.<sup>91</sup> Understood in this way, Brady maintains that aesthetic value is not subordinated to ethical value and that it merits consideration in policy apart from ethical value from the vantage of aesthetic philosophy.<sup>92</sup>

I will return to the relationship between environmental ethics and environmental aesthetics in my discussion of environmental values in international environmental law in part 3 of this Chapter. I will first address the relationship between aesthetics of the environment and of the arts in anticipation of my discussion of law and aesthetics in Chapter 4.

### 2.3 Environmental aesthetics on the arts

When Ronald Hepburn returned aesthetic philosophy to the contemplation of the environment, he argued that appreciating the natural environment was an altogether different philosophical exercise from appreciating art.<sup>93</sup> Unlike art, he said, the environment’s aesthetic quality ‘is always provisional, correctible by reference to a different, perhaps wider context, or to a narrower one realized in greater detail.’<sup>94</sup> Hepburn was adamant in his claim that a love of the natural environment could not be understood in the same way as a love of art. Both Carlson and Brady agree.<sup>95</sup>

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<sup>87</sup> Robin Attfield, *Environmental Ethics* (Polity Press, 2003) 15. See also Robert Elliot, *Environmental Ethics* (Oxford University Press, 1995); J Baird Callicott, *Earth’s Insights: A Survey of Ecological Ethics from the Mediterranean Basin to the Australian Outback* (University of California Press, 1994).

<sup>88</sup> Alexander Gillespie, *International Environmental Law, Policy and Ethics* (Oxford University Press, 2<sup>nd</sup> ed, 2014). On the relevance of environmental ethics to political movements of environmentalism, see Chris Brown and Robyn Eckersley, ‘International Political Theory and the Real World’ in Chris Brown and Robyn Eckersley (eds), *The Oxford Handbook of International Political Theory* (Oxford University Press, 2018) 3.

<sup>89</sup> Brady, *Aesthetics of Environment* (n7) 254-5; See also Maskit (n8) 54, quoting Martin Seel, *Eine Ästhetik der Natur* (Suhrkamp, 1991), 342.

<sup>90</sup> Brady, *Aesthetics of Environment* (n7) 255; 229.

<sup>91</sup> Ibid 260; see also Nathalie Blanc, ‘Ethics and Aesthetics of Environmental Engagement’ in Emily Brady and Pauline Phemister (eds), *Human-Environment Relations: Transformative Values in Theory and Practice* (Springer, 2012) 149; Bryan E Bannon, ‘Re-Envisioning Nature: The Role of Aesthetics in Environmental Ethics’ (2011) 33(4) *Environmental Ethics* 415.

<sup>92</sup> See also Brady, *Environmental Ethics* (n15) 194.

<sup>93</sup> See Hepburn (n14). See discussion in: Brady, *Aesthetics of Environment* (n7) 86 and 103ff; Carlson, *Aesthetics and Environment* (n20) 5.

<sup>94</sup> Hepburn (n14) 524. Cf my discussion of ‘ecocriticism’ later in Chapter 4.

<sup>95</sup> Brady, *Aesthetics of Environment* (n7) 52. Carlson is drawn, however, to ‘objective’ bases for art appreciation, Carlson, *Aesthetics and Environment* (n20) 6, and further at 42-7, 93, 121-2.

For Brady, without artistic context or artistic meaning directing appreciation, a person has more freedom in appreciating the natural environment.<sup>96</sup> In Carlson's opinion, the assimilation of art and environment appreciation 'is both a theoretical mistake and an appreciative pity.'<sup>97</sup> Yrjö Sepänmaa considers the two aesthetics to have a 'common ancestry' from which they deviate,<sup>98</sup> while Yuriko Saito argues that 'art-centred' aesthetics is not equipped to account for the breadth of environmental aesthetics.<sup>99</sup> Robert Elliot understands the appreciation of nature as antithetical to aesthetic judgements of art.<sup>100</sup> At the extreme, Don Mannison claims that the natural environment, absent 'artificialisation' or crafting by humans, cannot be the subject of aesthetic appreciation at all.<sup>101</sup>

In distinguishing between the appreciation of the environment and art, Allen Carlson subscribes to a notion of 'positive aesthetics',<sup>102</sup> several elements of which, I explain below, have been critiqued by other philosophers. Carlson understands all environments as being capable of positive aesthetic appreciation through scientific knowledge so long as they are 'untouched' or 'natural'.<sup>103</sup> This likely excludes from positive aesthetic appreciation places polluted, destroyed or otherwise changed by humans in a manner constituting an 'aesthetic affront'.<sup>104</sup>

The concept of positive aesthetics raises several issues for debate. First, the use of science as a basis for aesthetic judgement can still produce contested outcomes. Forests ravaged by wildfire are judged negatively because they represent 'a truncated system of growth',<sup>105</sup> yet natural science and traditional knowledges might also understand them to have positive associations of renewal. Secondly, a narrow conception of the natural environment for aesthetic appreciation as one free from human impact or influence has been criticised by Emily Brady and other scholars.<sup>106</sup> Those scholars maintain that all environments are under human influence.<sup>107</sup> Whether described as 'natural' and 'wild' or 'managed' and 'cultivated', all environments are culturally constructed or imagined, including those few, if any, places on earth that humans cannot access.<sup>108</sup> Natural science also dictates this. The interdependent nature of ecosystems means that no part of the globe is free from the impacts of human

<sup>96</sup> Brady, *Aesthetics of Environment* (n7) 15.

<sup>97</sup> Carlson, *Aesthetics and Environment* (n20) 115.

<sup>98</sup> See Yrjö Sepänmaa, 'The Two Aesthetic Cultures: The Great Analogy of Art and the Environment' in Arnold Berleant (ed), *Environment and the Arts: Perspectives on Environmental Aesthetics* (Ashgate, 2002) 39.

<sup>99</sup> See Saito (n13) 171.

<sup>100</sup> Robert Elliot, *Faking Nature: The Ethics of Environmental Restoration* (Routledge, 1997) 94; on art that mimics nature, see *ibid* 89.

<sup>101</sup> Don Mannison, 'A Prolegomenon to a Human Chauvinistic Aesthetic' in Don Mannison, Michael McRobbie and Richard Routley (eds), *Environmental Philosophy* (Australian National University, 1980) 212.

<sup>102</sup> Carlson, *Aesthetics and Environment* (n20) 72.

<sup>103</sup> *Ibid* ('untouched' and 'virgin'), 49 and 51 ('natural'), 12 ('pristine' nature).

<sup>104</sup> *Ibid*, 151. Cf Brady, *Aesthetics of Environment* (n7) 246-7. See also Frank Sibley, 'Some Notes on Ugliness' in John Benson, Betty Redfern, and Jeremy Roxbee Cox (eds), *Approach to Aesthetics: Collected Papers on Philosophical Aesthetics* (Oxford University Press, 2001) 190; Yuriko Saito, 'The Aesthetics of Unscenic Nature' (1998) 56(2) *Journal of Aesthetics and Art Criticism* 101. See generally Matthew Kieran, 'Aesthetic Value: Beauty, Ugliness and Incoherence' (1997) 72(281) *Philosophy* 383.

<sup>105</sup> Joseph W Meeker, *The Comedy of Survival: Studies in Literary Ecology* (Scribner, 1974) cited in Carlson, *Aesthetics and Environment* (n20) 75.

<sup>106</sup> Brady, *Aesthetics of Environment* (n7) 100. See also Janna Thompson, 'Aesthetics and the Value of Nature' (1995) 17(3) *Environmental Ethics* 291.

<sup>107</sup> See further Steven Vogel, *Thinking Like a Mall: Environmental Philosophy After the End of Nature* (MIT Press, 2015).

<sup>108</sup> Brady, *Aesthetics of Environment* (n7) 54.

pollution. Thirdly, philosopher Janna Thompson criticises Carlson's theory of positive aesthetics for failing to differentiate between different natural environments: the object of appreciation in positive aesthetics extends to microscopic and 'uncharismatic' species, such as mould or invertebrates, making it an undiscerning concept. When it comes to allocating resources for environmental protection, it is, Thompson argues, necessary to distinguish between environments more worthy of protection than others.<sup>109</sup>

In contrast to aesthetic philosophers who differentiate between the aesthetic appreciation of art and the environment, Janna Thompson entertains an aesthetic philosophy of the natural environment that is analogous to the arts.<sup>110</sup> She and others are not convinced of the demarcation between the aesthetics of nature and art.<sup>111</sup> The aesthetic philosophy developed for the arts provides a basis for aesthetic judgement of environments that can be communicated and argued – and which can differentiate between natural environments that do or do not merit protection by the state. Thompson considers aesthetic judgement as capable of distinguishing valuable environments – wild or managed – from environments that lack aesthetic value.<sup>112</sup> Thompson's view has, in turn, been criticised for its reliance on expertise and its exclusion of personal or popular affect or response to the environment.<sup>113</sup> Addressing this, another approach linking art and the environment is offered by Arnold Berleant.<sup>114</sup> He argues for the 'naturalisation' of aesthetics, whereby art is judged on the same terms as nature as opposed to judging nature on the same terms as art. Specifically, he offers an account of 'participatory aesthetics' which recognises the role of the 'appreciator' in the construction of aesthetic appreciation, whether applied to nature or to art.<sup>115</sup>

Despite the different arguments that have been made in contemporary philosophy, the intimacy between visual art and the natural environment through such things as the concept of 'landscape' and 'environmental art' has played an important role in philosophical thinking on the environment and the place of humans in it.<sup>116</sup> This issue is explained in Chapter 4 when I turn to a discussion of aesthetic philosophy as it relates to the arts and image.

An appreciation of the points of contention among scholars of environmental aesthetics is important to understanding the scope and boundaries of this field of philosophical inquiry.<sup>117</sup> Views in environmental aesthetics on objectivity, subjectivity and the need for common grounds for appreciation – as well as the distinctions between aesthetic value and other environmental values, such as scientific and ethical value – are relevant to understanding expressions of aesthetic value in international environmental law addressed in the next part of this Chapter. Questions around objectivity and subjectivity are also integral to legal

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<sup>109</sup> Thompson (n106).

<sup>110</sup> Ibid.

<sup>111</sup> See also David E Cooper, 'The Intimacy of Art and Nature' in Brady and Phemister (n91) 85.

<sup>112</sup> Thompson (n106).

<sup>113</sup> See generally Brady, *Aesthetics of Environment* (n7) 199-200. On problems of 'expert knowledge', see Brady, *ibid* 200, 206.

<sup>114</sup> Arnold Berleant, 'The Aesthetics of Art and Nature' in Kemal and Gaskell (n37) 228.

<sup>115</sup> Ibid 238-241. See also Arnold Berleant, *Aesthetics and Environment: Theme and Variations on Art and Culture* (Ashgate, 2005).

<sup>116</sup> WJT Mitchell, *Landscape and Power* (University of Chicago Press, 1992). See also Holmes Rolston III, 'Landscape from the Eighteenth Century to the Present' in Michael Kelly (ed), *Encyclopaedia of Aesthetics* (Oxford Art Online, 2<sup>nd</sup> ed, 2014); Harold Osborne, 'The Use of Nature in Art' (1962) 2 *British Journal of Aesthetics* 318.

<sup>117</sup> Cf Maskit (n8).

philosophy, including international legal philosophy, a legacy that I argue affects approaches to aesthetic value in international environmental law.<sup>118</sup>

### 3. AESTHETIC VALUE IN INTERNATIONAL ENVIRONMENTAL LAW

In this part, I explain where the term ‘aesthetic’ is expressed as an environmental value in international environmental law and how it has been characterised in international environmental legal scholarship.<sup>119</sup> The ‘aesthetic’ value of the environment protected under international environmental treaties has been the subject of only limited scholarly inquiry. As analysed below, some of those who have examined aesthetic value are uncritical in their characterisation of ‘aesthetic’ value as synonymous with beauty, recreation and landscape, raising issues that are debated among philosophers of environmental aesthetics.

#### 3.1 Expressions of aesthetic value

In his opening address to the First International Ornithological Congress in Vienna in 1884, Dr Bernard Altum distinguished himself from his ornithological colleagues by contemplating interstate protection of birds not only for their economic usefulness to agriculture as insectivores but in terms of their ‘aesthetic’ value too.<sup>120</sup> His proposed scheme of aesthetic value comprised form, colour and shape, movement and musical powers.<sup>121</sup> Dr Altum’s proposal was quashed.<sup>122</sup> The treaty that eventually emerged, the 1902 *Convention to Protect Birds Useful to Agriculture*,<sup>123</sup> made no mention of aesthetic value. However, at least as early as 1933, states agreed to concerted action to preserve wildlife for, among other reasons, its ‘esthetic interest’.<sup>124</sup>

Today, several international environmental treaties expressly assign aesthetic importance to particular species and habitats.<sup>125</sup> Aesthetic value is often listed as one in a constellation of environmental values that include scientific, economic, cultural and ethical values of environmental protection.<sup>126</sup> Aesthetic value has been extended to specific species, such as polar bears,<sup>127</sup> and groups of species, such as migratory birds and migratory wildlife in general.<sup>128</sup> Aesthetic value has also been assigned to places and spaces, including the habitats

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<sup>118</sup> See generally Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press, 2016); Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016). Discussed later in Chapter 4.

<sup>119</sup> Note in Chapter 4 I address, as a separate concern, the discussion of law and aesthetics in terms of the arts.

<sup>120</sup> Ottó Herman, *International Convention for the Protection of Birds Concluded in 1902; and Hungary: Historical sketch*. Written by order of His Exc. Ignatius de Darányi, Hungarian minister of agriculture (V. Hornyánszky, court printer, 1907) 61.

<sup>121</sup> Ibid 61.

<sup>122</sup> Ibid 63.

<sup>123</sup> *Convention to Protect Birds Useful to Agriculture*, opened for signature 19 March 1902, <<https://www.ecolex.org/details/treaty/convention-for-the-protection-of-birds-useful-to-agriculture-tre-000067/>> (entered into force 6 December 1905).

<sup>124</sup> *Convention Relative to the Preservation of Fauna and Flora in their Natural State*, opened for signature 8 November 1933, 172 LNTS 241 (entered into force 14 January 1936) art 2(1) (‘London Convention’).

<sup>125</sup> See generally Gillespie (n88) 68 72ff. My focus in this section is primarily multilateral treaties although I also reference select bilateral and regional treaties with restricted membership.

<sup>126</sup> P van Heijnsbergen, *International Legal Protection of Wild Fauna and Flora* (IOS Press, 1997) 56.

<sup>127</sup> *Eg Agreement on the Conservation and Management of the Alaska-Chukotka Polar Bear Population*, United States-Russia, signed 16 October 2000, 40 ILM. 397 (2001) (entered into force 23 September 2007), preamble.

<sup>128</sup> *Eg Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983) (‘Bonn Convention’) preamble 3<sup>rd</sup> tiret.



and migratory paths of fauna.<sup>129</sup> Environmental values have been expressed in different parts of treaties – including their preambles, their definitions, their commitments and annexes. As I explain later in Chapter 3, such juridical characterisations of treaty provisions can be relevant to a legal interpretation of the terms in treaties.<sup>130</sup>

### 3.1.1 *Commitments to protect aesthetic value*

International treaties specifically protecting the aesthetic value of the environment through express commitments include the *World Heritage Convention*<sup>131</sup> and the *Antarctic Protocol*.<sup>132</sup> As explained in Chapter 1 of this thesis, article 2 of the *World Heritage Convention* defines natural heritage to include ‘natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view’.<sup>133</sup> The definition of natural heritage is central to decisions of the World Heritage Committee to inscribe a natural property on the World Heritage List,<sup>134</sup> a vehicle created under the treaty to protect the ‘outstanding universal value’ of specific environments.

The *Antarctic Protocol* states in article 3 that:

The protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and **aesthetic** values and its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment, shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area.<sup>135</sup> [emphasis added]

It further provides that ‘activities in the Antarctic Treaty area shall be planned and conducted so as to avoid ... degradation of, or substantial risk to, areas of biological, scientific, historic, aesthetic or wilderness significance’.<sup>136</sup>

Several regional treaties also protect the environment’s aesthetic value through substantive treaty provisions in Africa, the Western Hemisphere, the South Pacific, the Wider Caribbean Region and in the Mediterranean.<sup>137</sup>

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<sup>129</sup> Eg *Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere*, opened for signature 12 October 1940, 161 UNTS 193 (entered into force 1 May 1942) preamble 2<sup>nd</sup> tiret, arts I, V and VII.

<sup>130</sup> See Chapter 3.

<sup>131</sup> *World Heritage Convention* (n4) art 2.

<sup>132</sup> *Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, 402 UNTS 71 (entered into force 14 January 1998) (*‘Antarctic Protocol’*) art 3.

<sup>133</sup> *World Heritage Convention* (n4) art 2.

<sup>134</sup> *Ibid* art 11.

<sup>135</sup> *Antarctic Protocol* (n132) art 3.

<sup>136</sup> *Ibid* art 3(2)(b)(vi).

<sup>137</sup> See eg *African Convention on the Conservation of Nature and Natural Resources*, concluded 15 September 1968, 1001 UNTS 3 (entered into force 16 June 1969) preamble and arts III and VI; *African Convention on the Conservation of Nature and Natural Resources* (Revised), adopted 11 July 2003, online at <<https://au.int/en/treaties/african-convention-conservation-nature-and-natural-resources-revised-version>> (entered into force 23 July 2016) art XII and annexes; *Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere*, opened for signature 12 October 1940, 161 UNTS 193 (entered into force 1 May 1942), preamble 2<sup>nd</sup> tiret and arts I, V and VII; *Convention on the Conservation of Nature in the South Pacific*, adopted 12 June 1976, online at <<https://www.ecolex.org/details/treaty/convention-on-conservation-of-nature-in-the-south-pacific-tre-000540/>> (entered into force 26 June 1990) (*‘Apia Convention’*) preamble and art II; *Protocol Concerning Specially Protected Areas and Wildlife to the Convention*

### 3.1.2 Aesthetic value expressed in preamble

International treaties that recognise aesthetic value in their preambular introductions include the *Convention on the International Trade in Endangered Species*,<sup>138</sup> the *Biodiversity Convention*,<sup>139</sup> and the *Bonn Convention*.<sup>140</sup> The preamble to the *Convention on the International Trade in Endangered Species*, for example, refers first to the concept of ‘beauty’, recognising that ‘wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come’ before going on to state that the parties are ‘[c]onscious of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view’.<sup>141</sup> In a list that is similar to the values of wildlife animals identified in the preamble to the *Bonn Convention*, the *Biodiversity Convention* states in its preamble that its parties are ‘[c]onscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components’.<sup>142</sup>

Some regional agreements protecting the environment, such as Council of Europe’s *Convention on the Conservation of European Wildlife and Natural Habitats*,<sup>143</sup> also mention aesthetic value in their preambles.

### 3.1.3 Aesthetic value informing treaty provisions

Some treaties omit references to aesthetic value while expressly mentioning other environmental values. The preamble to the *Ramsar Convention*, for example, makes no mention of aesthetic value when it states that the parties are ‘convinced that wetlands constitute a resource of great economic, cultural, scientific, and recreational value, the loss of which would be irreparable.’<sup>144</sup>

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*for the Protection and Development of the Marine Environment of the Wider Caribbean Region*, adopted 18 January 1990, online at <<https://www.ecolex.org/details/treaty/protocol-concerning-specially-protected-areas-and-wildlife-to-the-convention-for-the-protection-and-development-of-the-marine-environment-of-the-wider-caribbean-region-tre-001040/>> (entered into force 18 June 2000) preamble and arts 4 and 17; *Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean*, adopted 10 June 1995 <<https://www.ecolex.org/details/treaty/protocol-concerning-specially-protected-areas-and-biological-diversity-in-the-mediterranean-tre-001220/>> (entered into force 12 December 1999) art 4 and 8 and annex I; *Protocol on Integrated Coastal Zone Management in the Mediterranean*, adopted 21 January 2008, online at <[https://wedocs.unep.org/bitstream/handle/20.500.11822/14031/08IG18\\_Final\\_Act\\_iczm\\_eng.pdf](https://wedocs.unep.org/bitstream/handle/20.500.11822/14031/08IG18_Final_Act_iczm_eng.pdf)> (entered into force 24 March 2011) art 11. See also *ASEAN Agreement on the Conservation of Nature and Natural Resources*, adopted 9 July 1985, online at <<https://environment.asean.org/agreement-on-the-conservation-of-nature-and-natural-resources/>> (not in force) art 13.

<sup>138</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, adopted 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975) (‘CITES’) preamble 2<sup>nd</sup> tiret.

<sup>139</sup> *Biodiversity Convention* (n4) preamble 1<sup>st</sup> tiret.

<sup>140</sup> *Bonn Convention* (n128) preamble 3<sup>rd</sup> tiret.

<sup>141</sup> CITES (n138) preamble 2<sup>nd</sup> tiret.

<sup>142</sup> *Biodiversity Convention* (n4) preamble 1<sup>st</sup> tiret; see also *Bonn Convention* (n140) preamble 2<sup>nd</sup> tiret.

<sup>143</sup> *Convention on the Conservation of European Wildlife and Natural Habitats*, adopted 19 September 1979, ETS No 104 (entered into force 1 June 1982) (‘Bern Convention’) preamble 3<sup>rd</sup> tiret. See also *Agreement on the Conservation of African-Eurasian Migratory Waterbirds*, adopted 15 August 1996, 2365 UNTS 203 (entered into force 1 November 1999) preamble 4<sup>th</sup> tiret.

<sup>144</sup> *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975) (‘Ramsar Convention’) preamble 3<sup>rd</sup> tiret.

Other treaties invoke environmental values with reference to concepts such as ‘common’ interest or concern.<sup>145</sup> The *Whaling Convention* recognises the ‘interest of the nations of the world’ and ‘common interest’ in whale stocks.<sup>146</sup> The *Climate Change Convention* refers to the changing climate and its adverse effects as a ‘common concern of humankind’.<sup>147</sup> The aesthetic value of the environment is not expressed in these treaties. I maintain, however, that it is possible to understand provisions in these treaties in light of the aesthetic value of the environments they protect. In Chapter 3 of this thesis, for example, I explain how aesthetic appreciations of whales might inform a doctrinal interpretation of the *Whaling Convention*.<sup>148</sup>

### 3.2 Characterisations of aesthetic value

Few scholars of international environmental law have examined the meaning of ‘aesthetic’ value as a term posited in international treaties.<sup>149</sup> Still fewer have developed understandings of the environment’s aesthetic value for international environmental law in terms of the philosophy of environmental aesthetics I described above in part 2.<sup>150</sup> I have not identified any who has analysed ‘aesthetic’ value in accordance with the customary international rules of treaty interpretation.<sup>151</sup> They have instead considered aesthetic value in the broader context of ‘environmental values’ – the scientific, economic, ethical and cultural values listed in treaties<sup>152</sup> – or otherwise examined the normative foundations of international environmental law in terms of ethics or moral philosophy.<sup>153</sup> Critical approaches to values in international environmental law have given particular attention to the position of developing countries and the Global South.<sup>154</sup> I will in this part describe characterisations of aesthetic value by those

<sup>145</sup> See Jutta Brunnée, ‘Common Areas, Common Heritage, and Common Concern’ in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press, 2007).

<sup>146</sup> *International Convention on the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) (*‘Whaling Convention’*).

<sup>147</sup> *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) (*‘Climate Change Convention’*) preamble 1<sup>st</sup> tiret.

<sup>148</sup> See Chapter 3, part 4.

<sup>149</sup> Discussed in this part. Cf domestic environmental law, see eg Benjamin J Richardson, Emily Barritt and Megan Bowman, ‘Beauty: A Lingua Franca for Environmental Law?’ (2019) 8(1) *Transnational Environmental Law* 59; Douglas E Fisher, ‘Can the Law Protect Landscape Values?’ (2005) 9 *New Zealand Journal of Environmental Law* 1; John J Costonis, *Icons and Aliens: Law, Aesthetics, and Environmental Change* (University of Illinois Press, 1989). I discuss scholars who employ aesthetics for the arts in their analysis of environmental law and international environmental law in Chapter 4, part 3.3.

<sup>150</sup> Cf eg Gillespie (n88).

<sup>151</sup> Cf Alice Palmer, ‘Legal Dimensions to Valuing Aesthetics in World Heritage Decisions’ (2017) 26(5) *Social & Legal Studies* 581.

<sup>152</sup> See generally Gillespie (n88). Others also discussed below in parts 3.2.1, 3.2.2, 3.2.3.

<sup>153</sup> Christopher D Stone, ‘Ethics and International Environmental Law’ in Daniel Bodansky, Jutta Brunnée, Ellen Hey (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press, 2008) 291; Edith Brown Weiss, ‘International Environmental Law: Contemporary Issues and the Emergence of a New World Order’ (1993) 81(3) *Georgetown Law Journal* 675; James Nickel and Daniel Magraw, ‘Philosophical Issues in International Environmental Law’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 453-71; Malgosia Fitzmaurice, ‘Some Reflections on Legal and Philosophical Foundations of International Environmental Law’ (2012) 32 *Polish Yearbook of International Law* 89-110.

<sup>154</sup> See generally Karin Mickelson, ‘South, North, International Environmental Law, and International Environmental Lawyers’ (2000) 11(1) *Yearbook of International Environmental Law* 52; Sundhya Pahuja, ‘Conserving the World’s Resources?’ in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 398; Stephen Humphreys and Yuriko Otomo, ‘Theorizing International Environmental Law’ in Orford and Hoffmann (n118) 797; Usha Natarajan and Kishan Khoday, ‘Locating Nature: Making and Unmaking International Law’ (2014) 27 *Leiden Journal of*

scholars of international environmental law who have addressed it as an express term of international treaties protecting wildlife. They typically equate aesthetic value with natural beauty, describing it as a subjective and instrumental value which is perceived visually in terms of ‘landscape’. Later in section 3.3.1, I examine these characterisations of aesthetic value in light of the philosophy of environmental aesthetics.

### 3.2.1 Beauty and subjectivity

International environmental law scholar, Alexander Gillespie, has undertaken an extensive study of environmental values in international environmental law that includes a specific and detailed analysis of aesthetic value.<sup>155</sup> Referencing a contested characterisation of environmental values as either anthropocentric or non-anthropocentric, he maintains that aesthetic value is considered in anthropocentric terms as useful to humans.<sup>156</sup> Aesthetic value, he says, ‘is one of the foremost justifications for protecting the environment’.<sup>157</sup> Gillespie describes aesthetic value in terms of ‘natural beauty’, though variously defined,<sup>158</sup> and as a ‘subjective’ value.<sup>159</sup> In a previous edition, he maintained that efforts to identify an objective system of ‘formal visual qualities’ for aesthetic responses to the environment had been ‘unsuccessful’.<sup>160</sup>

International environmental legal scholar Catherine Redgwell assumes, in the context of world natural heritage, that aesthetic value is synonymous with ‘natural beauty’.<sup>161</sup> She comments on the World Heritage Committee criterion that references both aesthetic and natural beauty values – terms expressed separately in the *World Heritage Convention*’s definition of natural heritage.<sup>162</sup> Redgwell says they are ‘subjective’. Explaining that ‘there does not exist a universal classification system for “aesthetic importance” or “natural beauty”’, she nevertheless observes that ‘aesthetic value must reside in more than the local population to satisfy the requirements of the [World Heritage] Convention’.<sup>163</sup> Redgwell does not for this purpose situate her analysis in the scholarship on axiology,<sup>164</sup> or on aesthetic philosophy. Nor does she address international rules of treaty interpretation.<sup>165</sup>

Discussing aesthetic value in the context of international laws protecting biodiversity, Werner Scholtz considers beauty as a subjective consideration and rejects ‘aesthetic objectivism’, stating:

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*International Law* 573. On critical perspectives of environmental law generally, see Andreas Philippopoulos-Mihalopoulos, ‘Critical Legal Thinking in Environmental Law’ in Andreas Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Routledge, 2011) 18.

<sup>155</sup> Gillespie (n88).

<sup>156</sup> Ibid 13.

<sup>157</sup> Ibid 68.

<sup>158</sup> Ibid 76-80.

<sup>159</sup> Ibid 68.

<sup>160</sup> Alexander Gillespie, *International Environmental Law, Policy and Ethics* (Oxford University Press, 1<sup>st</sup> ed, 1997) 87.

<sup>161</sup> Catherine Redgwell, ‘Article 2 Definition of Natural Heritage’ in Francesco Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press, 2008) 64, 73.

<sup>162</sup> *World Heritage Convention* (n4) art 2. See discussion in Chapter 3.

<sup>163</sup> Redgwell (n161) 73.

<sup>164</sup> Cf Catherine Redgwell, ‘Life, the Universe and Everything: Critique of Anthropocentric Rights’ in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Paperbacks, 1997) 71.

<sup>165</sup> Cf doctrinal interpretation in Chapter 3.

It is, of course, probable that most of society may agree on the aesthetic appeal of a certain object. This agreement may exist at the local, national or international level. But even this form of consensus must not be viewed as evidence of aesthetic objectivism. It is merely the product of convention which may be coined in appropriate circumstances as society's taste.<sup>166</sup>

### 3.2.2 Instrumentality and intrinsic and inherent values

A distinction made by Alexander Gillespie between anthropocentrism and non-anthropocentrism is related to a distinction made in the legal scholarship in general between instrumental and intrinsic values of the environment.<sup>167</sup> As explained earlier, Gillespie considers aesthetic value as an instrumental value, where the environment is valued for its usefulness to humans.<sup>168</sup> Instrumental values possibly equate to 'extrinsic' or 'utilitarian' values.<sup>169</sup> Legal scholar P van Heijnsbergen goes further to distinguish economic from non-economic values within the overall category of instrumental values, assigning aesthetic value to the realm of 'non-economic' concerns.<sup>170</sup> As a non-economic value, aesthetic value is categorised by van Heijnsbergen in the company of scientific, cultural, recreational and educational values, among others.<sup>171</sup>

*Lyster's International Wildlife Law* also analyses the environmental values protected in what it describes as 'wildlife' law.<sup>172</sup> Consistent with the work elsewhere of one of its authors, Michael Bowman,<sup>173</sup> this book categorises aesthetic value as an 'inherent value', distinct from instrumental and intrinsic values. The book provides that inherent value 'is that which an entity possesses of itself, by virtue not of its utility, but of its mere existence' distinct from 'intrinsic' value which is also the value that an entity possesses of itself but 'for itself, regardless of the interests or utility of others.'<sup>174</sup> Elsewhere, Michael Bowman couples 'aesthetic' with recreational considerations, contrasting both aesthetic and recreational values with 'utilitarian' concerns.<sup>175</sup>

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<sup>166</sup> Scholtz, (n54) 16.

<sup>167</sup> Mattia Fosci and Tom West, 'In Whose Interest? Instrumental and Intrinsic Value in Biodiversity Law' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar Publishing, 2016) 55; in philosophical literature, see Eugene C Hargrove, 'An Overview of Conservation and Human Values: Are Conservation Goals Merely Cultural Attitudes?' in David Western and Mary C Pearl (eds), *Conservation in the Twenty-First Century* (Oxford University Press, 1989) 227.

<sup>168</sup> Gillespie (n88) 13.

<sup>169</sup> See Brady, *Aesthetics of Environment* (n7), 23. On axiology, see further Iwao Hirose and Jonas Olson, 'Introduction to Value Theory' in Iwao Hirose and Jonas Olson (eds), *The Oxford Handbook of Value Theory* (Oxford University Press, 2015).

<sup>170</sup> See van Heijnsbergen (n126) 56.

<sup>171</sup> Ibid.

<sup>172</sup> Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster's International Wildlife Law* (Cambridge University Press, 2nd ed, 2010) 61 ('Lyster's').

<sup>173</sup> Michael Bowman, 'Biodiversity, Intrinsic Value and the Definition and Valuation of Environmental Harm' in Michael Bowman and Alan Boyle (eds), *Environmental Damage in International and Comparative Law: Problems of Definition and Valuation* (Oxford University Press, 2002) 41–61 ('Environmental Harm'). Compare J Baird Callicott, 'On the Intrinsic Value of Nonhuman Species' in Bryan G Norton (ed), *The Preservation of Species: The Value of Biological Diversity* (Princeton University Press, 1986) 138.

<sup>174</sup> *Lyster's* (n172) 62. See also Bowman, 'Environmental Harm' (n173).

<sup>175</sup> Michael Bowman, 'Law, Legal Scholarship and the Conservation of Biological Diversity: 2020 Vision and Beyond' in Bowman, Davies and Goodwin (n167) 3, 13 ('2020 Vision').



In describing intrinsic value as a basis for environmental protection, James Nickel and Daniel Magraw describe ‘the experience of beauty’ as ‘intrinsically valuable’ and suggest that in the view of some scholars the natural systems and objects are a constitutive rather than instrumental part of that experience.<sup>176</sup> If they, like Catherine Redgwell,<sup>177</sup> consider ‘natural beauty’ to be the same as ‘aesthetic’ value, they would likely support the classification of aesthetic value as an intrinsic value. Lynda Collins also associates the environment’s aesthetic value with ‘the intangible, quality-of-life values inherent in natural environments’.<sup>178</sup>

### 3.2.3 Visual appreciation and landscape ideals

Michael Bowman and his co-authors of *Lyster's International Wildlife* associate ‘aesthetic’ value with visual appreciation and landscape ideals, explaining that:

From an aesthetic point of view, [inherent] value may reside in any entity capable of being the subject of sensual appreciation. Clearly, plants and animals may satisfy this criterion, either individually or collectively, though the emphasis in the latter case is likely to fall upon aesthetically appreciable assemblages (notably flocks, herds, landscapes and vistas), rather than upon ecologically significant collectivities such as species, communities or ecosystems. Once again, such value is not restricted to living entities, but extends to inanimate features of the landscape, including mountains, lakes and rivers, and even to transient or intangible elements such as clouds, sunsets and rainbows.<sup>179</sup>

Despite the initial reference to ‘sensual appreciation’ in this quote,<sup>180</sup> the explanation is weighted to visual appreciation, including through the terms ‘appreciable assemblages’ and ‘landscape’ features.

### 3.2.4 Variable accounts of aesthetic value

Overall, the scholarship on aesthetic value in international environmental law indicates that there is no clear agreement on how to characterise ‘aesthetic value’ as it applies to wildlife and natural environments in international treaties. Common associations are made with natural beauty, landscape and recreational values, with appreciation of these values typically described in visual terms. There is, however, no apparent consensus on the meaning of aesthetic value for the various treaties that use the term, or on the basis for defining it. Aesthetic value is variously described as anthropocentric, instrumental, non-economic, inherent and possibly intrinsic.<sup>181</sup> The reference in *Lyster's International Wildlife* to ‘sensual appreciation’ appears to contemplate visual appreciation in accordance with ‘landscape’ elements – ‘appreciable assemblages’ of animals, ‘landscapes’ and ‘vistas’.<sup>182</sup> Some of the scholars associate aesthetic value with other environmental values such as natural beauty and recreational value, without necessarily making a distinction between those values. Possibly common to all – expressly or impliedly – is an understanding that aesthetic value is ‘subjective’.

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<sup>176</sup> Nickel and Magraw (n153) 464.

<sup>177</sup> Redgwell (n161).

<sup>178</sup> Lynda Collins, ‘The United Nations, Human Rights and the Environment’ in Anna Grear and Louis J Kotzé (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar Publishing, 2015) 219, 242. Note Collins also associates aesthetic value with beauty and indigenous culture, *ibid*.

<sup>179</sup> *Lyster's* (n172) 68.

<sup>180</sup> *Ibid*.

<sup>181</sup> See Gillespie (n88), Redgwell (n161), van Heijnsbergen (n126), *Lyster's* (n172).

<sup>182</sup> *Lyster's* (n172) 68.

It also appears to be assumed in the scholarship reviewed that axiological concepts for categorising values are appropriately applied to ‘environmental’ values in international law. Considerations of values in terms, for example, of instrumentality contrasted with the intrinsic, or subjectivity contrasted with objectivity, is derived from axiology, the theory of values in philosophy.<sup>183</sup> Value theory is relevant to many philosophies to examine what is deemed good or bad, but it is well-developed in moral philosophy and theories of ethics, including environmental ethics.<sup>184</sup> A division between so-called ‘new’ and ‘old’ environmental ethics is central to Alexander Gillespie’s framing of environmental values for international environmental law.<sup>185</sup>

It is not clear why scholars of international environmental law have turned to axiology and environmental ethics to characterise aesthetic value of the environment where it is expressed as a term of international treaties. In Chapter 3, I will consider these characterisations in the context of doctrinal rules of treaty interpretation. However, I will below consider them in light of the philosophy of environmental aesthetics described earlier in part 2 of this Chapter.

#### 4. AESTHETIC VALUE FOR INTERNATIONAL ENVIRONMENTAL LAW

In his characterisation of the environment’s aesthetic value, Alexander Gillespie identifies several issues debated in aesthetic philosophy.<sup>186</sup> I will in this section analyse the characterisations of aesthetic value by scholars of international environmental law, discussed above in part 3, in light of philosophical scholarship in environmental aesthetics described earlier in part 2. I elaborate on the implications for international law of characterising aesthetic value in terms of natural beauty, and as either subjective or objective for legal understandings of the term. I argue that characterisations of aesthetic value by philosophers of environmental aesthetics, particularly Emily Brady, could assist in crafting an understanding of the environment’s aesthetic value well-suited to international law.

##### 4.1 Aesthetic value as hedonism

The legal protection of aesthetic value in terms of ‘flocks’, ‘herds’ and ‘vistas’ beset by ‘sunsets and rainbows’ – to use the terms in *Lyster’s International Wildlife*<sup>187</sup> – speaks to a particular understanding of natural beauty that trivialises aesthetic value in the way that has so concerned Emily Brady and other philosophers of environmental aesthetics. As discussed above in part 2, Brady has observed that aesthetic value is treated less seriously than other environmental values in British environmental policy where it is associated with a visual appreciation of natural beauty in leisurely pursuits.<sup>188</sup> Aesthetic value appears as an hedonistic, incidental luxury that would pale in comparison to either scientific concerns for ecosystem collapse or ethical concerns for the survival of species, including humans.

Brady has sought to address this trivialisation of aesthetic value in public policy by disassociating it from ‘scenery’ models of nature appreciation tied to the visual in British and European landscapes from the 18<sup>th</sup> and 19<sup>th</sup> centuries. She posits that ‘a critical understanding

<sup>183</sup> See Hirose and Olson (n169). See also David R. Keller (ed), *Environmental Ethics: The Big Questions* (Wiley-Blackwell, 2010).

<sup>184</sup> See Gardiner and Thompson (n86).

<sup>185</sup> Gillespie (n88) 2.

<sup>186</sup> Gillespie does not explicitly discuss the philosophy of ‘environmental aesthetics’ but he cites eg to Allen Carlson and Emily Brady, see Gillespie (n88) 68.

<sup>187</sup> *Lyster’s* (n172), see various quotes above in part 3.2.

<sup>188</sup> Brady, *Aesthetics of Environment* (n7) 225.



of environmental aesthetics helps to correct the common view that aesthetics has only to do with values such as prettiness, beauty or attractiveness, an assumption often implicit in the scenic model.<sup>189</sup> As was explained above in part 2, Brady and other philosophers of environmental aesthetics have developed complex accounts of the aesthetic value of the natural environment that extend beyond philocaly – a love of beauty – and the idea of wilderness as visual appreciation.<sup>190</sup> There is a multisensory appreciation of the environment that does not privilege the visual in aesthetic experience. From Emily Brady's perspective, it is conceived in a way that is manifestly important to people while also allowing for pluralised, place-based aesthetic significance in ways some philosophers might describe as subjective. She develops an integrated aesthetic model where the situations of object *and* subject guide appreciation in an aesthetic approach that 'emphasises the engaged, relational and contextual character of environmental appreciation and preserves a kind of non-instrumentalism through the concept of disinterestedness'.<sup>191</sup>

#### 4.2 Subjective aesthetic value and irregularity in law

The legal scholarship reviewed in part 3 described aesthetic value as subjective. Legal scholar Alexander Gillespie, for example, understands aesthetic value as a 'relative' value.<sup>192</sup> Catherine Redgwell also notes the lack of a 'universal classification system' for aesthetic value in the context of the *World Heritage Convention*.<sup>193</sup> Werner Scholtz and Lynda Collins also characterise aesthetic value as subjective with Scholtz specifically rejecting 'aesthetic objectivism'.<sup>194</sup> In this sense, the legal scholarship is consistent with models of environmental aesthetics identified by Emily Brady as 'non-cognitive' theories, and by philosopher Allen Carlson as 'subjectivist' accounts, of the aesthetic appreciation of the natural environment.<sup>195</sup>

However, the subjectivity of aesthetic value is problematic for the implementation of international environmental treaties.<sup>196</sup> The practice of international environmental law is grounded in an expectation of objectivity.<sup>197</sup> To be sure, that expectation has long been a feature of sound criticism in legal theory.<sup>198</sup> A reliance on objective method has nevertheless persisted, fuelled by positivist pretensions, in the broad practice of international law and in the international laws directed at environmental protection.<sup>199</sup> By this account, an objective international law is an expression of the will of sovereign states, posited in a written instrument and quarantined from partisan or subjective influences such as those implied by values. Environmental values, including aesthetic value, that are expressed in treaties are posited as

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<sup>189</sup> Ibid, 229.

<sup>190</sup> Ibid, 46 (on American transcendentalism). See also William Cronon, 'The Trouble with Wilderness or Getting Back to the Wrong Nature' in J Baird Callicott and Michael P Nelson (eds), *The Great New Wilderness Debate* (University of Georgia Press, 1998) 471–499. Cf Mark Woods, *Rethinking Wilderness* (Broadview Press, 2017).

<sup>191</sup> Brady, *Aesthetics of Environment* (n7), 3; see also ibid 120.

<sup>192</sup> Gillespie (n88) 76.

<sup>193</sup> Redgwell (n161).

<sup>194</sup> Scholtz (n54); Collins (n178).

<sup>195</sup> See above part 2.1.

<sup>196</sup> See eg Gillespie (n88) 76.

<sup>197</sup> See eg Anne Orford and Florian Hoffmann, 'Introduction: Theorizing International Law' in Orford and Hoffmann (n118) 1, 4.

<sup>198</sup> See Bianchi (n118) 21 cf 135. See also Andrea Bianchi, *Theory and Philosophy of International Law: An Edward Elgar Research Review* (Edward Elgar Pub., 2017).

<sup>199</sup> Jörg Kammerhofer, 'International Legal Positivism' in Orford and Hoffmann (n118) 407.

part of an international agreement. They are, by virtue of their identification in those treaties, values on which all parties – at least for doctrinal practice – are agreed and committed.<sup>200</sup>

In this context, aesthetic value cast as relative or subjective would be readily overshadowed, in the administration of treaties, by values (environmental or otherwise) that can be quantified or otherwise ‘objectified’ by forms of reductive valuation. Economic or scientific values of the environment are promoted for the objective ‘rational’ methods by which they are described. Alexander Gillespie, for example, observes that environmental values that can be reduced to economic values can then be compared with each other.<sup>201</sup> He notes that ‘the costs and benefits that are more difficult to measure, and harder to attribute economic data to, tend to be ignored or undervalued.’<sup>202</sup> *Lyster’s International Wildlife* states that ‘reliable methods of comparison and quantification’ such as economic valuation are adopted for the purposes of prioritising different values – one environmental value as against another environmental value, and all environmental values as against non-environmental values – in the service of ‘sustainable development’.<sup>203</sup> It describes the ways in which aesthetic appeal can be characterised in financial terms,<sup>204</sup> recognising, as does Gillespie, that not all aspects of aesthetic value are capable of being expressed in monetary or ‘commodity’ terms.<sup>205</sup>

These issues of measure and comparison are at the root of concerns for those philosophers in environmental aesthetics who seek to develop ‘cognitive’ or ‘objectivist’ foundations for the aesthetic appreciation of the environment.<sup>206</sup> For Allen Carlson, for example, if scientific knowledge of natural species and natural spaces drives aesthetic appreciation, it provides common ground for the appreciation of the natural environment.<sup>207</sup> The sonar capacities of a bat’s head, to respond to Malcolm Budd quoted earlier, would be significant to the aesthetic appreciation of the bat.<sup>208</sup> Having concerns about using science as a common ground, however, Emily Brady co-opted the concept of ‘disinterestedness’ in her quest for a theory of environmental aesthetics that can be communicated for the purposes of comparison in a policy setting.<sup>209</sup> In Janna Thompson’s view – a view that I will return to in subsequent chapters of the thesis – it is the aesthetic criteria of art that provide a common framework for evaluation of the aesthetic value of the environment.<sup>210</sup>

International law’s practised orientation towards objectivity might drive Redgwell’s observation that ‘aesthetic value must reside in more than the local population to satisfy the requirements of the [World Heritage] Convention’.<sup>211</sup> As discussed further in Chapter 5 of this thesis, the *World Heritage Convention* is by its terms premised on objectivity – it protects ‘outstanding universal value’ in natural and cultural heritage determined in accordance with scientific method.<sup>212</sup> Yet all international environmental laws, I argue, by virtue of being

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<sup>200</sup> On *pacta sunt servanda*, see Malcolm Shaw, *International Law* (Cambridge University Press, 8<sup>th</sup> ed, 2017) 685.

<sup>201</sup> Gillespie (n88) 27.

<sup>202</sup> Ibid 26.

<sup>203</sup> *Lyster’s* (n172) 78-79.

<sup>204</sup> Ibid 63.

<sup>205</sup> Ibid 79; Gillespie (n88) 40.

<sup>206</sup> See above part 2.

<sup>207</sup> Carlson, *Aesthetics and Environment* (n20) 9.

<sup>208</sup> Budd (n46) 270.

<sup>209</sup> Brady, *Aesthetics of Environment* (n7) 141.

<sup>210</sup> Thompson (n106).

<sup>211</sup> Redgwell (n161). Cf Scholtz (n54).

<sup>212</sup> *World Heritage Convention* (n4) arts 1 and 2.

multilateral arrangements that assume the existence of an aesthetic value for collective protection, are confronted in practice with locating aesthetic value in an objective framework – or at least a framework that provides for the articulation of the value in terms that can be understood by all parties as a unified concept that is distinct from other environmental values.<sup>213</sup> This concerns international treaties that express aesthetic value but it applies too where a legal claim is made on the basis that aesthetic value informs the interpretation of a treaty – as I will argue in Chapter 3 in the context of interpreting the *Whaling Convention*.<sup>214</sup>

However, a move away from subjectivism towards objectivism in the characterisation of aesthetic value would also be problematic, for other reasons, for the practice of international environmental law.

### 4.3 Hegemony of objectified aesthetic value

A conception of aesthetic value in objective terms is resisted by non-cognitive or subjectivist philosophers of environmental aesthetics.<sup>215</sup> For those philosophers, objectivist or cognitive models of environmental aesthetics promote a conception of the environment as separate from humans. In his book *Law and Nature*, David Delaney makes the same observation of objectification in law.<sup>216</sup> He suggests that '[i]n stories about progress, development, civilization, and socialization, law is frequently cast by social theorists as that which marks the break, and therefore, that which makes humans distinctively *human*. As such, law is commonly figured as antinature, and it is this opposition to nature that makes law.'<sup>217</sup>

In the case of international law applied among states, the 'objectification' of aesthetic value has further consequences where its effect is to universalise for all states parties to a treaty a culturally-specific understanding of aesthetic value. Referencing the paradigm of 'environmentalism of the poor', critical scholarship has addressed the hegemonic effect of environmental movements bound to the specific ideas of natural beauty and wilderness developed in Europe and Britain and embraced in the United States.<sup>218</sup> Aesthetic value is seen as what might be called a 'full belly' luxury.<sup>219</sup> An aesthetic value 'objectified' as natural beauty might only constitute a value construct of rich, industrial former colonising states which is applied by all states under the guise of universalism.<sup>220</sup>

As explained above in part 2 of this Chapter, aesthetic scholar Jonathan Maskit does not appear to credit Brady and the non-cognitivist scholars she applauds as having situated aesthetic appreciation in a cultural context.<sup>221</sup> By her own description, however, Brady is a proponent of cultural pluralism, describing her understanding of the 'knowledge' that contributes to aesthetic appreciation in terms of 'commonsense, folk and other cultural knowledges, including

<sup>213</sup> On treaty interpretation, see Chapter 3.

<sup>214</sup> See Chapter 3, part 4.

<sup>215</sup> Cf Maskit (n8).

<sup>216</sup> David Delaney, *Law and Nature* (Cambridge University Press, 2003).

<sup>217</sup> Ibid 24.

<sup>218</sup> See Cronon (n190) 471, cited in Maskit (n8).

<sup>219</sup> See generally Ramachandra Guha, *Environmentalism: A Global History* (Longman, 2000); Ramachandra Guha, 'Radical American Environmentalism and Wilderness Preservation: A Third World Critique' (1989) 11(1) *Environmental Ethics* 71. See discussion in Gillespie (n88) 77. See also Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press, 2011) 5.

<sup>220</sup> See generally Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011).

<sup>221</sup> Maskit (n8).

scientific knowledge'.<sup>222</sup> Her reliance on the Kantian concept of disinterestedness is contrived by her to remove idiosyncratic judgments of value for the purposes of aesthetic evaluations in policy. This does not, she maintains, detract from an acknowledgement of pluralised aesthetic experiences of the environment that are spatially and culturally situated.<sup>223</sup> I maintain that Emily Brady's model of environmental aesthetics could avoid universalising a singular aesthetic in international environmental law. Variances between states in their culturally-specific articulation of the environment's aesthetic value would be accepted within a common framework for evaluation of the value. How disinterestedness could be institutionalised for this purpose, however, is not clear.<sup>224</sup> It might be that, in the context of judgements of aesthetic value under treaties, aesthetic value is significant for all states but significant in different ways. I will explore this point further through the cases studies in Chapters 5 to 7.

#### 4.4 Environmental aesthetics for international environmental law

Scholarship on international environmental law has examined environmental values from the philosophical perspective of environmental ethics.<sup>225</sup> It typically presents aesthetic value in terms of axiological categories, describing it as a subjective and instrumental value that is associated with environmental values such as natural beauty, recreation and scenic values.<sup>226</sup> Distinctions between aesthetic value and other environmental values have not been explained in this literature. I maintain that this characterisation in legal scholarship of the environment's aesthetic value is problematic for international environmental law. Aesthetic value might be seen as trivial and subjective, or passed off as objective, leaving it to carry no, or too much, weight in the decisions of international communities to protect the environment.<sup>227</sup>

The characterisation of the environment's aesthetic value by scholars in international environmental law contrasts with that of philosophers of environmental aesthetics. Philosophers such as Emily Brady understand aesthetic value in terms of a multisensory engagement with the natural environment, shaped by imagination, emotion and knowledge, including knowledge from different cultures.<sup>228</sup> This account of environmental appreciation evokes what I am calling an 'exquisite' and 'profound' affect, which makes it distinct from other environmental values. It is an environmental appreciation that is also a product of culture. I argue that such conceptions of the environment's aesthetic value among philosophers of environmental aesthetics, including Emily Brady, are appropriate characterisations of aesthetic value for international law. As exquisite and profound it is both distinct from other environmental values protected by international environmental treaties and important for protection by the international community of states that make international environmental law. That it is sensitive to cultural variations, makes Brady's model of environmental aesthetics relevant to constructions of aesthetic value for the different nation states that are party to international treaties that protect the environment for its aesthetic value.<sup>229</sup>

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<sup>222</sup> Brady, *Aesthetics of Environment* (n7) 185.

<sup>223</sup> Ibid. See also Brady, *Environmental Ethics* (n15).

<sup>224</sup> See Chapter 8.

<sup>225</sup> Eg Gillespie (n88).

<sup>226</sup> See above part 3.2.4.

<sup>227</sup> Cf issues of 'ugly' but ecologically significant environments in: Gillespie (n88) 79; Brady, *Aesthetics of Environment* (n7) 229; Emily Brady, 'The Ugly Truth: Negative Aesthetics and Environment' (2012) 69 *Philosophy and Environment: Royal Institute of Philosophy Supplements* 83.

<sup>228</sup> See above part 2.2.

<sup>229</sup> See above part 2.2.4.

## 5. CONCLUSION

I have argued from a jurisprudential perspective that environmental aesthetics provides a sound basis for the protection of aesthetic value by international environmental treaties. It is, however, not clear if such a characterisation of the environment's aesthetic value corresponds to the meanings of aesthetic value where it is expressed as a term of a treaty or is otherwise informing the interpretation of treaties that protect the environment.

I contend that the term 'aesthetic' expressed in international environmental treaties is a legal and jurisprudential term.<sup>230</sup> In international legal practice it would be interpreted in accordance with doctrinal rules of treaty interpretation, including those prescribed by the *Vienna Convention on the Law of Treaties*.<sup>231</sup> Under those rules, words in a treaty are to be interpreted in good faith in accordance with the ordinary meaning in context and in light of the treaty's object and purpose.<sup>232</sup> The same word can have a different meaning in different treaties and in different parts of the same treaty.<sup>233</sup> Enforcement of a treaty might turn on interpretation of a term,<sup>234</sup> and if treaty powers are exercised under a misapprehension of meaning, the exercise of those powers by officers authorised to make decisions under the treaty might be unlawful.<sup>235</sup>

I will in the next Chapter employ international rules of treaty interpretation to develop legal definitions of the term 'aesthetic' value in the context of three treaties: the *World Heritage Convention*,<sup>236</sup> the *Biodiversity Convention*,<sup>237</sup> and the *Whaling Convention*.<sup>238</sup> There I will consider the extent to which meanings of the environment's 'aesthetic' value, developed from orthodox sources of treaty interpretation for each treaty, correspond to understandings of aesthetic value in the philosophy of environmental aesthetics.

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<sup>230</sup> See further Chapter 3.

<sup>231</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

<sup>232</sup> *Ibid* art 31(1).

<sup>233</sup> On different meanings of the same term in an instrument, see Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2015) 209.

<sup>234</sup> See Chapter 6.

<sup>235</sup> See Chapter 5.

<sup>236</sup> *World Heritage Convention* (n4); see Chapter 5.

<sup>237</sup> *Biodiversity Convention* (n4); see Chapter 7.

<sup>238</sup> *Whaling Convention* (n146); see Chapter 6.

## CHAPTER 3 LEGAL INTERPRETATION OF AESTHETIC VALUE

### EXHIBIT: WILLIAM WYLD, *MANCHESTER FROM KERSAL MOOR* (1852)

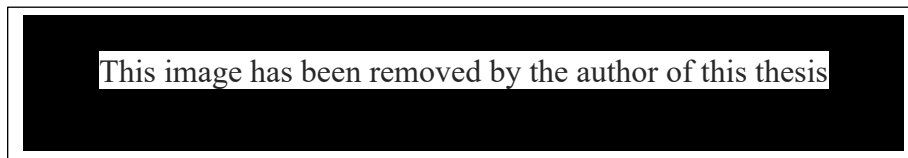


Figure 3.1: William Wyld, *Manchester from Kersal Moor*, 1852, watercolour, 32cm x 49cm, Royal Collection.  
Source: Wikimedia Commons

William Wyld's *Manchester from Kersal Moor* (1852) (fig 3.1) provides a remarkably contemporary vision despite portraying a landscape from two centuries past. In the distance, the golden glow of a sunset blends to a bruised hue in the haze of emissions from chimney stacks, spires of industrialisation threatening to overcome the church steeples in their midst. A river encircles the eponymous moor, a border to the unkempt countryside outside the city limits. A dank but not unpleasant smell rises with heat from muddy banks. A family atop a hill in that unwieldy foreground might be missed but for the cardinal red of the woman's skirts. There a mother's gaze appears caught by her infant while an attentive dog looks on and a protective father looks out. Long, end-of-day shadows extend from darkening trees as night falls. Bleats and tweets are reedy in the cooling air.

Is the man watchful or distracted? Whether his gaze is one of awe or concern is not clear. It is a spectacular scene, commissioned by Britain's Queen Victoria.<sup>1</sup> Not knowing then what we know now of the impacts that fossil fuel emissions would wreak on the world – the chimneys were built on cotton mills powered by coal-fired steam engines<sup>2</sup> – the painting might well be seen as a secular homage to the might of 'man', a sacrilegious celebration of human ingenuity and the taming of both nature and God. Seen today, it resembles contemporary New

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<sup>1</sup> Royal Collection Trust, Description of '*Manchester from Kersal Moor*', online at <<https://www.rct.uk/collection/920223/manchester-from-kersal-moor>>.

<sup>2</sup> Richard L Hills, *Power in the Industrial Revolution* (Manchester University Press, 1970), 10, 139, 149.

Delhi, Los Angeles or Beijing, bathed in the unabated smog of consumption.<sup>3</sup> Or this is a dystopian vision: hell's fires burn while that mighty 'man' looks on, beguiled or complacent, so happy with his lot that he cannot see beyond the brilliant palette that backgrounds his domestic contentedness.

## 1. INTRODUCTION

My description of Wyld's painting *Manchester from Kersal Moor* (1852) (fig 3.1) uses aesthetic methods developed for the analysis of visual art to articulate different understandings of the environment's aesthetic value. Multiple meanings arise from my analysis. Some of those understandings relate to conceptions of aesthetic value among philosophers of environmental aesthetics that I described in Chapter 2.<sup>4</sup> A multisensory engagement with the environment is suggested, for example, by sounds, smells and sights. My perception of the depicted environment is shaped by my imagination, emotion and knowledge. Other elements in my description suggest an aesthetic appreciation relevant to the arts, including eco-critical perspectives on history and environmental concerns of the current day.<sup>5</sup> I will discuss those art methods and their relevance to my thesis in Chapter 4. First, I will examine the extent to which international law's doctrinal methods for interpreting terms in treaties might also incorporate conceptions of aesthetic value from the philosophy of environmental aesthetics.

Where expressed as a treaty term or otherwise informing the implementation of a treaty, 'aesthetic' value is a legal term that must in legal practice be interpreted in accordance with doctrinal rules of treaty interpretation.<sup>6</sup> In this Chapter, I employ different methods of treaty interpretation to develop meanings of 'aesthetic' value for three international treaties:<sup>7</sup> the *World Heritage Convention* and the *Biodiversity Convention* which protect the environment's aesthetic value through their express terms; and the *Whaling Convention* which, I argue, protects aesthetic value through an amendment to ban commercial whaling. Like aesthetic analysis, a range of meanings, and methods for constructing meanings, can arise from treaty interpretation in international law. Endorsing literal, contextual, and teleological approaches, as well as intentional and evolutive techniques,<sup>8</sup> the rules of treaty interpretation could produce myriad meanings for the environment's 'aesthetic' value protected by international treaties.

As explained in Chapter 2, environmental aestheticians such as Emily Brady understand aesthetic value as distinct from other environmental values, and important for consideration,

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<sup>3</sup> See World Health Organisation, *Global Ambient Air Quality Database* (Summary Results of the Database, 2018).

<sup>4</sup> See Chapter 2, part 2.1. Note I address different aspects of the relationship between art and the environment's aesthetic value in Chapter 2, part 2.3 and in Chapter 4, part 2.

<sup>5</sup> See Chapter 4, part 2.3.2.

<sup>6</sup> See eg Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2015). See also Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2013). Cf critical interpretation of international law, see generally Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press, 2015).

<sup>7</sup> *Convention for the Protection of the World Cultural and Natural Heritage*, adopted 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*'); *International Convention on the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) ('*Whaling Convention*'); *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('*Biodiversity Convention*').

<sup>8</sup> Explained below part 3.



yet sensitive to cultural variations.<sup>9</sup> This is a conception of the environment's aesthetic value that is, I maintain, appropriate for protection under international treaties by diverse nation states.<sup>10</sup> I conclude in this Chapter, however, that the orthodox sources and methods for interpreting treaties produce a variable account of the meanings of the environment's aesthetic value, compromising the protection of that environmental value in international environmental law.

## 2. INTERPRETATION OF INTERNATIONAL ENVIRONMENTAL LAW

The making, implementation and enforcement of international treaties agreed between sovereign states are functions of international legal practice that rely on the interpretation of terms in those treaties.<sup>11</sup> Public international law has developed rules for interpreting treaties that are largely codified in the 1969 *Vienna Convention on the Law of Treaties* ('*Vienna Convention*').<sup>12</sup> The act of treaty interpretation has been variously characterised as the application of legal rules,<sup>13</sup> reference to guidance,<sup>14</sup> part of the 'atmosphere' lying around the law,<sup>15</sup> derived from the 'climate of opinion'<sup>16</sup> and a 'social practice' between like-minded people.<sup>17</sup> Jan Klabbbers suggests instead that treaty interpreters (including civil servants and policy makers) should be guided by 'humility, acquiescence, integrity and candour'.<sup>18</sup> Iain Scobbie argues that legal texts 'need to have an identifiable meaning, or [a] range of acceptable meanings, because the practice of law is an instrumental activity aimed at practical outcomes.'<sup>19</sup>

In the case of international environmental treaties, diplomats and civil servants engage in acts of interpretation in the course of making and implementing international environmental

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<sup>9</sup> See Chapter 2, part 2.2. See generally Emily Brady, *Aesthetics of the Natural Environment* (Edinburgh University Press, 2003) ('Aesthetics of Environment').

<sup>10</sup> See Chapter 2, part 4.4.

<sup>11</sup> See generally Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press, 4<sup>th</sup> ed, 2018). Daniel Bodansky, Jutta Brunnée and Ellen Hey, 'International Environmental Law: Mapping the Field' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press, 2008) 1. Cf Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.

<sup>12</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*Vienna Convention*'). See Gardiner (n6) 16.

<sup>13</sup> Philip Allott, 'Language, Method and the Nature of International Law' (1971) 45 *British Yearbook of International Law* 79, 133.

<sup>14</sup> Maarten Bos, 'Theory and Practice of Treaty Interpretation' (Part I) (1980) 27(1) *Netherlands International Law Review* 3, 21.

<sup>15</sup> Maarten Bos, 'Theory and Practice of Treaty Interpretation' (Part II) (1980) 27(2) *Netherlands International Law Review* 135, 170.

<sup>16</sup> Ian Johnstone, 'Treaty Interpretation: The Authority of Interpretive Communities' (1991) 12(1) *Michigan Journal of International Law* 371, 376.

<sup>17</sup> Jan Klabbbers, *International Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2017) 58.

<sup>18</sup> Jan Klabbbers, 'Virtuous Interpretation' in Malgosia Fitzmaurice, Olufemi Elias, Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, 2010) 17, 37. See also Katayoun Hosseinnjad, 'On the Nature of Interpretation in International Law' (2015) 4(2) *UCL Journal of Law and Jurisprudence* 225-249.

<sup>19</sup> Iain Scobbie, 'A View of Delft: Some Thoughts About Thinking About International Law' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 5<sup>th</sup> ed, 2018) 51, 63-4.

treaties.<sup>20</sup> Enforcement proceedings in international courts and tribunals that would require interpretation of treaty terms are not common and it appears that there has been no judicial interpretation of ‘aesthetic’ value as it relates to the environment under international environmental treaties.<sup>21</sup> I will in this part revisit how aesthetic value is relevant to three of the international environmental treaties that I identified in Chapter 2,<sup>22</sup> before discussing matters relevant to interpreting the meaning of ‘aesthetic’ value in those treaties under international law.

## 2.1 Relevance of aesthetic value to the treaty regimes

The three treaties examined in this thesis have a range of characteristics that could affect the interpretation of ‘aesthetic’ value under international law to produce different meanings for the term. I will briefly describe each treaty below.

Agreed under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1972, the *World Heritage Convention* creates an international system for the protection of natural and cultural heritage that is of ‘outstanding universal value’.<sup>23</sup> As explained previously in Chapter 1, an ‘aesthetic’ point of view is one of four that informs the concept of ‘outstanding universal value’ of natural environments. Specifically, article 2 of the treaty defines ‘natural heritage’ to include ‘natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view’.<sup>24</sup> Natural heritage also includes natural sites that are of ‘outstanding universal value’ from ‘conservation’ or ‘natural beauty’ points of view. In a form of ‘international administration’,<sup>25</sup> outstanding universal value is determined through a long standing but evolving decision-making process. That process is initiated through state nominations, then informed by expert evaluations, and decided by the World Heritage Committee – a body of 21 experts elected by the 193 states parties to the treaty.<sup>26</sup>

Like the *World Heritage Convention*, the *Biodiversity Convention* also expressly protects ‘aesthetic’ value. The treaty was adopted in 1992 to protect biological diversity, an attribute of healthy natural environments – oftentimes shortened to ‘biodiversity’ – which is defined in the treaty to mean ‘the variability among living organisms’.<sup>27</sup> In the preamble to the *Biodiversity Convention*, the parties identify the values underlying their pact as applying to ‘biological diversity’ and to ‘its components’. As explained in Chapter 2, the first tiret of the preamble states that the parties are ‘[c]onscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components’.<sup>28</sup> The *Biodiversity Convention*

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<sup>20</sup> Ibid. See also Shabtai Rosenne, ‘Conceptualism as a Guide to Treaty Interpretation’ in Shabtai Rosenne, *An International Law Miscellany* (Martinus Nijhoff, 1993) 441.

<sup>21</sup> Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law: A Modern Introduction* (Cambridge University Press, 2<sup>nd</sup> ed, 2018) 299-300; 328-330.

<sup>22</sup> See Chapter 2, part 3.1.

<sup>23</sup> *World Heritage Convention* (n7).

<sup>24</sup> Ibid art 2. Natural heritage is defined separately from ‘cultural heritage’ which also refers to aesthetic value: *World Heritage Convention* (n7) art 1. Discussed below part 3.1.2.

<sup>25</sup> As opposed to ‘distributed’ or ‘network’ administration, see Benedict Kingsbury, ‘Global Environmental Governance as Administration: Implications for International Law’ in Daniel Bodansky, Jutta Brunnée and Ellen Hey, (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 63.

<sup>26</sup> *World Heritage Convention* (n7) art 8.

<sup>27</sup> *Biodiversity Convention* (n7) art 2.

<sup>28</sup> Ibid preamble.

combines the objectives of conserving biodiversity, sustainably using biodiversity's components, and sharing 'benefits' such as medicines and agricultural products derived from genetic resources.<sup>29</sup> To these ends, states parties undertake a range of initiatives such as the establishment of natural reserves known as 'protected areas'.<sup>30</sup> The treaty undertakings are overseen by a governing body, the Conference of the Parties, supported by a network of subsidiary bodies.<sup>31</sup>

The *Whaling Convention* does not refer to aesthetic value in its express terms. It was agreed in 1946 to create a system for the preservation of certain whale species as a resource for human use: the treaty's preamble recognises 'the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks' and expresses the desire of the states parties 'to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks'.<sup>32</sup> The treaty was amended in 1982 to ban commercial whaling,<sup>33</sup> a requirement on the states parties that I argue later in this Chapter was introduced and is maintained for aesthetic reasons, among others. States parties, known as contracting members, are each represented in the International Whaling Commission, the governing body created by the treaty to develop scientific studies of whale stocks and manage whale fisheries.<sup>34</sup>

The next section explains the ways in which these three international environmental treaties chosen for close examination as case studies in this thesis engage different aspects of treaty interpretation.

## 2.2 Features of the treaties relevant to interpretation

The three treaties are multilateral, each having a significant number of states parties. However, they differ in terms of the juridical form of aesthetic value, the kinds of environments that are valued, and the periods in the history of international environmental law in which they were adopted. I describe these features below.

As to the multilateral nature of the treaties, membership of the three conventions is large and culturally diverse. This is a factor that might, I will explain later in the Chapter,<sup>35</sup> be significant for understandings of the environment's aesthetic value among the parties. Both the *World Heritage Convention* and the *Biodiversity Convention* have what is called 'universal' membership, in the sense that almost all the world's nations are bound by their terms, with 193 and 196 states parties respectively.<sup>36</sup> The membership of the *Whaling Convention* has fluctuated over time and, from mid-2019, it comprised 88 states.<sup>37</sup> Although its membership

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<sup>29</sup> Ibid art 1.

<sup>30</sup> Ibid art 8 (protected areas).

<sup>31</sup> Ibid art 23.

<sup>32</sup> *Whaling Convention* (n7) preamble.

<sup>33</sup> Ibid schedule, clause 10(e).

<sup>34</sup> The International Whaling Commission's work is supported by committees of experts, including the Scientific Committee: *Whaling Convention* (n7) art III.4.

<sup>35</sup> See part 3.4.2.

<sup>36</sup> Respectively: see United Nations Educational Scientific and Cultural Organization, 'Resources: Conventions' <<https://en.unesco.org>>; United Nations Treaty Collection, 'Depository: Status of Treaties', <<https://treaties.un.org/>>.

<sup>37</sup> Following the withdrawal of Japan, see United States Department of State, 'Status Lists for Treaties for Which the United States is Depository' <<https://www.state.gov/depositary-status-lists/>>.

is not ‘universal’ of all the world’s nations, the states parties are from different geographical regions and variously support or oppose whaling.

The juridical form (or manifestation in law) of ‘aesthetic’ value in each of the treaties studied in the thesis differs, creating opportunities for different interpretations. Two make express mention of aesthetic value although to different juridical effect. The use of the term ‘aesthetic’ as an element of ‘outstanding universal value’ in the definition of ‘natural heritage’ under the *World Heritage Convention* pertains to determinations of world heritage by the World Heritage Committee. The *Biodiversity Convention* identifies aesthetic value in its preamble as a value of biological diversity. As a term in the preamble, aesthetic value would, under the rules of treaty interpretation, inform the implementation of the substantive commitments but it is not a provision that itself takes the form of a substantive commitment.<sup>38</sup> As noted earlier, the *Whaling Convention* contains no express mention of aesthetic value. I will discuss later in this Chapter how aesthetic value might nevertheless be relevant to the interpretation of the ban on commercial whaling and exceptions to the ban.<sup>39</sup>

Each treaty also differs in terms of the aspects of the natural environment valued for their aesthetic qualities. Each ‘object’ of aesthetic appreciation could produce different meanings of aesthetic value because the rules of treaty interpretation dictate that terms be interpreted in their context.<sup>40</sup> The *World Heritage Convention* protects natural areas, features and formations of natural areas (natural properties),<sup>41</sup> the *Biodiversity Convention* protects natural systems (biological diversity) for their aesthetic qualities,<sup>42</sup> and the *Whaling Convention* protects species of wild animals (whales and other cetaceans).<sup>43</sup>

The treaties are also temporally different. Two decades separate the *World Heritage Convention* adopted in 1972 and the *Biodiversity Convention* adopted in 1992. The *Whaling Convention* was first adopted in 1946,<sup>44</sup> then amended in 1982 to ban commercial whaling,<sup>45</sup> before being enforced in 2014 in a decision of the International Court of Justice.<sup>46</sup> As explained later in this Chapter, treaty interpretation can take account of meanings that have evolved over time: meanings intended by the negotiators of a treaty might be changed by such things as explicit agreement on interpretation,<sup>47</sup> the subsequent practice of states under the treaty or,<sup>48</sup> more controversially, evolving expectations of the international community prevailing at the time of interpretation.<sup>49</sup> Various changes over time might inform the legal interpretation of treaties. For example, the conception of the environment for treaties has evolved with scientific developments, shifting from species to their habitats and, ultimately, the eco-systems that

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<sup>38</sup> On preambles, see Gardiner (n6) 205-6. Discussed below part 3.1.2.

<sup>39</sup> *Whaling Convention* (n7) schedule, clause 10(e).

<sup>40</sup> *Vienna Convention* (n12) art 31.

<sup>41</sup> *World Heritage Convention* (n7) art 2. Note that properties can be a mix of natural and cultural heritage, see below part 3.1.2.

<sup>42</sup> *Biodiversity Convention* (n7) preamble.

<sup>43</sup> Coverage of cetacean species is contentious, see Malgosia Fitzmaurice, *Whaling and International Law* (Cambridge University Press, 2015) 50-1.

<sup>44</sup> *Whaling Convention* (n7).

<sup>45</sup> *Ibid* schedule, clause 10(e) (commercial whaling ban). See ‘Verbatim Record’, International Whaling Commission, 34<sup>th</sup> Annual Meeting (19-24 July 1982) *Agenda item 6 Ending of Commercial Whaling* 72, 86.

<sup>46</sup> *Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Judgment)* [2014] ICJ Rep 226 (‘*Whaling in the Antarctic*’).

<sup>47</sup> *Vienna Convention* (n12) art 31(4) (special meaning).

<sup>48</sup> *Ibid* art 31(3)(b).

<sup>49</sup> Eg evolutive interpretation, below part 3.4. On ‘time factors in treaty interpretation’, see Gardiner (n6) 292.

render all species and habitats inter-dependent.<sup>50</sup> Different political and cultural interests are also represented over time in ways that might affect an evolutive interpretation of a treaty. International relations have evolved from a period dominated by the interests of the rich countries of the ‘North’ to one influenced by the environmental concerns of the poor or ‘developing’ nations of the ‘Global South’.<sup>51</sup>

In the next part 3, I employ international rules of treaty interpretation to develop meanings for aesthetic value in the *World Heritage Convention* and the *Biodiversity Convention*. In part 4, I will consider the meaning of aesthetic value as a value that informs the terms of the *Whaling Convention*.

### 3. AESTHETIC AS EXPRESS TERM

The meaning of treaty terms is constructed for the purposes of the practice of international law in accordance with a range of techniques of treaty interpretation. The oft-cited article 31(1) of the *Vienna Convention* provides for treaty interpretation to be ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of [the treaty’s] object and purpose’.<sup>52</sup> Treaty interpreters may also look to evidence of such things as subsequent practice, historical intention and ‘evolutive’ meanings to construct meanings for treaty terms.<sup>53</sup> Each of these approaches, as they apply to the term ‘aesthetic’ expressed in the *World Heritage Convention* and *Biodiversity Convention*, is discussed in turn below.

#### 3.1 Treaty text: ordinary meaning in context and in light of object and purpose

The text of a treaty is the source for techniques of treaty interpretation that have been described as ‘literal’, ‘contextual’ and ‘teleological’ approaches.<sup>54</sup> No technique takes precedence over another.<sup>55</sup>

##### 3.1.1 Literal interpretation

The search for the literal or ‘ordinary’ meaning of a treaty term typically starts with reference to dictionaries.<sup>56</sup> Where used as an adjective, the *Oxford English Dictionary* defines ‘aesthetic’ to mean ‘[o]f or relating to the perception, appreciation, or criticism of that which is beautiful.’<sup>57</sup> In relation to a thing, ‘aesthetic’ means ‘in accordance with principles of artistic beauty or taste; giving or designed to give pleasure through beauty; of pleasing appearance.’<sup>58</sup> In the *Macquarie Dictionary*, ‘aesthetic’ means: ‘relating to the sense of the beautiful or the science of aesthetics’.<sup>59</sup> In contrast, the *New Oxford American Dictionary* meaning is confined

<sup>50</sup> See eg ‘History’ in Sands and Peel (n11) 21.

<sup>51</sup> Karin Mickelson, ‘South, North, International Environmental Law, and International Environmental Lawyers’ (2000) 11(1) *Yearbook of International Environmental Law* 52.

<sup>52</sup> *Vienna Convention* (n12) art 31(1).

<sup>53</sup> For issues arising from different techniques, see Gardiner (n6) 460ff. Note Maarten Bos identifies the methods as grammatical, historical, systematic, teleological, sociological: Bos, Part II (n15), 136. Cf Jan Klabbbers who limits the methods to textual, historical and teleological: Klabbbers (n17) 56-7.

<sup>54</sup> Gardiner (n6) 161-2; 460.

<sup>55</sup> Gardiner (n6) 162. Cf Aust saying art 31 gives preference to textual technique: Aust (n6) 209.

<sup>56</sup> Gardiner (n6) 186ff.

<sup>57</sup> *OED Online* (Oxford University Press, 2019).

<sup>58</sup> *Ibid.*

<sup>59</sup> *Macquarie Dictionary Online* (Macmillan Publishers Australia) defines aesthetic as:  
‘adjective 1. relating to the sense of the beautiful or the science of aesthetics.  
2. having a sense of the beautiful; characterised by a love of beauty.

to beauty, defining ‘aesthetic’ as ‘concerned with beauty or the appreciation of beauty’ or ‘giving or designed to give pleasure through beauty; of pleasing appearance’.<sup>60</sup> Reference can be made to dictionaries in the negotiating or authorised languages of the treaty.<sup>61</sup> The *World Heritage Convention* was negotiated in both English and French,<sup>62</sup> and both it and the *Biodiversity Convention* can be read in several authorised languages.<sup>63</sup> The *Dictionnaire de l'Académie française* defines ‘esthétique’ as ‘[q]ui est motivé par la perception et la sensation du beau’ [‘[t]hat which is motivated by perception and a sense of beauty’].<sup>64</sup>

A meaning of ‘aesthetic’ noted by the *Oxford English Dictionary* as obsolete is ‘[o]f or relating to perception by the senses; received by the senses’.<sup>65</sup> This meaning is linked to the historical meaning of aesthetic as a noun which references the usage by 18<sup>th</sup> century German philosopher Immanuel Kant and ‘the science of sensory perception’.<sup>66</sup> It explains that ‘[m]odern usage of the word and its family largely reflects [Alexander] Baumgarten’s use’,<sup>67</sup> as distinct from Immanuel Kant.

The dictionaries do not necessarily specify the object of appreciation or specifically address the meaning of aesthetic as it relates to the environment. Here, specialist dictionaries or encyclopaedias could be instructive.<sup>68</sup> The *Routledge Encyclopedia of Philosophy* describes the study of ‘aesthetics’ in relation to the environment as extending ‘beyond the narrow confines of the art world and beyond the appreciation of works of art to the aesthetic appreciation of human-influenced and human-constructed as well as natural environments’.<sup>69</sup>

Overall, these sources suggest a variety of meanings, ranging from a narrow conception of ‘beauty’ associated with the arts to broader definition linked to ‘perception by the senses’, and a combination of both. The broader and purportedly obsolete definitions of ‘aesthetic’ associated with ‘perception’ and the ‘senses’ resonate with the characterisation of aesthetic value by contemporary philosophers of environmental aesthetics.<sup>70</sup>

### 3.1.2 Contextual interpretation

The possibility of different meanings for aesthetic as either synonymous with ‘beauty’ or otherwise relating to ‘perception by the senses’ could be clarified by an examination of context. Resort to context in treaty interpretation includes the term’s grammatical context as well as the

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noun 3. a philosophical theory as to what is aesthetically valid at a given time.

4. an artistic expression, viewed as reflective of a personal or cultural ideal of what is aesthetically valid.’

<sup>60</sup> Angus Stevenson and Christine A Lindberg (eds) *New Oxford American Dictionary* (Oxford University Press, 3<sup>rd</sup> ed, 2011).

<sup>61</sup> *Vienna Convention* (n12) art 33; see also Gardiner (n6) 413ff.

<sup>62</sup> See negotiating documents in English and French language under the category ‘Establishment of the Convention’ in WHC document archive <<https://whc.unesco.org/en/documents/>>.

<sup>63</sup> *World Heritage Convention* (n7) art 30: Arabic, English, French, Russian and Spanish; *Biodiversity Convention* (n7) art 42: Arabic, Chinese, English, French, Russian and Spanish.

<sup>64</sup> *l'Académie française*, 9<sup>th</sup> ed, online at <<http://atilf.atilf.fr/academie9.htm>> tr author.

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Baumgarten’s use of the word was purportedly derived from the Greek *aisthētikos*, *ibid*.

<sup>68</sup> *Vienna Convention* (n12) art 33; see also Gardiner (n6) 413ff.

<sup>69</sup> Allen Carlson, ‘Environmental Aesthetics’ in Edward Craig (ed), *Routledge Encyclopedia of Philosophy* (Routledge, 2011). See also Allen Carlson, ‘Nature: Contemporary Thought’ in Michael Kelly (ed), *Encyclopedia of Aesthetics* (Oxford Art Online, 1998).

<sup>70</sup> See Chapter 2, part 2.1.



treaty as a whole.<sup>71</sup> The different context of a term in a given treaty means that the same word can have different meanings within the one treaty and between different treaties.<sup>72</sup>

In each of the treaties, the term ‘aesthetic’ applies to different aspects of the environment to which other values are attached. In the context of the definition of ‘natural heritage’ in article 2 of the *World Heritage Convention*, the term ‘aesthetic’ concerns the value attached to ‘natural features’.<sup>73</sup> Under article 2, these elements may also be assessed to be of ‘outstanding universal value’ from a ‘scientific point of view’. As noted earlier, the *World Heritage Convention* identifies other points of view – conservation and natural beauty – in the definition of natural heritage. Those points of view apply to elements of the environment that are different from those elements to which an ‘aesthetic’ point of view is applied.

In the *Biodiversity Convention*, ‘aesthetic’ is one of several adjectives describing the value of ‘biological diversity and its components’.<sup>74</sup> The other adjectives denoting different values of biological diversity are: ecological, genetic, social, economic, scientific, educational, cultural, recreational. These values are identified separately from ‘intrinsic value of biological diversity’. As noted earlier, biological diversity is defined in the treaty as ‘the variability among living organisms’.<sup>75</sup> However, the concept of biological diversity – shortened to ‘biodiversity’ – and the attribution of values to it, is contested in both legal and philosophical literature.<sup>76</sup> Specific questions have been raised in relation to attributing ‘intrinsic’ value to biological diversity.<sup>77</sup> However, the assignment of aesthetic value to ‘biological diversity’ (as an attribute that is distinct from physical places, animals or plants) also leads to conceptual challenges, making it difficult to draw any definitive conclusions from that aspect of the term’s context for the purposes of treaty interpretation.

That the objects of aesthetic value in the treaties are elements of the natural environment would mean that the literal meaning of aesthetic value established from dictionaries as ‘beauty’ could be understood in the more specific terms of ‘natural beauty’. However, an interpretative maxim of international law known as the ‘principle of effectiveness’ requires that no treaty term be rendered redundant by interpretation.<sup>78</sup> By this reasoning, if a treaty referred to ‘white and all the colours of the rainbow’, the ‘colours’ of the rainbow would be interpreted to exclude white. The principle of effectiveness would mean that ‘aesthetic’ must have a meaning that is different from the other ‘points of view’ in article 2 of the *World Heritage Convention*, not only ‘scientific’ but ‘conservation’ and ‘natural beauty’ points of view too. Under the *Biodiversity Convention*, ‘aesthetic’ would need to be interpreted to have a meaning different from the other values listed with it in the preamble, including those values with which it is associated in the legal scholarship described in Chapter 2. The preamble does not list ‘natural beauty’, so ‘aesthetic’ value under the *Biodiversity Convention* could mean natural beauty without flouting the rule on effectiveness. It would, however, need to be distinguished from other values that

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<sup>71</sup> Gardiner (n6) 197.

<sup>72</sup> Ibid 209.

<sup>73</sup> *World Heritage Convention* (n7) art 2.

<sup>74</sup> *Biodiversity Convention* (n7) preamble 1<sup>st</sup> tiret.

<sup>75</sup> Ibid art 2.

<sup>76</sup> See generally Michael Bowman, ‘The Nature, Development and Philosophical Foundations of the Biodiversity Concept in International Law’ in Michael Bowman and Catherine Redgwell (eds), *International Law and the Conservation of Biological Diversity* (Kluwer Law International, 1996) 5. See further Chapter 7, part 3.1.2.

<sup>77</sup> Freya Dawson, ‘What is the Value of Biodiversity? Scientific and Philosophical Perspectives’ in Nicole Rogers (ed), *Green Paradigms and the Law* (Southern Cross University Press, 1998) 93, 107.

<sup>78</sup> The Latin maxim *ut res magis valeat quam pereat*, Gardiner (n6) 168 and 179ff.



are expressed in the treaty such as ‘cultural’ and ‘recreational’ values, and ‘intrinsic’ value too.<sup>79</sup>

The context extends to the whole agreement. In the case of the *World Heritage Convention*, the term ‘aesthetic’ is also used in the definition of ‘cultural heritage’: article 1 defines three kinds of cultural heritage properties, including ‘sites’ that are ‘works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.’<sup>80</sup> Properties can be inscribed as a mix of natural and cultural heritage.<sup>81</sup> The different contexts for the term ‘aesthetic’ in the respective definitions would, I maintain, require a different meaning.

The context also includes annexes. Article 7 of the *Biodiversity Convention* requires parties to ‘[i]dentify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in annex I’.<sup>82</sup> Annex I refers explicitly to only four of the values of biodiversity listed in the preamble – namely social, economic, cultural or scientific values. There is no mention of ‘aesthetic’ value in the annex. States are however guided to identify ecosystems and habitats containing ‘wilderness’.<sup>83</sup> It could be argued that the terms ‘aesthetic’ and ‘wilderness’ should be read in the context of each other, with each informing the other’s meaning.<sup>84</sup>

Overall, the context of the term ‘aesthetic’ in the two treaties suggests a definition of aesthetic that is different from other environmental values expressly stated. In the case of the *World Heritage Convention*, ‘aesthetic’ would be different from ‘natural beauty’ and other points of view on natural heritage, and different from the ‘aesthetic’ value of cultural heritage. I argue that this favours the dictionary definition of ‘aesthetic’ described above as ‘perception by the senses’, distinct from aesthetic value in the arts.<sup>85</sup> In the case of the *Biodiversity Convention*, I argue that context requires that the ‘aesthetic’ value of biodiversity be distinguished from other biodiversity values, including cultural value.<sup>86</sup> However, given that there is no mention of ‘natural beauty’ in that treaty, context does not exclude a narrow dictionary definition associated with ‘beauty’ as distinct from sensorial perception in general. Context might also mean that the ‘aesthetic’ value of biodiversity is informed by, or that it informs, the term ‘wilderness’ in annex I to the *Biodiversity Convention*.

### 3.1.3 Teleological interpretation

The teleological or purposive technique of reading a term in light of a treaty’s ‘object and purpose’ will include reference to any stated objectives, including any in the preamble.<sup>87</sup> In practice there is little if any distinction between the ‘object’ and the ‘purpose’.<sup>88</sup>

<sup>79</sup> *Biodiversity Convention* (n7) preamble, 1<sup>st</sup> tiret. See Chapter 2, part 2.2.5. See also discussion of ‘intrinsic’ value of biodiversity in Chapter 7, part 3.1.2.

<sup>80</sup> *World Heritage Convention* (n7) art 1.

<sup>81</sup> World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc WHC.19/01 (10 July 2019) (‘*WHC Operational Guidelines*’) [46] (mixed properties) and [77] (criteria).

<sup>82</sup> *Biodiversity Convention* (n7) art 7.

<sup>83</sup> *Ibid* annex I.

<sup>84</sup> See discussion of ‘wilderness’ in Chapter 7, part 3.1.2.

<sup>85</sup> See above Chapter 2, part 2.3.

<sup>86</sup> In Chapter 7, I discuss the relevance of this argument to indigenous knowledges.

<sup>87</sup> *Vienna Convention* (n12) art 31(1).

<sup>88</sup> Gardiner (n6) 214.

The purpose of the *World Heritage Convention* is apparent in at least two paragraphs of the preamble, stating that ‘deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world’<sup>89</sup> and ‘that parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole’.<sup>90</sup> It could be argued that the international significance assigned by the parties to cultural and natural heritage warrants a broad interpretation of ‘aesthetic’. This favours the broader literal definition of aesthetic described above as ‘perception by the senses’.<sup>91</sup>

The term ‘aesthetic’ appears in the preamble of the *Biodiversity Convention*, that part of the treaty that can itself describe a treaty’s object and purpose. The interpretation of terms in the substantive parts of the treaty could depend on the meaning of ‘aesthetic’ value in the preamble as part of context discussed earlier and as part of the object and purpose.<sup>92</sup> Terms in the preamble must also be interpreted in light of their object and purpose. In the *Biodiversity Convention*, the objectives are expressly stated in article 1 to concern biodiversity conservation, the sustainable use of the commercially valuable components of biodiversity, and the sharing of ‘benefits’ derived from the exploitation of genetic resources. As suggested in connection with the *World Heritage Convention*, it could be argued that the international significance assigned by the parties to biological diversity warrants a broad interpretation of ‘aesthetic’ offered by literal interpretation, favouring sensual perception over natural beauty.

#### 3.1.4 Outcome of interpretations of the treaty text

In summary, literal, contextual and teleological techniques of treaty interpretation contemplated in article 31(1) of the *Vienna Convention* suggest a range of possible interpretations. It is possible to conclude that ‘aesthetic’ value, as it relates to either natural heritage or biodiversity, has a meaning associated with broad dictionary definitions associated with ‘perception by the senses’. This approach would give aesthetic value a meaning that is distinct from the dictionary references to ‘beauty’, and from other environmental values mentioned in the *World Heritage Convention* and *Biodiversity Convention*. An understanding of aesthetic value in terms of sensorial perception would be consistent with an aesthetic appreciation of the environment contemplated in the philosophy of environmental aesthetics that I explained in Chapter 2. However, article 31 of the *Vienna Convention* points to further sources of interpretation which I examine next.

#### 3.2 Subsequent practice

Article 31(3) of the *Vienna Convention* describes other sources that interpreters of treaties can look to, including ‘[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’<sup>93</sup> In his treatise on treaty

<sup>89</sup> *World Heritage Convention* (n7) preamble, 2<sup>nd</sup> tiret.

<sup>90</sup> *Ibid*, preamble, 6<sup>th</sup> tiret.

<sup>91</sup> See above part 3.1.1 (dictionaries).

<sup>92</sup> On preamble as a source for object and purpose, see Gardiner (n6) 213.

<sup>93</sup> *Vienna Convention* (n12) art 31(3)(b). Maarten Bos suggests that subsequent practice is part of context: Bos, Part II (n15), 145. I do not consider in this Chapter related agreements, either as subsequent agreement (*Vienna Convention* (n12) art 31(3)(a)) or other agreements on the same subject matter (for purposes either of ‘context’, ‘relevant rules of international law’, or supplementary means of interpretation (*Vienna Convention* (n12) arts 31(1), 31(3)(a) or 32). Aust says, in relation to art 32, ‘[o]ne may also look at other treaties on the same subject matter adopted either before or after the one in question that use the same or similar terms.’ Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2013) 220. Note that none of the

interpretation, Richard Gardiner describes ‘subsequent practice’ as ‘what can be shown to have been done systematically or repeatedly in implementation and application of a treaty’.<sup>94</sup> Gardiner goes on to explain the circumstances in which decisions of organisations might satisfy these requirements. He explains that

where states by treaty entrust performance of activities to an organization, how those activities are conducted can constitute practice under the treaty; but whether such practice establishes agreement of the parties regarding the treaty’s interpretation may require account to be taken of further factors. These may include assessment of the powers of the organ acting in the matter, the potential for any other body in the organization to control the organ, [or] the manner in which states parties to the treaty participate in the activities of the organization.<sup>95</sup>

Below I examine different practices in the application of each treaty that might establish ‘the agreement of the parties’ regarding the interpretation of aesthetic value for the *World Heritage Convention* and *Biodiversity Convention*.

### 3.2.1 Subsequent practice under World Heritage Convention

The determination of the ‘outstanding universal value’ of natural properties for the purposes of article 2 of the *World Heritage Convention*, including a determination from an aesthetic point of view, follows a process of state nominations, expert evaluations and Committee decisions.<sup>96</sup> Although the World Heritage Committee comprises only 21 of the 193 states parties to the *World Heritage Convention*,<sup>97</sup> its decision-making authority derives from the treaty,<sup>98</sup> and it makes decisions on behalf of the parties as a whole. As such, I maintain that ‘subsequent practice’ of the parties as to the meaning of the term ‘aesthetic’ is evident from guidance and decisions of the World Heritage Committee to inscribe natural properties in the World Heritage List on the basis of aesthetic value.<sup>99</sup>

The World Heritage Committee has produced and regularly updates *Operational Guidelines for the Implementation of the World Heritage Convention* (‘*Operational Guidelines*’) that detail its policies and procedures in its administration of the treaty.<sup>100</sup> I argue that the *Operational Guidelines* are an authoritative indication of the subsequent practice of the parties to the *World Heritage Convention* in their interpretation of the treaty. The *Operational Guidelines* provide that, to be of ‘outstanding universal value’, a property must conform to one or more of the stated criteria.<sup>101</sup> Criterion (vii) concerns natural heritage properties which,

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following related agreements refers to ‘aesthetic’ value: *Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted 17 October 2003, 2368 UNTS 3 (entered into force 20 April 2006); *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, opened for signature 29 January 2000, 2226 UNTS 208 (entered into force 11 September 2003); *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, opened for signature 29 October 2010, 2226 UNTS 208 (entered into force 12 October 2014).

<sup>94</sup> Gardiner (n6) 254. See also Rahim Moloo, ‘When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation’ (2013) 31(1) *Berkeley Journal of International Law* 39.

<sup>95</sup> Gardiner (n6) 281.

<sup>96</sup> *World Heritage Convention* (n7) art 2. See above part 2.1.

<sup>97</sup> *World Heritage Convention* (n7) art 8.

<sup>98</sup> *Ibid* art 11. See *Rules of Procedure of the World Heritage Committee*, WHC-2015/5 (July 2015).

<sup>99</sup> See *Operational Guidelines* (n81).

<sup>100</sup> *Operational Guidelines* (n81). Cf World Heritage Policy Compendium <<https://whc.unesco.org/en/compendium/>>.

<sup>101</sup> *Operational Guidelines* (n81) [77]. Other criteria discussed below.

following an amendment in 1994,<sup>102</sup> has included the term ‘aesthetic’ in addition to ‘natural beauty’. Under criterion (vii), the outstanding universal value of natural heritage contemplates environments that ‘contain superlative natural phenomena or areas of exceptional natural beauty and aesthetic importance’.<sup>103</sup>

The World Heritage Centre, the Secretariat for the World Heritage Committee, generates resource manuals which I maintain are also indicative of ‘subsequent practice’.<sup>104</sup> A 2011 World Heritage Resource Manual on ‘Preparing World Heritage Nominations’ guides the states parties to the *World Heritage Convention* on the characteristics contemplated by criterion (vii).<sup>105</sup> The *Resource Manual* provides that the aesthetic importance of natural heritage is distinct from considerations of aesthetics in connection with cultural heritage.<sup>106</sup> It indicates that nominated properties should be compared with properties previously inscribed under criterion (vii), including a ‘comparison of measurable indicators of scenic value.’<sup>107</sup> It is, however, not clear whether ‘scenic value’ relates to either or both ‘natural beauty’ and ‘aesthetic importance’ in criterion (vii).<sup>108</sup>

If determined by the World Heritage Committee to have ‘outstanding universal value’ on the basis of one of the criteria in the *Operational Guidelines*, a nominated property may be ‘inscribed’ on the World Heritage List by a decision of the World Heritage Committee.<sup>109</sup> Inscriptions are to be accompanied by a Statement of Outstanding Universal Value.<sup>110</sup> I maintain that individual instances of the application of criterion (vii) justified in Statements of Outstanding Universal Value constitute further ‘subsequent practice’ of the parties’ interpretation of the term ‘aesthetic’. Individual applications of criterion (vii) evidenced by Statements of Outstanding Universal Value are examined in Chapter 5. As explained in that Chapter, a study of the application of the criterion found that quantitative and scientific values typically prevail over natural beauty and aesthetic importance in justifications of that criterion.<sup>111</sup>

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<sup>102</sup> World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc WHC/2/Revised (February 1994), [44(a)(iii)]. The criteria for natural and cultural heritage were later combined so natural criterion 44(a)(iii) became Outstanding Universal Value criterion 77(vii): World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc WHC. 05/2 (2 February 2005) [77(vii)]. The requirement of integrity attached to criterion (vii) was changed from ‘outstanding aesthetic value’ to ‘Outstanding Universal Value’, *ibid* [92].

<sup>103</sup> *Operational Guidelines* (n81) [77].

<sup>104</sup> See above discussion of Gardiner (n6) 254.

<sup>105</sup> World Heritage Centre, ‘Preparing World Heritage Nominations’ *World Heritage Resource Manual* (UNESCO, 2<sup>nd</sup> ed, 2011) (*‘Resource Manual’*) 40.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid*.

<sup>108</sup> See Chapter 5.

<sup>109</sup> The Committee considers nominations and the recommendations of the Advisory Bodies at its annual meetings and decides whether or not to include the property in the World Heritage List: *World Heritage Convention* (n7) art 11(2); *Operational Guidelines* (n81) [153].

<sup>110</sup> Statements of outstanding universal value are adopted in World Heritage Committee decisions to inscribe properties on the World Heritage List: *Operational Guidelines* (n81) [154], [157].

<sup>111</sup> Nora Mitchell, *IUCN Study on the Application of Criterion (vii): Considering Superlative Natural Phenomena and Exceptional Natural Beauty within the World Heritage Convention* (Report for the International Union for the Conservation of Nature, World Heritage Study N° 10, 2013) 57-8. See Chapter 5, part 3.3.2.

### 3.2.2 Subsequent practice under Biodiversity Convention

Several sources could be seen to document the subsequent practice of the parties to the *Biodiversity Convention* as to the meaning of aesthetic value. I contend that decisions of the treaty's governing body, the Conference of the Parties ('COP decisions'), could be evidence of meanings for treaty terms. However, the capacity of such COP decisions to 'establish the agreement of the parties' is not clear.<sup>112</sup> In any event, they do not appear to have addressed the meaning of aesthetic value of biodiversity in its own right. COP decisions under the *Biodiversity Convention* instead mention aesthetic value in the context of naming all the values of biodiversity.<sup>113</sup> Later in Chapter 7, I consider the mention of biodiversity values in the Aichi Biodiversity Targets, agreed by a decision of the Conference of the Parties to the *Biodiversity Convention*.<sup>114</sup>

Reports of international organisations endorsed by the Conference of the Parties to the *Biodiversity Convention* could be relevant to establishing 'subsequent practice'. Several such reports refer to the aesthetic value of biodiversity as a cultural service of ecosystems. The *Millennium Ecosystem Assessment*,<sup>115</sup> for example, is referenced in decisions of the Conference of the Parties.<sup>116</sup> It explains that ecosystem services can be clustered in terms of provisioning, regulating and supporting services as well as 'cultural' services.<sup>117</sup> Ecosystem services are described to include such things as the purification of water, the protection of land from erosion, the propagation of food sources, the absorption of carbon dioxide and medicinal properties.<sup>118</sup> In the context of cultural ecosystem services, the *Millennium Ecosystem Assessment* refers to 'beauty or aesthetic value in various aspects of ecosystems, as reflected

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<sup>112</sup> On legal status of decisions of governing bodies, see Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15(1) *Leiden Journal of International Law* 1. See also Elisa Morgera and Elsa Tsioumani, 'Yesterday, Today, and Tomorrow: Looking Afresh at the Convention on Biological Diversity' (2010) 21(1) *Yearbook of International Environmental Law* 3.

<sup>113</sup> See eg Conference of the Parties to the *Convention on Biological Diversity*, Decision XII/3 *Resource mobilization*, 12<sup>th</sup> mtg, UN Doc UNEP/CBD/COP/DEC/XII/3 (17 October 2014). Cf discussion of aesthetic services as part of cultural value in Conference of the Parties to the *Convention on Biological Diversity*, Decision VIII/28 *Impact Assessment: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment*, 8<sup>th</sup> mtg UN Doc UNEP/CBD/COP/DEC/VIII/28 (15 June 2006); values of biodiversity in Conference of the Parties to the *Convention on Biological Diversity*, Decision IX/6 *Incentive measures (Article 11)*, 9<sup>th</sup> mtg UN Doc UNEP/CBD/COP/DEC/9/6 (30 May 2008). Cf different conceptions of aesthetic value in Darrell Addison Posey (ed), *Cultural and Spiritual Values of Biodiversity: A Complementary Contribution to the Global Biodiversity Assessment* (United Nations Environment Programme and Intermediate Technology Publications, 1999).

<sup>114</sup> Conference of the Parties to the *Convention on Biological Diversity*, Decision X/2 *The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets*, 10<sup>th</sup> mtg, UN Doc UNEP/CBD/COP/DEC/X/2 (29 October 2010) annex ('Aichi Targets'). See Chapter 7, part 2.1.

<sup>115</sup> *Millennium Ecosystem Assessment, Ecosystems and Human Well-Being: Synthesis* (Island Press, 2005) circulated to the parties to the *Convention on Biological Diversity* as UN Doc UNEP/CBD/SBSTTA/11/INF/22.

<sup>116</sup> See eg Conference of the Parties to the *Convention on Biological Diversity*, Decision VII/11 *Ecosystem Approach*, 7<sup>th</sup> mtg, UN Doc UNEP/CBD/COP/DEC/VII/11 (13 April 2004); Conference of the Parties to the *Convention on Biological Diversity*, Decision VIII/9 *Implications of the findings of the Millennium Ecosystem Assessment*, 8<sup>th</sup> mtg UN Doc UNEP/CBD/COP/DEC/VIII/9 (15 June 2006); Conference of the Parties to the *Convention on Biological Diversity*, Decision IX/7 *Ecosystem approach*, 9<sup>th</sup> mtg UN Doc UNEP/CBD/COP/DEC/IX/7 (9 October 2008); Conference of the Parties to the *Convention on Biological Diversity*, Decision IX/15 *Follow-up to the Millennium Ecosystem Assessment*, 9<sup>th</sup> mtg UN Doc UNEP/CBD/COP/DEC/IX/15 (9 October 2008).

<sup>117</sup> *Millennium Ecosystem Assessment* (n115) v.

<sup>118</sup> *Ibid.* Alternative conceptions of valuing biodiversity to ecosystem services are discussed in Chapter 7, part 4.2.

in the support for parks, scenic drives, and the selection of housing locations'.<sup>119</sup> In its assessment of aesthetic value, the *Millennium Ecosystem Assessment* notes:

Natural environments are an important source of aesthetic pleasure for people all over the world. The high aesthetic value of nature is reflected in many areas of human behaviour, such as the use of plants and flowers as decorative elements in interiors, the use of computer screensavers depicting natural environments, and the demarcation of "scenic routes".<sup>120</sup>

*The Economics of Ecosystems and Biodiversity* (TEEB), an accounting framework for ecosystem services, is also endorsed by the Conference of the Parties to the *Biodiversity Convention*.<sup>121</sup> It describes aesthetic value as 'aesthetic appreciation and inspiration for culture, art and design'.<sup>122</sup>

The reference to aesthetic value in descriptions of 'cultural services' suggests that, in the context of ecosystem services at least, 'aesthetic' value is understood as 'cultural'. I maintain, however, that this characterisation of aesthetic value does not assist in developing an interpretation of the term that is distinct from the 'cultural' value of biodiversity, a term that is also expressly identified in the preamble to the *Biodiversity Convention* and which is also capable of complex interpretations.<sup>123</sup> As explained, all terms must be interpreted to have an effective meaning that is distinct from other terms in a treaty.<sup>124</sup>

Several technical and information reports on the values of biodiversity have been produced by the Secretariat of the *Biodiversity Convention*. Again, it is not clear that such publications would constitute 'subsequent practice' for the purposes of treaty interpretation. In any event, they make only limited if any mention of 'aesthetic' value. One publication, *An Exploration of Tools and Methodologies for Valuation of Biodiversity and Biodiversity Resources and Functions*, describes 'aesthetic benefits' as an 'intangible aspect of well-being'.<sup>125</sup> Another report, *Protected Areas in Today's World: Their Values and Benefits for the Welfare of the Planet*, notes that aesthetic value is relevant to all the case studies in the paper but does not elaborate how.<sup>126</sup> A report titled *The Value of Nature: Ecological, Economic, Cultural and Social Benefits of Protected Areas* makes no mention of aesthetic value.<sup>127</sup>

I maintain that evidence of subsequent practice for interpretative purposes could also include the national reports submitted by individual states parties on a cyclical basis under article 26

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<sup>119</sup> Ibid 40.

<sup>120</sup> 'Cultural and Amenity Services' in *Millennium Ecosystem Assessment Current State and Trends Assessment*, online at <<http://www.millenniumassessment.org/documents/document.286.aspx.pdf>> 467.

<sup>121</sup> Eg Decision X/2 (n114) 5.

<sup>122</sup> Pavan Sukhdev et al, *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A Synthesis of the Approach, Conclusions and Recommendations of TEEB* (Progress Press, 2010) ('TEEB Synthesis') annex, 34.

<sup>123</sup> *Biodiversity Convention* (n7) preamble 1<sup>st</sup> tiret. See also Chapter 7.

<sup>124</sup> Gardiner (n6) 168 and 179ff.

<sup>125</sup> Secretariat of the Convention on Biological Diversity, *An Exploration of Tools and Methodologies for Valuation of Biodiversity and Biodiversity Resources and Functions* (Technical Series No 28, 2007) 16.

<sup>126</sup> Secretariat of the Convention on Biological Diversity, *Protected Areas in Today's World: Their Values and Benefits for the Welfare of the Planet* (Technical Series No 36, 2008) 95.

<sup>127</sup> KJ Mulongoy and SB Gidda, *The Value of Nature: Ecological, Economic, Cultural and Social Benefits of Protected Areas* (Secretariat of the Convention on Biological Diversity, 2008).



of the *Biodiversity Convention*.<sup>128</sup> National reports commonly describe specific cases of treaty implementation, including mentions of aesthetic value in national laws and policies that implement the *Biodiversity Convention*.<sup>129</sup> A comprehensive review of all of the national reports and jurisdictions that protect aesthetic value in laws and policies on biodiversity would be necessary to make a case for an agreed understanding among the parties on the meaning of aesthetic value in the treaty. However, my assessment of select national reports revealed variable meanings attributed to biodiversity's aesthetic value that are unlikely to amount to an agreed definition.<sup>130</sup>

### 3.2.3 Outcome of examination of subsequent practice

In summary, subsequent practice does not appear to clarify the meaning of 'aesthetic' value for either the *World Heritage Convention* or the *Biodiversity Convention*. It tends to contradict the conclusion from the literal, contextual and teleological approaches to interpretation used above in part 3.1. I used those approaches to construct a meaning of aesthetic value associated with 'perception by the senses' which was distinct from other environmental values expressly mentioned in the treaties and consistent, to some extent, with the 'aesthetic' value conceived in the philosophy of environmental aesthetics. Subsequent practice, in contrast, appears in some cases to have conflated aesthetic value with other values, such as with 'natural beauty' in the case of the *World Heritage Convention*, and with 'cultural value' in the case of the *Biodiversity Convention*. As explained in the next section, further sources of interpretation are suggested in the *Vienna Convention* where clarification is needed.

## 3.3 Historical intention

Article 32 of the *Vienna Convention* provides for 'supplementary means of interpretation' in some circumstances, including where meanings are 'ambiguous or obscure'. Historical documents generated in the negotiation of the treaty (preparatory work or '*travaux préparatoires*') can be consulted to clarify meanings of terms.<sup>131</sup> Anthony Aust warns, however, that this is a source that is 'very seldom decisive'.<sup>132</sup> The preparatory documents for the negotiation of both the *World Heritage Convention* and the *Biodiversity Convention* are discussed below.

### 3.3.1 Preparatory drafts of the World Heritage Convention

The preparatory drafts of the *World Heritage Convention* are not particularly helpful in clarifying the intended meaning of the 'aesthetic' point of view in the treaty's definition of outstanding universal value. One of the first drafts of the definition for 'natural heritage' for the *World Heritage Convention* incorporated 'great beauty' but contained no reference to

<sup>128</sup> *Biodiversity Convention* (n7) art 26.

<sup>129</sup> See Secretariat of the *Convention on Biological Diversity*, National Reports <<https://www.cbd.int/reports/>>.

<sup>130</sup> See eg references to biodiversity's 'aesthetic' value in: First National Report to the *Convention on Biological Diversity* of Antigua and Barbuda (March 2001); Second National Report to the *Convention on Biological Diversity* of Georgia (2010) 46; Fourth National Reports to the *Convention on Biological Diversity* of Brazil (2010) 120, Canada (undated) 91, Kenya (2009) 26, Kyrgyz Republic (2008) 16, Malta (2010) 17; Fifth National Reports to the *Convention on Biological Diversity* of Australia (May 2014) 4, Cambodia (2014) 18, Estonia (undated) pp17, 20, Indonesia (2014) 2, Lao People's Democratic Republic (2016) 19, Lebanon (August 2015) 50, Malawi (2014) 4, Maldives (2015) xii, Seychelles (2014) 4, Tuvalu (2016) xiv, 23, Uganda (2014) 16, 31, Yemen (2014) 2-3. All reports available at <<https://www.cbd.int/reports/>>.

<sup>131</sup> *Vienna Convention* (n12) art 32.

<sup>132</sup> Aust (n6) 219.



aesthetic value.<sup>133</sup> A further draft created three categories of property in the definition and included the ‘aesthetic’ point of view for the first and third clusters of natural property.<sup>134</sup> Subsequent draft proposals saw the deletion of ‘aesthetic’ value from the third cluster of properties in natural heritage and reference to ‘conservation or natural beauty’ in its place, as evident in the final agreement.<sup>135</sup> A draft report at the conclusion of an expert meeting makes ambiguous reference to ‘aesthetic’ and ‘natural beauty’ as possibly synonymous.<sup>136</sup> The French delegation was responsible for the use of the term ‘aesthetic’ in relation to the definition of ‘cultural heritage’. It proposed at one stage that the word ‘artistic’ should be deleted and replaced with ‘aesthetic’. I speculate that this proposed change could have been to distinguish it from the use of ‘aesthetic’ in connection with natural heritage but no reasons for the change were provided in the document.<sup>137</sup>

### 3.3.2 Preparatory drafts of the Biodiversity Convention

Similarly, the preparatory drafts of the *Biodiversity Convention* are unclear as to the intended meaning of the ‘aesthetic’ value of biodiversity. The final wording of the preambular phrase in the *Biodiversity Convention* referencing ‘aesthetic’ value evolved from an earlier phrase in the first draft of the treaty stating: ‘*Conscious of the ever growing environmental, ecological, genetic, scientific, aesthetic, recreational, cultural, educational, social and economic values of biological diversity and its components*’.<sup>138</sup> This formulation appeared unchanged from the first to the penultimate final draft when ‘intrinsic’ value was also included.<sup>139</sup> The first draft claims as the source for the phrase one of the *Elements for Possible Inclusion in a Global Framework Legal Instrument on Biological Diversity*.<sup>140</sup> There was, however, no reference in that source to aesthetic value or to many of the other values ultimately listed. An Explanatory Note in the first draft of the *Biodiversity Convention* explains that ‘[l]anguage and precedents from existing treaties have been drawn on when consistent with the elements and comments

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<sup>133</sup> See United Nations Educational, Scientific and Cultural Organization (‘UNESCO’), Special Committee of Government Experts to Prepare a Draft Convention and a Draft Recommendation to Member States Concerning the Protection of Monuments, Groups of Buildings and Sites, *Working Document Prepared by the Working Group: Draft Convention Concerning the Protection of Cultural and Natural World Heritage*, UN Doc SHC-72/CONF.37/4 (7 April 1972).

<sup>134</sup> UNESCO, Special Committee of Government Experts to Prepare a Draft Convention and a Draft Recommendation to Member States Concerning the Protection of Monuments, Groups of Buildings and Sites, *Working Document Prepared by the Working Group II: Draft Convention Concerning the Protection of Cultural and Natural World Heritage*, UN Doc SHC-72/CONF.37/8 (11 April 1972).

<sup>135</sup> UNESCO, Special Committee of Government Experts to Prepare a Draft Convention and a Draft Recommendation to Member States Concerning the Protection of Monuments, Groups of Buildings and Sites, *Drafting Committee* UN Doc SHC.72/CONF.37/RED/1 (undated).

<sup>136</sup> UNESCO, Special Committee of Government Experts to Prepare a Draft Convention and a Draft Recommendation to Member States Concerning the Protection of Monuments, Groups of Buildings and Sites, *Draft Report* UN Doc SHC.72/CONF.37/19 (21 April 1972) [13].

<sup>137</sup> UNESCO, Special Committee of Government Experts to Prepare a Draft Convention and a Draft Recommendation to Member States Concerning the Protection of Monuments, Groups of Buildings and Sites, UNESCO House 4-22 April 1972, *Projet d’amendement, présenté par la délégation de la France*, UN Doc SHC.72/CONF.37/DR.21 (10 April 1972).

<sup>138</sup> Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity, *Draft Convention on Biological Diversity* 2<sup>nd</sup> sess, UN Doc UNEP/Bio.Div/WG.2/2/2 (22 January 1991) (‘*First Draft Convention*’).

<sup>139</sup> Intergovernmental Negotiating Committee for a Convention on Biological Diversity, Fifth Revised Draft Convention on Biological Diversity 5<sup>th</sup> sess, UN Doc UNEP/Bio.Div/N7-INC.5/2 (20 February 1992).

<sup>140</sup> Ad Hoc Working Group of Experts on Biological Diversity, *Elements for Possible Inclusion in a Global Framework Legal Instrument on Biological Diversity* UN Doc UNEP/Bio.Div/WG.2/1/3 (24 September 1990) (‘*Elements*’).

from delegations.’<sup>141</sup> Several legal instruments are listed in that Explanatory Note as source material, including the *Convention on the Conservation of Migratory Species of Wild Animals* (‘*Bonn Convention*’).<sup>142</sup> The *Bonn Convention* includes a list of values similar to that included in the first draft of the *Biodiversity Convention* so it was a likely precedent for the naming of ‘aesthetic’ as a value of biodiversity.<sup>143</sup> There is, however, no suggestion from the documentation that consideration was given to any difference between the valuing of biodiversity as opposed to migratory species on aesthetic grounds.

### 3.3.3 Outcome of analysis of historical intention

On the basis of the draft treaties, it would appear that the distinction between ‘aesthetic’ and ‘natural beauty’ in the *World Heritage Convention* was intended by the negotiators. However, the reasoning behind the differentiation is not apparent from the negotiating documents. Other than suggesting that another agreement protecting wildlife was a precedent for the list of values associated with biodiversity, the negotiating drafts of the *Biodiversity Convention* suggest no specific meaning for the term ‘aesthetic’ in the treaty’s preamble. An historical approach to interpreting the term ‘aesthetic’ in the treaties does not exclude a broad interpretation associated with perception of the senses. Nor does it explicitly support such a view.

In the next section, I consider the extent to which evolutive interpretation could support a broad meaning of aesthetic value associated with sensorial perception. As I explained earlier, such a meaning would be consistent with a contemporary philosophical conception of the environment’s aesthetic value which I have argued is appropriate for use in international environmental law.

## 3.4 Evolutive interpretation

Other techniques of treaty interpretation have been recognised as either derived from or additional to those contemplated in the *Vienna Convention*. One such technique is evolutive interpretation, also known as an evolutionary, sociological or dynamic approach to the interpretation of treaties.<sup>144</sup> In this section, I will explain the technique before considering how ‘aesthetic’ value expressed in the *World Heritage Convention* and *Biodiversity Convention* might be interpreted on an evolutive basis.

### 3.4.1 Evolutive techniques

There is debate among practitioners of international law as to whether evolutive interpretation is a sanctioned technique and, if so, what it entails.<sup>145</sup> Judges and adjudicators from a range of

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<sup>141</sup> *First Draft Convention* (n138) 2.

<sup>142</sup> *Ibid*, 4; *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983) (‘*Bonn Convention*’).

<sup>143</sup> *Bonn Convention*, *ibid*, preamble 2<sup>nd</sup> tiret.

<sup>144</sup> See generally Gardiner (n6) 467ff.

<sup>145</sup> See further Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014); Pierre-Marie Dupuy, ‘Evolutionary Interpretation of Treaties: Between Memory and Prophecy’ in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011) 123; Malgosia Fitzmaurice, ‘Dynamic (Evolutive) Interpretation of Treaties: Part I’ (2008) 21 *Hague Yearbook of International Law* 101 and ‘Part II’ (2009) 22 *Hague Yearbook of International Law* 3; Julian Arato, ‘Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences’ (2010) 9 *Law and Practice of International Courts and Tribunals* 443.

international courts and tribunals have nevertheless recognised a degree of mobility in the meaning of treaty terms to reflect ‘present-day conditions’.<sup>146</sup>

In his comprehensive text on international treaty interpretation, Richard Gardiner has proposed that evolutive interpretation might be justified in at least three circumstances: advances not contemplated at the time the treaty was made; elaborations emerging from processes created by the treaty to develop the treaty; or developments in the legal system at large.<sup>147</sup> It is an approach that appears to be contemplated by George Nolte of the International Law Commission who referred to the need for treaties to ‘evolve according to the social needs of the international community’.<sup>148</sup> Maarten Bos describes the technique in terms of an interpreter exercising freedom in departing from an ‘obsolete’ written rule to ensure that it continues to ‘correspond with the needs of society’.<sup>149</sup> Legal scholar Ian Johnstone has suggested that it is the international nature of the community of states parties to multilateral treaties as opposed to a small number of states that demands evolutive interpretation. Both the *World Heritage Convention* and *Biodiversity Convention* qualify as multilateral treaties.<sup>150</sup> Johnstone observed that ‘[m]ultilateral treaties and constitutional instruments (like the United Nations Charter) tend to be more open-textured than bilateral treaties, because they must capture a broader range of interests, concerns and understandings. The interpretive process tends to be more evolutionary as shared meanings are worked out over time.’<sup>151</sup>

Some judges and scholars have been critical of evolutive interpretation as subverting the states’ intentions when agreeing to treaty commitments. Referring to states parties, Sir Gerald Fitzmaurice has said: ‘It would not be *their* treaty that would emerge from the fray, but another that someone else thought was the one they should have entered into.’<sup>152</sup> Aware of this concern, judges of the European Court of Human Rights have stressed, in the context of the Council of Europe’s *Human Rights Convention*,<sup>153</sup> that evolutive interpretation ‘does not allow entirely new concepts or spheres of application to be introduced into the Convention: that is a legislative function that belongs to the member States of the Council of Europe.’<sup>154</sup>

### 3.4.2 Evolutive meanings of aesthetic value

International environmental law scholar, Catherine Redgwell, has described the *World Heritage Convention* as ‘the quintessential living treaty instrument’,<sup>155</sup> linking changes effected by the World Heritage Committee’s *Operational Guidelines* to ‘new environmental legal concepts such as the conservation of biological diversity.’<sup>156</sup> I maintain that evolutive

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<sup>146</sup> Gardiner (n6) 472. See also George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007) 74.

<sup>147</sup> Gardiner (n6) 468.

<sup>148</sup> Georg Nolte, ‘Treaties over time in particular: Subsequent Agreement and Practice’, *International Law Commission Report on the Work of the 60<sup>th</sup> Session* UN Doc A/63/10 (2008), annex 1 [1].

<sup>149</sup> Bos Part II (n15) 137-8, citing A Pitlo, *Evolutie in het privaatrecht* [Evolution in Private Law] (Haarlem 1969) 126.

<sup>150</sup> See above part 2.1.

<sup>151</sup> Johnstone (n16) 407.

<sup>152</sup> Sir Gerald Fitzmaurice, ‘*Vae Victis* or Woe to the Negotiators! Your Treaty or Our “Interpretation” of It?’ (1971) 65(2) *American Journal of International Law* 358, 368.

<sup>153</sup> Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, open for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953).

<sup>154</sup> *Feldbrugge v Netherlands* [1986] Eur Court HR (ser A) 99 (Joint Dissenting Opinion) [23–24].

<sup>155</sup> Catherine Redgwell, ‘Article 2 Definition of Natural Heritage’ in Francesco Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press, 2008) 64, 66.

<sup>156</sup> *Ibid* 67.

interpretation of the term ‘aesthetic’ in both the *World Heritage Convention* and *Biodiversity Convention* would take account of developments in the philosophy of environmental aesthetics.

As explained in Chapter 2, philosopher Ronald Hepburn’s paper calling for a specific conception of aesthetics in relation to the natural environment was ground-breaking in the Anglo-American philosophical literature in 1966. Writing before the adoption of the *World Heritage Convention* in 1972 and the *Biodiversity Convention* in 1992, Hepburn’s ideas were at odds with the mainstream philosophy of aesthetics that focussed on the arts. The field of environmental aesthetics has, however, since acquired the support of a significant number of contemporary scholars.<sup>157</sup> Philosophers such as Emily Brady describe aesthetic value of the environment in terms of sensorial experience shaped by imagination, emotion and knowledge.<sup>158</sup> Their account of the evolution of aesthetics would likely favour a shift from the dictionary connotations of aesthetic value and ‘beauty’ to a broader understanding of aesthetics as ‘perception of the senses’. To the extent that Brady and other philosophers also advocate an understanding of aesthetic value that is culturally diverse,<sup>159</sup> their views would likely inform an interpretation that also acknowledges that the environment’s aesthetic value manifests differently for different states parties to the treaties.

It is arguable that a contemporary understanding of the environment’s aesthetic value derived from the philosophy of environmental aesthetics serves ‘the social needs of the international community’.<sup>160</sup> However, whether developments in the philosophy of environmental aesthetics would warrant evolutive interpretation of the treaties on the basis of what Richard Gardiner calls ‘advances not contemplated at the time the treaty was made’,<sup>161</sup> is not clear. I maintain that such developments in philosophy would be relevant but the contested nature of evolutive interpretation as a technique means it is far from certain that treaty interpreters would be compelled to reach such a conclusion.

### 3.5 Variable interpretation

It appears that none of the techniques of treaty interpretation provides a clear meaning of aesthetic value as it applies to natural heritage or biodiversity respectively in the *World Heritage Convention* and *Biodiversity Convention*. Textual approaches to interpreting terms in light of the ordinary meaning, context and treaty object and purpose might support a broader understanding of aesthetics as ‘perception of the senses’ as opposed to ‘beauty’. However subsequent practice suggests that aesthetic value is conflated with other environmental values, including natural beauty in the administration of the *World Heritage Convention* and cultural value under the *Biodiversity Convention*. Whether this subsequent practice qualifies as a source of interpretation or constitutes interpretation that is misconceived, is not clear.<sup>162</sup> The meaning intended by the negotiators of the treaties is not apparent from the preparatory documents for the treaties and, while evolutive interpretation would support looking to characterisations of aesthetic value in the contemporary philosophy of environmental aesthetics, that approach might be seen to subvert the parties’ intentions. The techniques of treaty interpretation do, however, reveal complexities in the understanding of aesthetic value of the environment which are not necessarily recognised in some of the practices under the treaties.

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<sup>157</sup> See Chapter 2, part 2.1.

<sup>158</sup> See generally Brady, *Aesthetics of Environment* (n9).

<sup>159</sup> See Chapter 2, part 2.2.4.

<sup>160</sup> Nolte (n148).

<sup>161</sup> Gardiner (n6) 468.

<sup>162</sup> See Chapter 8.

In the next part, I examine issues that might arise for interpretation of the *Whaling Convention* in relation to aesthetic value before returning to consider matters arising from a doctrinal account of the meaning of aesthetic value for all three of the treaties.

#### 4. AESTHETIC VALUE INFORMING INTERPRETATION

Unlike the *World Heritage* and *Biodiversity Conventions*, the *Whaling Convention* makes no express mention of the aesthetic value of whales. Claiming as its objective or objectives the ‘proper and effective conservation and development of whale stocks’,<sup>163</sup> the treaty could appear from the preamble to be motivated by a range of environmental values that concern either keeping whales in the oceans or taking them out.<sup>164</sup> An ethical responsibility to keep whales in the oceans is apparent, for example, from the treaty’s preambular claim that parties are conserving whale stocks for ‘future generations’. This is not ethics concerning the whales but people – it is a value based on a perceived ethical responsibility to unborn humans, so that they might also benefit in unstated ways from whale stocks in the future.<sup>165</sup> However, the preamble also refers to exploiting whales for their ‘economic and nutritional’ values for present generations, evoking both commercial and subsistence values associated with harvesting whales.<sup>166</sup> Allowances made in the treaty for scientific research are indicative of the scientific value of whales (whether in or out of the oceans), while exceptions for aboriginal whaling are related to cultural and subsistence values of whaling.<sup>167</sup>

I argue that still further environmental values – not expressed in the treaty – are nevertheless relevant to an interpretation of its terms. I contend that the amendment to the *Whaling Convention* to place a ban or ‘moratorium’ on commercial whaling was motivated, and is maintained, on the basis of several environmental values, including aesthetic value. Relying on the international rules of treaty interpretation, I maintain that aesthetic value informs the interpretation of the ban on commercial whaling and the exemptions to it, including the exemption for scientific whaling.<sup>168</sup>

##### 4.1 The ban on commercial whaling

One of the most significant restrictions on whaling under the *Whaling Convention* is a ban, also called a ‘moratorium’, on commercial whaling which was effected by an amendment to the treaty in 1982.<sup>169</sup> The *Whaling Convention* allows for amendments to be made to the treaty by a three-fourths majority of the members of the governing body, the International Whaling Commission.<sup>170</sup> Amendments bind all parties unless, within a fixed period of time, individual parties lodge formal objections.<sup>171</sup> In 1982, the International Whaling Commission achieved the requisite three-quarter majority vote to amend the treaty to set commercial catch limits of whales at zero, with an anticipated review of that limit at a later time.<sup>172</sup> The new provision

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<sup>163</sup> *Whaling Convention* (n7) preamble.

<sup>164</sup> On dual purpose, see *Whaling in the Antarctic* (n46) [56].

<sup>165</sup> See Fitzmaurice (n43) 177.

<sup>166</sup> *Whaling Convention* (n7) preamble.

<sup>167</sup> Ibid art VIII and schedule. See Fitzmaurice (n43) 234.

<sup>168</sup> I do not examine for the purposes of this Chapter other bans on whaling and other exceptions to such bans under the *Whaling Convention* (n7) eg schedule cl 7(b).

<sup>169</sup> See above part 2.1.

<sup>170</sup> *Whaling Convention* (n7) arts III and V.

<sup>171</sup> Ibid art V(3).

<sup>172</sup> Ibid schedule cl 10(e).



was effective from the 1985/1986 whaling season.<sup>173</sup> Several members lodged objections and continued whaling unbound by the amendment.<sup>174</sup> Japan was bound by the ban but continued to allow whaling ‘for purposes of scientific research’, purportedly under an exemption in article VIII of the treaty.<sup>175</sup> In 2014, Australia successfully challenged Japan’s reliance on the exemption before the International Court of Justice.<sup>176</sup> Following several failed attempts to see the ban lifted, Japan withdrew from the *Whaling Convention* effective from July 2019.<sup>177</sup>

#### 4.2 Aesthetic value as a reason for the ban

The ban on commercial whaling was debated at meetings of the International Whaling Commission and its advisory bodies before and after it was introduced.<sup>178</sup> In their statements at the annual meetings of the International Whaling Commission, states invoked science in support of both the creation, maintenance and removal of the ban. Some members claimed that the science on whale stocks was too uncertain to justify any commercial whaling while others maintained that scientific evidence confirmed that certain whale populations would tolerate a resumption of the practice.<sup>179</sup>

Japan has described science as the only value that has united the members.<sup>180</sup> However, values other than science are also apparent in statements of members at meetings of the International Whaling Commission. For example, several members have pointed to ethical concerns, particularly regarding inhumane methods for killing whales.<sup>181</sup> But Japan has also identified aesthetic value as a – in its view illegitimate – basis for the ban. During the debate that preceded the approval of the ban in 1982, Japan cited a representative of the Food and Agriculture Organisation as having stated that ‘a justification for a complete cessation of whaling can be put forward on aesthetic or moral grounds but these are outside the terms of reference of the Commission.’<sup>182</sup> Supporting the ban, St Lucia pointed out that ‘there were no provisions made at the time [the treaty was adopted in 1946] for the circumstances with which we are now confronted’.<sup>183</sup> It cited ‘world public opinion’ against whaling, evidenced by instruments and agreements made in the United Nations and other fora representing the world’s nations.<sup>184</sup>

That the ‘world public opinion’ is influenced at least in part by aesthetic considerations is suggested by the analysis of anthropologist Arne Kalland. Kalland describes a composite

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<sup>173</sup> Note other restrictions are also included eg *Whaling Convention* (n7) schedule cl 7(b) (Southern Ocean Sanctuary).

<sup>174</sup> See footnote to *Whaling Convention* (n7) schedule cl 10(e) note to schedule; Norway and the Russian Federation lodged objections to the moratorium and Iceland made a reservation to it after leaving then rejoining the treaty in 2002; Canada withdrew from the *Whaling Convention*. See further Gerald Nagtzaam, *The Making of International Environmental Treaties: Neoliberal and Constructivist Analyses of Normative Evolution* (Edward Elgar, 2009) 192.

<sup>175</sup> *Whaling Convention* (n7) art VIII.

<sup>176</sup> *Whaling in the Antarctic* (n46).

<sup>177</sup> See US Department of State, Depository Information, Status List for the *Whaling Convention*, <https://www.state.gov/documents/organization/191051.pdf>.

<sup>178</sup> Fitzmaurice (n43) 66-76.

<sup>179</sup> Ibid. See eg ‘Verbatim Record’, International Whaling Commission, 34<sup>th</sup> Annual Meeting (19-24 July 1982) *Agenda item 6 Ending of Commercial Whaling* 72 (‘IWC 34<sup>th</sup> Annual Meeting’).

<sup>180</sup> ‘Verbatim Record’, International Whaling Commission, 31<sup>st</sup> Annual Meeting (9-13 July 1979) *Agenda item on Proposals for a World Wide Ban on Whaling and for Moratoria*, 60 (Japan).

<sup>181</sup> Eg IWC 34<sup>th</sup> Annual Meeting (n179) 72 (Australia) and 73 (United Kingdom) 78 (Antigua and Barbuda).

<sup>182</sup> Ibid 77 (Japan).

<sup>183</sup> Ibid 78 (St Lucia).

<sup>184</sup> Ibid 80 (St Lucia).

‘super-whale’ as being common to many cultures around the world. The super-whale is a totemic blend of whale species that combines size, intelligence, song and beneficent tendencies in one endangered animal.<sup>185</sup> Kalland argues that it has replaced the image of whale as a resource commodity.<sup>186</sup> The super-whale qualities are evident in a letter to the International Whaling Commission from then United States President Ronald Reagan, read to a meeting prior to the introduction of the ban:

Throughout human history, whales have evoked awe and wonder. They are the largest creatures ever to have lived on this earth; yet they are also among the most mysterious. It is this mysterious quality that gives whales their appeal and increased the importance of effective management that could assure whale populations for the future. ... I urge you to join with us and other people throughout the world to secure the protection of these magnificent creatures.<sup>187</sup>

President Reagan’s invocation of awe and wonder is an aesthetic claim.<sup>188</sup> It is not unlike claims made by other state leaders when speaking to laws that prohibit whaling in their domestic jurisdictions.<sup>189</sup> The descriptions of whales by states parties to the *Whaling Convention* adhere to elements of aesthetic value discussed by philosophers of aesthetic value. Aesthetic value associated with expressive wild animals, including large mammals, has been recognised by philosophers of environmental aesthetics. Philosopher Emily Brady has, for example, argued that ‘[e]ngaging with expressive qualities [of wild animals] can deepen appreciation and open up new avenues that are not shallow but instead support respectful aesthetic valuing.’<sup>190</sup> However, some philosophers critique the aesthetic value placed on charismatic mammals (such as whales) at the expense of small or ‘ugly’ animals.<sup>191</sup>

In the next section, I explain how the evocations of aesthetic value by states parties could be seen to inform the *Whaling Convention*.

#### 4.3 Interpretative techniques for the ban

I argue that ‘aesthetic’ value is relevant to a doctrinal interpretation of the express terms of the ban on commercial whaling, and to the express terms of the exemptions to the ban, under the *Whaling Convention*. The protection of whales for their aesthetic value is, I maintain, an ‘object and purpose’ of the ban,<sup>192</sup> or evident from material constituting supplementary means of interpretation.<sup>193</sup> I argue below that it is also possible to apply an evolutive technique to invoke aesthetic value in the interpretation of the ban on commercial whaling.

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<sup>185</sup> Arne Kalland, *Unveiling the Whale: Discourses on Whales and Whaling* (Berghahn Books, 2009) 28.

<sup>186</sup> Ibid 75.

<sup>187</sup> ‘Verbatim Record’, International Whaling Commission, 33<sup>rd</sup> Annual Meeting (20 July 1981)) *Agenda Item 7.1 Indefinite Ban on all Commercial Whaling*, 29 (USA).

<sup>188</sup> See Chapter 4, part 2.1.1. See also Chapter 6.

<sup>189</sup> Eg Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 4 April 1979, Ministerial Statement ‘Whales and Whaling’ (Prime Minister Malcolm Fraser). See Chapter 6.

<sup>190</sup> Emily Brady, ‘Aesthetic Value and Wild Animals’ in Martin Drenthen and Jozef Keulartz (eds), *Environmental Aesthetics: Crossing Divides and Breaking Ground* (Fordham University Press, 2014) 188, 199 (‘Wild Animals’).

<sup>191</sup> Emily Brady, ‘The Ugly Truth: Negative Aesthetics and Environment’ (2012) 69 *Philosophy and Environment: Royal Institute of Philosophy Supplements* 83.

<sup>192</sup> *Vienna Convention* (n12) art 31(1); Gardiner (n6) 211.

<sup>193</sup> Ibid art 32; Gardiner (n6) 347.



A treaty's object and purpose inform the interpretation of treaty provisions.<sup>194</sup> The object and purpose is apparent from the preamble and the treaty as a whole.<sup>195</sup> Aesthetic value is not expressly stated in the preamble or other provisions of the treaty and I do not maintain that it should be an implied term.<sup>196</sup> I argue instead that aesthetic value is apparent from the reasons given for the ban at the time the amendment was agreed, and at the times it has been retained, in the course of the debate among the states parties in the International Whaling Commission.

The debate of the ban is recorded in verbatim records and can be ascertained from materials relevant to individual states parties, such as the letter to the International Whaling Commission from the US President and other statements cited earlier.<sup>197</sup> These records and materials are, I maintain, 'supplementary means of interpretation' allowed under article 32 of the *Vienna Convention* to determine the 'object and purpose' of the treaty as it relates to the ban.<sup>198</sup> I argue that they are either part of the 'preparatory work' of the amendment to the treaty, or part of the 'circumstances of its conclusion', for the purposes of article 32. Richard Gardiner explains that '[t]he circumstances which cause a treaty to be drawn up, affect its content, and attach to its conclusion, are all factors which are in practice taken into account [in interpretation].'<sup>199</sup>

I maintain that the records of debate and other material are also relevant to the interpretation of terms in the ban that are not otherwise ascertained through an interpretation of the ordinary meaning of terms in their context and in light of the treaty's object and purpose. So by extension, aesthetic value would also inform the interpretation of the exemptions to the ban – such as the scientific exemption in article VIII of the *Whaling Convention*.

It is also possible to understand the terms of the ban and exemption in an evolutive way to have regard for aesthetic values of whales.<sup>200</sup> In its decision in *Whaling in the Antarctic* – discussed in detail in Chapter 6 – the International Court of Justice acknowledged that the *Whaling Convention* is 'an evolving instrument'.<sup>201</sup> St Lucia referred in debate in the International Whaling Commission to a changed 'world public opinion'. Above I described the 'evolutive' technique of treaty interpretation as taking account of 'present-day conditions',<sup>202</sup> including 'the social needs of the international community'.<sup>203</sup> The verbatim records and other official statements of states parties to the *Whaling Convention* would be a relevant source of evolutive interpretation.

It would, I argue, also be relevant for the purposes of evolutive interpretation to refer to the philosophy of environmental aesthetics for a contemporary understanding of the aesthetic value of the environment.<sup>204</sup> Richard Gardiner explains that 'academic guides and studies are often

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<sup>194</sup> Ibid art 31(1); discussed above in part 3.1.3.

<sup>195</sup> Gardiner (n6) 218.

<sup>196</sup> See ibid 165-167.

<sup>197</sup> See above (n187) and (n189).

<sup>198</sup> Gardiner (n6) 214-215.

<sup>199</sup> Ibid 398.

<sup>200</sup> See generally Jeffrey J Smith, 'Evolving to Conservation: The International Court's Decision in the Australia/Japan Whaling Case' (2014) 45(4) *Ocean Development and International Law* 301; Margaret A Young and Sebastian Rioseco Sullivan, 'Evolution through the Duty to Cooperate: Implications of the Whaling Case at the International Court of Justice' (2015) 16(2) *Melbourne Journal of International Law* 311.

<sup>201</sup> *Whaling in the Antarctic* (n46) [45]. Cf *Whaling in the Antarctic* (n46) [3-4] (Ad hoc Judge Charlesworth) [46] (Judge Yusuf). Discussed in Fitzmaurice (n43) 91.

<sup>202</sup> Gardiner (n6) 308. See above part 3.4.1.

<sup>203</sup> Nolte (n148).

<sup>204</sup> Emily Brady, 'Wild Animals' (n190).

used by courts and tribunals to assist them in analysis of text, preparatory work, comparative case law, and argument on controversial issues.<sup>205</sup> Recourse to scholarship on the philosophy on environmental aesthetics would introduce pluralised meanings of the environment's aesthetic value associated with such things as sensation, imagination, emotion and knowledge from experience and culture.<sup>206</sup>

Not all parties bound by the amendment that introduced the ban on commercial whaling under the *Whaling Convention* have indicated aesthetic grounds for the ban. As noted above,<sup>207</sup> scientific values are commonly referenced, and ethical values have also been invoked. However, I maintain that the other values do not displace aesthetic value in the motivation of states supporting the moratorium but are additional to it. States parties have the option of objecting to amendments such that they are not bound by them.<sup>208</sup> Where however states parties opt to be bound, I maintain that the treaty interpretative concept of 'good faith', and the international legal principle of *pacta sunt servanda*, requires that the treaty terms be interpreted on the same basis for all the parties bound by it.<sup>209</sup> Japan's statements as to scientific value would not then exclude consideration of aesthetic value as a basis for the ban and exemptions to it.

I will consider the implications of my arguments around aesthetic value in the *Whaling Convention* in Chapter 6. For now, I conclude only that aesthetic value is relevant to the interpretation of the *Whaling Convention* and that an understanding of that value as developed by philosophers of environmental aesthetics could be relied on to describe the nature of aesthetic value for that purpose.

## 5. SOURCES FOR TREATY INTERPRETATION

Doctrinal techniques for treaty interpretation rely on written sources.<sup>210</sup> As seen from this Chapter, orthodox sources for treaty interpretation include materials such as the text of treaties augmented by dictionaries, documentation generated in and descriptive of subsequent practice, and written materials created in the course of treaty negotiations. For reasons explained below, I argue that the written sources that typically document meanings for law do not provide an adequate account of the meaning of aesthetic value in terms conceived in the philosophy of environmental aesthetics.

### 5.1 From documents

Like the scholarship on aesthetic value in international environmental law examined in Chapter 2, the doctrinal legal interpretation of the treaties using orthodox written sources that I undertake in this Chapter provides a variable account of the environment's aesthetic value. I conclude that it would be possible for certain interpretative techniques to draw from the

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<sup>205</sup> Gardiner (n6) 404.

<sup>206</sup> See Brady, *Aesthetics of Environment* (n9). See generally Emily Brady, 'Aesthetic Value, Nature, and Environment' in Stephen M Gardiner and Allen Thompson (eds), *Oxford Handbook of Environmental Ethics* (OUP, 2017) 186 ('*Oxford Handbook*'). See Chapter 2, part 2.1.

<sup>207</sup> See above part 4.2.

<sup>208</sup> See above part 4.1

<sup>209</sup> On *pacta sunt servanda* and 'good faith', see eg Gardiner (n6) 169.

<sup>210</sup> See eg Gardiner (n6) 81 (interpretative material generated in making treaties) and 255 (written documentation of subsequent practice). Cf on written sources of law as opposed to sources for interpretation: Peter G. Staubach, *The Rule of Unwritten International Law: Customary Law, General Principles, and World Order* (Taylor and Francis, 2018).

philosophical scholarship on environmental aesthetics to develop a comprehensive understanding of aesthetic value for law. I discuss in this Chapter, for example, the ways in which that scholarship could be engaged in a textual or evolutive interpretation of the three treaties. The philosophy of environmental aesthetics could be used to build on a broad definition of aesthetic value as ‘perception by the senses’ to describe a multisensorial appreciation informed by imagination, emotion and knowledge.<sup>211</sup> However, other sources of interpretation – such as the documentation I identify as having been generated in the practice of the treaties – suggest accounts of aesthetic value wedded to natural beauty, cultural and ethical values. This documentation of subsequent practice undermines a legal characterisation of aesthetic value that is both distinct from those other environmental values and profound in its significance.<sup>212</sup>

The equivocal results from applying the international rules of treaty interpretation highlight the failings of such techniques in identifying clear meanings for treaty terms. Both legal practitioners and critical legal scholars would be unsurprised by such findings. Treaty interpretation is, after all, an ‘art’ dressed up as ‘science’.<sup>213</sup> More specifically, *legal science*.<sup>214</sup> But these methods of interpretation are used in the practice of international law – they are themselves customary international law<sup>215</sup> – and, as such, they would be applied by interpreters of the terms in international environmental treaties to develop legal understandings of the term ‘aesthetic’. Ultimately, to engage in the formalities of treaty interpretation is to do as states do, or at least to do as states want to be seen to be doing – using legal method to determine law.<sup>216</sup> One meaning might be identified from several as valid with reference to techniques of interpretation.

I argue, however, that any interpreters of international environmental treaties engaging doctrinal techniques of interpretation to characterise the environment’s aesthetic value are twice blighted in their task. They are limited in the ways that all doctrinal interpretations are constrained by textual ambiguity. But they are also limited in a more fundamental way in respect of the environment’s aesthetic value – by the orthodox written sources of legal interpretation, and the techniques constructed for those sources.

## 5.2 To images

The written documents typically used as a source for treaty interpretation contrast with the ‘sources’ relied on by philosophers of environmental aesthetics when they characterise the environment’s aesthetic value. The principal source for philosophy is the physical environment itself, with imagination, emotion and knowledge, to greater or lesser degrees, shaping philosophical characterisations of the aesthetic value of that environment. Philosophers of

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<sup>211</sup> See Brady, *Aesthetics of Environment* (n9). See Chapter 2, part 2.2.

<sup>212</sup> See Chapter 2, part 2.2.5.

<sup>213</sup> See Sir Humphrey Waldcock, Special Rapporteur of the International Law Commission on the Law of Treaties, ‘Third Report on the Law of Treaties’ (1964) II *Yearbook of the International Law Commission* 54. See also Jan Klabbers, *International Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2017) 58.

<sup>214</sup> Panos Merkouris, ‘Introduction: Interpretation is a Science, is an Art, is a Science’ in Malgosia Fitzmaurice, Olufemi Elias, Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff, 2010) 1.

<sup>215</sup> See Gardiner (n6) 16.

<sup>216</sup> See generally Philip Allott, ‘Language, Method and the Nature of International Law’ (1971) 45 *British Yearbook of International Law* 79.

environmental aesthetics contemplate an immersion in natural environments or physical experiences of the environment.<sup>217</sup>

Yet, in writing about the aesthetic value of the natural environment, philosophers of environmental aesthetics rely on images – images expressed in words, and images expressed graphically, such as in photographs.<sup>218</sup> These images are used by environmental aestheticians to characterise the aesthetic experience or value of the environment theorised in their scholarship. So, for example, Allen Carlson includes a photograph by Ansel Adams of *The Grand Tetons, Wyoming* (fig 3.2) in his discussion of whether the site is ‘majestic’ or ‘dumpy’,<sup>219</sup> and Emily Brady includes an evocative description of the ‘magnificently sublime and harmonious’ South Lewis, Harris and North Uist National Scenic Area in her ‘case study’ on the environment’s aesthetic value.<sup>220</sup> Understandings of the representations of the environment’s aesthetic value in those images are formed by reference to the philosophy of environmental aesthetics. They could, I argue in Chapter 4, also be developed through insights from aesthetic philosophy as it relates to the arts where aesthetic methods are used to interpret the images.

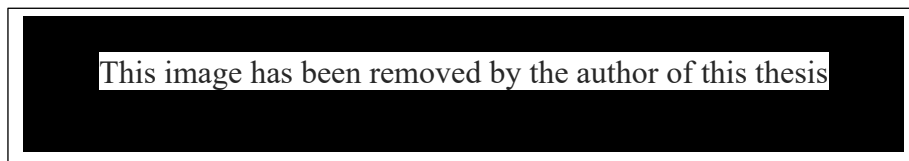


Figure 3.2: Ansel Adams, *The Grand Tetons, Wyoming*. Courtesy of Corbis/Ansel Adams Trust, in Allen Carlson, *Aesthetics and the Environment: The Appreciation of Nature, Art and Architecture* (Routledge, 2000) 56

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<sup>217</sup> See Chapter 2, parts 2.1, 2.2.2 and 2.3.

<sup>218</sup> See eg list of ‘illustrations’, including photographs, in Allen Carlson, *Aesthetics and the Environment: The Appreciation of Nature, Art and Architecture* (Routledge, 2000) ix.

<sup>219</sup> Ibid, 56. The debate was also taken up by: Glenn Parsons, ‘Freedom and Objectivity in the Aesthetic Appreciation of Nature’ (2006) 46(1) *British Journal of Aesthetics* 17; Malcolm Budd, ‘Objectivity and the Aesthetic Value of Nature: Reply to Parsons’ (2006) 46(3) *British Journal of Aesthetics* 267.

<sup>220</sup> Brady, *Aesthetics of Environment* (n9) 240.

Images – expressed in words or graphically – are not formally recognised as orthodox sources of treaty interpretation. I have found that images such as those used by philosophers of environmental aesthetics are, however, apparent in the materials generated in practices under the three treaties.<sup>221</sup> As explained in my introductory chapter to this thesis, those images include photographs submitted by states parties under the *World Heritage Convention* in nominations of natural properties to the World Heritage List,<sup>222</sup> photographs of whales and whale parts were submitted to the International Court of Justice by parties to a dispute under the *Whaling Convention*,<sup>223</sup> and photographic images of the environment are used in documentation that informs decisions of the Conference of the Parties to the *Biodiversity Convention*.<sup>224</sup> In the remainder of this thesis, I consider the relevance of those and other images to understandings of the meaning of the environment's aesthetic value for decisions made under the three treaties. I argue that aesthetic concepts and methods are relevant to the conception and analysis of such images for international law and legal practice in terms contemplated by philosophers of environmental aesthetics.

## 6. CONCLUSION

It is conceptions of aesthetic value in the philosophy of environmental aesthetics that, I have argued in Chapter 2,<sup>225</sup> are appropriate for international environmental law, including in the decision-making under treaties that protect aesthetic value. I have, however, demonstrated in this Chapter that a reliance on written sources, and the use of techniques designed for written sources, in the course of doctrinal interpretations of treaties, will inevitably compromise an understanding of the environment's aesthetic value in terms contemplated by philosophers of environmental aesthetics.

In later Chapters, I argue that extending the sources of interpretation and of international law to include images, particularly photographic images, is both proper and useful to constructions of the environment's aesthetic value for international environmental law. My identification and examination of the photographs presented to the international bodies could have instrumental applications in treaty interpretation and implementation concerning the environment's aesthetic value that I identify in my concluding Chapter 8. However, by paying close attention to the photographs used in the decision-making processes under the treaties, my aim is to make a broader contribution to the jurisprudential understanding of both aesthetic value, and of graphic image, in international law.

In Chapters 5 to 7, I identify images of aesthetic value for each of the treaties examined in this Chapter and analyse their relevance to judgements of aesthetic value for those treaties. As explained in Chapter 1, those determinations are made by the World Heritage Committee under the *World Heritage Convention* and, in different ways, by the International Court of Justice in connection with the *Whaling Convention* and the Conference of the Parties to the *Biodiversity Convention*. To prepare for my analysis of the environment's aesthetic value in the photographs used in each of the treaty processes, I will in the next Chapter 4 examine aesthetic philosophy as it concerns images and law. I will describe the different techniques developed

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<sup>221</sup> See eg site visits for treaty decision-making processes: see Chapter 5, part 5.1. Cf Michael A Becker and Cecily Rose, 'Investigating the Value of Site Visits in Inter-State Arbitration and Adjudication' (2017) 8(2) *Journal of International Dispute Settlement* 219.

<sup>222</sup> See Chapter 5.

<sup>223</sup> *Whaling in the Antarctic* (n46). See further Chapter 6.

<sup>224</sup> Eg Secretariat of the *Convention on Biological Diversity* (2014) *Global Biodiversity Outlook* 4.

<sup>225</sup> See Chapter 2, part 4.4.

in the aesthetic philosophy of the arts to analyse photographs, identifying possible concerns for using images to analyse the environment's aesthetic value from the perspective of environmental aesthetics, before closing with an examination of the understandings of image in legal theory known as visual jurisprudence or 'imaginal law'.<sup>226</sup>

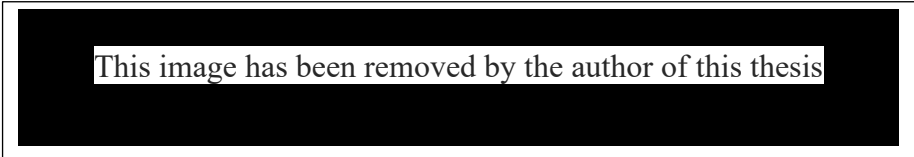
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<sup>226</sup> Desmond Manderson, 'Introduction: Imaginal Law' in Desmond Manderson (ed), *Law and the Visual: Representations, Technologies and Critique* (University of Toronto Press, 2018). See Chapter 4.



## CHAPTER 4 IMAGE OF AESTHETIC VALUE IN INTERNATIONAL ENVIRONMENTAL LAW

EXHIBIT: PIERRE HUYGHE, *AFTER ALIFE AHEAD* (2017)



This image has been removed by the author of this thesis

Figure 4.1: Pierre Huyghe, *After ALife Ahead*, 2017, sculptural installation, Münster, Germany. Photo: Alice Palmer

In 2017, French artist Pierre Huyghe took over a disused ice-skating rink in the German town of Münster to create a large-scale sculptural installation called *After ALife Ahead* (fig 4.1).<sup>1</sup> Huyghe had partly removed a concrete floor to excavate a pit of clay. At first glance, it was a mining site that had displaced the natural environment. On further inspection, it was an archaeological dig, uncovering natural artefacts. Seemingly random pools of eutrophic, snail-inhabited water edged a maze of walking paths. Visitors were invited to navigate a post-Apocalyptic scene of concrete shards and termite-like ‘hills’ that housed living bees. Crabs lurked in a small aquatic acropolis atop a mound of earth while overhead skylights opened and closed intermittently to allow the bees to move between the cool dark interior and the hot bright world outside. Fetid odours filled the cavernous space while a soundscape of drips, clanks, buzzing and whispers encroached on the cathedral silence.

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<sup>1</sup>*Skulptur Projekte Münster 2017*, Münster, Germany, < <https://www.skulptur-projekte-archiv.de/en-us/2017/>>.

The variability of life was subtle and artificially manipulated in the work but, ultimately, biology was ingenious, adapting in the task of survival. Drained of colour, the space and its elements nevertheless exhibited diversity in tones, shapes and scale. From the high canopy to the subterranean pools, contrasts and variety might have indicated a healthy environment. Charismatic, domesticated animals placed in the installation – peacocks white so that they too were robbed of colour – had gone rogue, apparently taking flight never to return,<sup>2</sup> giving way to lesser known wild species of insects, molluscs and crustaceans. Malignant microorganisms, fed with oxygen, flourished in a box at the edge of the excavation, a reminder of nature's irreverent course. The skating rink, constructed on an environment it had destroyed, was itself decaying to bear new life, good and bad, life in a cycle that would in turn die or be evicted when the artwork was demolished at the close of the sculpture festival for which it was commissioned.

The artwork's dominant medium of clay, a malleable and often-times transitional material used by sculptors in the process of making more durable creations in metals, embodies both art practice and the earth's raw material. It was nature constructed by humans. But the artwork demonstrated to me how such a fecund place can appear, on the surface, empty of life, upsetting visual expectations of biodiverse environments. It extended the understanding of aesthetic values of biodiversity beyond classical concepts of beauty and exceptionalism to new forms of appreciation, disrupting one aesthetic with its proposal of another. I could be nostalgic for the lost aesthetic while also appreciating Huyghe's novel take on the ecological elements and processes that comprise the variability of life. I noted, however, that even this life is fragile, its extinction anticipated from its inception. The high financial cost of such a grand yet impermanent gesture performed the profligacy it could be seen to critique.

## 1. INTRODUCTION

My description of Pierre Huyghe's sculptural installation *After ALife Ahead* (fig 4.1) uses aesthetic methods of analysis developed for the arts to describe an aesthetic understanding of the natural environment informed by the philosophy of environmental aesthetics. Relying on philosopher Emily Brady's conception of the environment's aesthetic value,<sup>3</sup> I argued in Chapter 2 that the aesthetic value protected under international environmental law should be understood in terms of a multi-sensory experience shaped by imagination, emotion and knowledge, including Western science and other cultural knowledges.

Brady's conception of aesthetic value is, however, at odds with the meaning I constructed using methods of treaty interpretation in Chapter 3. In treaty practice, aesthetic value has been conflated with natural beauty, cultural value and ethical values of the environment – all related but distinct from the understanding of aesthetic value developed by Brady. In Chapter 3, I developed meanings from orthodox sources of treaty interpretation – written texts. I maintain, however, that photographic images of the environment can also be understood for their meanings of aesthetic value. As I did for Huyghe's *After ALife Ahead*, I will in this thesis use aesthetic methods developed for visual art to construct meanings of the environment's aesthetic value from photographic images used in international decision-making processes that determine the environment's aesthetic value.

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<sup>2</sup> Joe Lloyd, 'Skulptur Projekte Münster 2017' Studio International (online, 3 July 2017).

<sup>3</sup> Emily Brady, *Aesthetics of the Natural Environment* (Edinburgh University Press, 2003) ('*Aesthetics of Environment*') 120, 146, 185. Note discussion of environmental aesthetics in connection with quarry, 239.

In part 2 of this Chapter, I examine literature on the aesthetic philosophy of the arts as it relates to the environment before explaining, in part 3, the ways in which the arts have been engaged in the analysis of law. Legal theorists have looked to aesthetic philosophy as it concerns the arts but few scholars of environmental law – domestic or international – have engaged aesthetic philosophy to understand the environment’s aesthetic value.<sup>4</sup> They have not combined philosophical vantages of the arts and of the natural environment to analyse the concept of aesthetic value as a term in international environmental treaties. This Chapter introduces the concepts of aesthetics for the arts that I develop in my analysis of photographs in treaty processes in Chapters 5 to 7.

## 2. AESTHETICS IN ART ON THE NATURAL ENVIRONMENT

The natural environment analysed by philosopher Emily Brady and Allen Carlson is not the mainstream concern of contemporary aesthetic philosophy.<sup>5</sup> Since the 19<sup>th</sup> century, the principal focus of the philosophy of aesthetics in Western Europe and Britain has been the appreciation of the arts.<sup>6</sup> Over time, aesthetic methods for the arts has evolved to define, describe, analyse, critique, interpret and judge creative expression in its many forms.<sup>7</sup> The ‘arts’ for these purposes encompasses a broad range of humanistic endeavours, including literature and poetry, visual art in its many media, as well as music and the performing arts such as theatre and dance.<sup>8</sup> In this part, I will examine aesthetic theories as they concern visual art depicting natural environments.

### 2.1 Landscape and nature

Art historian Kenneth Clark writes that the ‘rise and development since the middle ages [of landscape painting] is part of a cycle in which the human spirit attempted once more to create a harmony with its environment.’<sup>9</sup> The arts have long been a source of ‘idealizations of nature’.<sup>10</sup> It is however through landscape painting, since the 18<sup>th</sup> century, that artists and aesthetic philosophers in Europe and Britain have developed the concept of the ‘picturesque’ in conversation with understandings of ‘natural beauty’ and the ‘sublime’.<sup>11</sup> These concepts, and the landscape tastes they have inspired, are described below.

#### 2.1.1 Landscape concepts for nature: natural beauty, picturesque and the sublime

Philosophical theories of the environment’s aesthetic value, including contemporary environmental aesthetics, rely on a concept of natural beauty variously conceived. In the 18<sup>th</sup> century, Western European philosophical understandings of beauty included the beauty of nature. Yet the objects contemplated for aesthetic appreciation were not necessarily conceived

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<sup>4</sup> See below part 3.3.

<sup>5</sup> See Chapter 2, part 2.1. See further Allen Carlson, ‘Ten Steps in the Development of Western Environmental Aesthetics’ in Martin Drenthen and Jozef Keulartz (eds), *Environmental Aesthetics: Crossing Divides and Breaking Ground* (Fordham University Press, 2014) 13.

<sup>6</sup> Jerrold Levinson, ‘Philosophical Aesthetics: An Overview’ in Jerrold Levinson (ed), *The Oxford Handbook of Aesthetics* (Oxford University Press, 2003) 3.

<sup>7</sup> See generally Stephen Davies and Philip Alperson, *The Philosophy of Art* (Wiley Blackwell, 2016).

<sup>8</sup> Robert Stecker, ‘Definition of Art’ in Levinson (n6) 136; Arthur C Danto, *What Art Is* (Yale University Press, 2013).

<sup>9</sup> Kenneth Clark, *Landscape into Art* (Pelican Books, 1956) 17.

<sup>10</sup> Brady, *Aesthetics of Environment* (n3) 30.

<sup>11</sup> Ibid 39. See also Emily Brady, *The Sublime in Modern Philosophy: Aesthetics, Ethics and Nature* (Cambridge University Press, 2013) (‘Sublime’).

in terms of the natural and unnatural.<sup>12</sup> Aesthetics philosopher Emily Brady explains that ‘natural beauty,’ as understood in European and British painting prior to the 18<sup>th</sup> century, largely corresponded to neo-classical renditions of pastoral beauty – smooth, uniform, symmetrical and serene.<sup>13</sup> Nature loved was a becalmed nature, tended and fruitful; nature unkempt was, Marjorie Hope Nicolson maintains, a place of gloom.<sup>14</sup>

Separate from ‘natural beauty’, is a concept of the environment as ‘picturesque’.<sup>15</sup> Emily Brady describes the concept of the ‘picturesque’ in European and British landscape painting as connoting qualities of ‘roughness’ and ruggedness, ‘sudden variation’ and asymmetry, as well as ‘irregularity’ and changes in the environment over time.<sup>16</sup> ‘Picturesque scenery’ is, Brady says:

[B]roken and undulating with variety, including water, for example a lake with ‘savage banks’ and a surface broken rather than smooth, perhaps with a pattern in the water from the wind, or the fast-flowing water of waterfalls and whitewater.<sup>17</sup>

Buildings feature in picturesque scenes but as ruins. The scene is framed – tourists to the British countryside were directed to use a ‘Claude glass’ to tint and frame a natural landscape so that it might be better observed.<sup>18</sup> Nature’s temporality, imperfections and expressiveness were prized in the picturesque.<sup>19</sup>

Reacting to the objectification of nature as ‘picturesque’, the 19<sup>th</sup> century Western European Romantic movement conceived humans as at one with nature. Emily Brady explains that Romantics did not see humans as detached and reasoned observers of nature but imaginative and emotional subjects in nature.<sup>20</sup> Romanticism took elements of the picturesque and magnified them through the ‘sublime’, the philosophical concept accounting for awe and fear arising from a sense of nature being beyond human control and capacities.<sup>21</sup> Romanticism would extend from Europe and Britain to the invaded frontierscapes of the Americas, Africa, and Australia.<sup>22</sup> By the 20<sup>th</sup> century, the ‘American Transcendentalism’ of Henry David Thoreau and Ralph Waldo Emerson had, Brady explains, fostered a concept of ‘wilderness’

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<sup>12</sup> See Jonathan Maskit, ‘On Universalism and Cultural Historicism in Environmental Aesthetics’ in Martin Drenthen and Jozef Keulartz (eds), *Environmental Aesthetics: Crossing Divides and Breaking Ground* (Fordham University Press, 2014) 41.

<sup>13</sup> Eg Brady, *Aesthetics of Environment* (n3) 41.

<sup>14</sup> Marjorie Hope Nicolson, *Mountain Gloom and Mountain Glory: The Development of the Aesthetics of the Infinite* (Norton, 1959) cited in Brady, *Aesthetics of Environment* (n3) 35.

<sup>15</sup> Brady, *Aesthetics of Environment* (n3) 39-40.

<sup>16</sup> Ibid 39-40.

<sup>17</sup> Ibid 40.

<sup>18</sup> See Allen Carlson, *Aesthetics and the Environment: The Appreciation of Nature, Art and Architecture* (Routledge, 2000) (‘Aesthetics and Environment’) 45.

<sup>19</sup> Brady, *Aesthetics of Environment* (n3) 41.

<sup>20</sup> Ibid 43.

<sup>21</sup> MH Abrams, *The Mirror and the Lamp: Romantic Theory and the Critical Tradition* (Oxford University Press, 1953). See further Brady *Sublime*, (n11).

<sup>22</sup> See generally Christopher Fitter, Holmes Rolston, Daniel Joseph Nadenicek, and Allen A Carlson, ‘Landscape’ in Michael Kelly (ed), *Encyclopedia of Aesthetics* (Oxford University Press, 2014). See also Ian Potter Museum of Art, *Not as the Songs of Other Lands: 19th Century Australian and American Landscape Painting* (Ian Potter Museum of Art, University of Melbourne, 2017).

that echoed the themes of Romanticism.<sup>23</sup> Their philosophies would later inform 20<sup>th</sup> century conservation laws in the United States and other countries inspired by the wilderness ethos.<sup>24</sup>

### 2.1.2 Landscape tastes

Scholars and artists have observed a convergence of landscape-style tastes in people's appreciation of the natural environment around the world.<sup>25</sup> In their painting *America's Most Wanted* (fig 4.2), artists Vitaly Komar and Alexander Melamid created a visual composite of what Americans surveyed in 1993 expected of a pleasing painting – a 'dishwasher-sized' landscape in blue hues with water, animals and people at leisure.<sup>26</sup> The results for the majority of the other thirteen countries surveyed – mostly European nations but China, Kenya (fig 4.3) and Russia were also included – suggested that a 'World's Most Wanted' would look strikingly similar to the American ideal.<sup>27</sup>



Figure 4.2: Vitaly Komar and Alexander Melamid, *America's Most Wanted*. Source: Denis Dutton

Figure 4.3: Vitaly Komar and Alexander Melamid, *Kenya's Most Wanted*. Source: Denis Dutton

Responding to the Komar and Melamid project, art critic Arthur Danto concluded that '[t]he 44 percent-blue landscape with water and trees must be the a priori aesthetic universal.'<sup>28</sup> Landscapes in art are built on visual precedents in art: landscape conventions developed in art in Europe and Britain mirror landscape aesthetics that evolved in Asia, particularly China and Japan, from the 10th century.<sup>29</sup> Those conventions were adopted in colonial landscapes.<sup>30</sup> But Danto blamed popular media – the scourge of calendar images circulated around the world – for propagating ubiquitous visions of nature that art had long left behind.<sup>31</sup> Others have

<sup>23</sup> Brady, *Aesthetics of Environment* (n3) 45-47.

<sup>24</sup> See William Cronon, 'The Trouble with Wilderness or Getting Back to the Wrong Nature' in J Baird Callicott and Michael P Nelson (eds), *The Great New Wilderness Debate* (University of Georgia Press, 1998), 471-499. See Chapter 2.

<sup>25</sup> WJT Mitchell, *Landscape and Power* (University of Chicago Press, 1992).

<sup>26</sup> JoAnn Wypijewski (ed), *Painting by Numbers: Komar and Melamid's Scientific Guide to Art* (Farrar Straus Giroux, c1997) 2 and 7.

<sup>27</sup> Countries surveyed in an initial phase from 1993 were: China, Denmark, Finland, France, Iceland, Kenya, Russia, Turkey, Ukraine and the United States, gathering opinions from almost 2 billion people. Wypijewski, *ibid* 2 and 89; Germany, Italy, the Netherlands and Portugal were subsequently polled, see <<http://awp.diaart.org/km/painting.html>>.

<sup>28</sup> Arthur C Danto, 'Can It Be the "Most Wanted Painting" Even if Nobody Wants It?' in Wypijewski (n26) 124, 137.

<sup>29</sup> Roderick Whitfield, 'Landscape: China, People's Republic of' in *Grove Art Online* (Oxford University Press, 2003). See also Hugo Munsterberg, *The Landscape Painting of China and Japan* (CE Tuttle Co, 1955).

<sup>30</sup> Eg Tim Bonyhady, *Images in Opposition: Australian Landscape Painting 1801-1890* (Oxford University Press, 1985).

<sup>31</sup> Danto (n28) 137.

attributed a universal preference for particular qualities in natural environments to human evolution.<sup>32</sup> Aesthetic philosopher, Denis Dutton, apportioned responsibility for the harmonisation of landscape conventions to both nature and nurture.<sup>33</sup>

For aesthetic philosophers Emily Brady and Allen Carlson,<sup>34</sup> it is the picturesque and Romantic conceptions of nature developed through the arts that survive today in ‘landscape’ or ‘scenery’ models in nature conservation and restoration policy.<sup>35</sup> Both of those scholars consider the contemporary incarnations of these aesthetic concepts from the arts as inadequate to the task of environmental aesthetics.<sup>36</sup> Brady criticises the ‘picturesque’ movement for its ‘impoverished’ aesthetic experience of nature, marred by human-centred standards, limited framing, two-dimensional flatness and a bias towards the visual.<sup>37</sup> As explained earlier, environmental aesthetics understands environmental appreciation instead in terms of all senses.<sup>38</sup>

Despite its apparent ubiquity, the 18<sup>th</sup> and 19<sup>th</sup> century conceptions of landscape in Europe and Britain are only one of the many ways in which the natural environment has been conceived in the practices of visual art around the world. The next section looks at some of the other ways in which the natural environment has been a subject of visual art.

## 2.2 Environment in art

It has been grandly claimed that all arts ‘are linked to the birdsong’.<sup>39</sup> Aesthetic philosophers have demonstrated how artistic renditions of the environment – prehistoric cave and parietal art (fig 4.4), ancient Chinese landscapes, Australian Indigenous representations of Country, Western European landscapes from medieval, classical and Romantic periods, 20<sup>th</sup> century photographs of American ‘wilderness’, as well as modern and contemporary reflections on environmental subjects – can capture or dictate the complexity of the aesthetic experience and value of the natural environment.<sup>40</sup> In this section, I describe categories of ‘environmental art’, and the politically motivated ‘ecological art’, as forms of ‘art of the environment’. Discussions of political intent and reception in relation to art of the environment help to situate the aesthetic methods that I engage in Chapters 5 to 7 to analyse the photographs used in international environmental treaty processes.

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<sup>32</sup> See also Matthew Rampley, *The Seductions of Darwin: Art, Evolution, Neuroscience* (Pennsylvania State University Press, 2017); David Walsh, Elizabeth Pearce, Steven Pinker, Brian Boyd, Geoffrey Miller, Mark Changizi, *On the Origin of Art* (Tasmania Museum of Old and New Art, 2016).

<sup>33</sup> Denis Dutton, *The Art Instinct: Beauty, Pleasure and Human Evolution* (Oxford University Press, 2009) 31.

<sup>34</sup> See Chapter 2, part 2.1.

<sup>35</sup> Brady, *Aesthetics of Environment* (n3) 43.

<sup>36</sup> Ibid 225ff. See also Carlson, *Aesthetics and Environment* (n18) 46-7; on environmentalism of the poor, see Chapter 2 part 4.3.

<sup>37</sup> Brady, *Aesthetics of Environment* (n3) 42; 228-9.

<sup>38</sup> See Chapter 2, part 2.2.2.

<sup>39</sup> Elizabeth Grosz, *Chaos, Territory, Art: Deleuze and the Framing of the Earth* (Columbia University Press, 2008) 12, cited in Petra Lange-Berndt, ‘White Cube Ecologies’ in Omar Kholeif (ed), *Lynette Yiadom-Boakye: Natures, Natural and Unnatural* (Whitechapel Gallery, 2015) 82.

<sup>40</sup> See Barbara C Matilsky, *Fragile Ecologies: Contemporary Artists’ Interpretations and Solutions* (Rizzoli International, 1992) 4; Simon Schama, *Landscape and Memory* (Harper Collins, 1995). Cf Brady, *Aesthetics of Environment* (n3) 15. See Chapter 2, part 2.3.

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Figure 4.4: Aurochs, Horses and Deer, Hall of Bulls c16,000 – 14,000 BC, Lascaux Caves, France. Photo: Prof Saxx. Source: Wikimedia Commons

### 2.2.1 *Environmental art*

Art scholar and curator, Barbara Matilsky, posits that ‘artists throughout history have sought metaphors in nature to help define human existence’.<sup>41</sup> Matilsky suggests that periods of ‘environmental stress’ have provoked major artistic developments.<sup>42</sup> She traces these developments in art through social history, commencing with an awareness of critical species, surmised from cave paintings for hunter-gatherer societies. A concern for the impact of agriculture on the natural environment is evident later, she maintains, in artistic imagery of sacred trees from Mesopotamia and Mayan peoples.<sup>43</sup> She concludes her historical survey with the responses to urbanism and industrial intensification evident in landscape painting in Europe and its colonies, as well as in China and Japan. For Matilsky, the response of contemporary artists to the environmental stresses of the Anthropocene era marks another significant development in artistic expression.<sup>44</sup>

In describing the subject of her inquiry, Matilsky refers to a broad category of ‘environmental art’ that reflects ‘a wide range of approaches to nature’.<sup>45</sup> In one sense, her understanding of ‘environmental art’ includes the art that Allen Carlson also contemplates under the same term – forms of ‘earth art’, ‘earthworks’ or ‘Land Art’ that creates art from the natural

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<sup>41</sup> Matilsky (n40) 4.

<sup>42</sup> Ibid 5.

<sup>43</sup> Ibid.

<sup>44</sup> See Alan C Braddock and Renée Ater, ‘Art in the Anthropocene’ (2014) 28(3) *American Art* 2; Eleanor Heartney, ‘Art for the Anthropocene Era: Four Artists Take on the Challenges of Our Environmental Crisis’ (2014) *Art in America* 76. Malcolm Miles, *Eco-Aesthetics: Art, Literature and Architecture in a Period of Climate Change* (Bloomsbury Academic, 2014).

<sup>45</sup> Matilsky (n40) 36.



environment.<sup>46</sup> Much cited North American examples of Land Art include Robert Smithson's *Spiral Jetty* (1970), Michael Heizer's *Double Negative* (1970) and Christo's *Running Fence, Sonoma and Marin Counties, California* (1972-76).<sup>47</sup> This form of art has been controversial for its destructive impact on the environment from which it is created.<sup>48</sup>



Figure 4.5: Agnes Denes, *A Forest for Australia*, 1998, environmental sculpture, Altona, Australia. Photo: Simon O'Dwyer. Source: *Sydney Morning Herald*

These interventions in the environment could be distinguished from works such as Agnes Denes' tree stand at the City West Sewage Plant in Altona, Melbourne, *A Forest for Australia* (1998) (fig 4.5),<sup>49</sup> or Alan Sonfist's *Time Landscape: Greenwich Village, New York* (planted 1978), which are situated in urban places to 'present' rather than 'alter' the environment.<sup>50</sup> British artists such as Richard Long, David Nash, Andy Goldsworthy, and in some respects, Barbara Hepworth, could also be termed environmental artists, with their works made from, in or of environmental elements and situated in national parks or natural settings.<sup>51</sup>

<sup>46</sup> Allen Carlson, 'Is Environmental Art an Aesthetic Affront to Nature?' in Carlson, *Aesthetics and Environment* (n18) 150. See also Art & Design Magazine: Art & Design Profile No 36, *Art and the Natural Environment* (Academy Editions, 1994).

<sup>47</sup> Stephanie Ross, 'Gardens, Earthworks, and Environmental Art' in Salim Kemal and Ivan Gaskell (eds), *Landscape, Natural Beauty and the Arts* (Cambridge University Press, 1993) 158.

<sup>48</sup> See eg Emily Brady, 'Aesthetic Regard for Nature in Environmental and Land Art' (2007) *Ethics, Place & Environment: A Journal of Philosophy & Geography* 287.

<sup>49</sup> Rachel Buchanan, 'Agnes Denes' Public Sculpture Neglected', *Sydney Morning Herald* (online, 30 November 2014).

<sup>50</sup> Matilsky (n40) 37; Carlson, *Aesthetics and Environment* (n18) 160.

<sup>51</sup> See eg Domaine du Muy, France; Grizedale Sculpture, UK; Jupiter Artland, Scotland; Kröller-Müller Museum and sculpture garden, The Netherlands; Louisiana, Denmark; Skulptur I Pilane, Sweden. Cf John A Fisher, 'Environmental Aesthetics' in Levinson (n6) 667, 674.

### 2.2.2 Ecological art

Also included in Matilsky's notion of environmental art is what she calls 'ecological art'.<sup>52</sup> This, she says, refers to artworks that 'relate to ecology by respecting nature and establishing a reverent relationship between the viewer and the earth.'<sup>53</sup> Matilsky's conception of 'ecological art' appears similar to that of Linda Weintraub who identifies 'eco-artists' as those who address their art 'from the vantage point of a sustainable planet'<sup>54</sup> as opposed to others who might use or reference the environment in their work. Ecological art is directed at raising awareness about the state of the environment and advocating change.<sup>55</sup> It is art that is motivated by a belief that: 'Art and fiction can change the world, and they can also increase the significance that nature has in the human world'.<sup>56</sup>

Matilsky and Weintraub identify several artists, mostly North American, who could be termed eco-artists.<sup>57</sup> There are many others from around the world who could also be named as such.<sup>58</sup> Exhibitions and art festivals have showcased art featuring human impacts on the environment. The Australian art association, CLIMARTE, for example, has initiated a regular festival of art projects responding to climate change.<sup>59</sup> The University of Melbourne's Ian Potter Museum of Art hosted the exhibitions *Nature/Revelation*, *EXIT* and Liam Gillick's *Some significant equations* as part of the respective CLIMARTE festivals in 2015, 2017 and 2019.<sup>60</sup> 'Artwise' curators in Britain has been involved in exhibitions concerning endangered species and fragile environments.<sup>61</sup> At the Venice Biennale of 2015, Artwise worked with the Heydar Aliyev Foundation to mount an environmentally-themed exhibition in the Azerbaijan Pavilion while the environment, and environmental crises, were the subject of art in several of the other national pavilions and the international exhibition that year.<sup>62</sup> Environmental issues were also the subject of several works in the Venice Biennale of 2017 and 2019,<sup>63</sup> and in Documenta-14

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<sup>52</sup> Matilsky (n40) 56; see also Jason B Simus, 'Environmental Art and Ecological Citizenship' in Drenthen and Keulartz (n5) 101; Ruth Wallen, 'Ecological Art: A Call for Visionary Intervention in a Time of Crisis' (2012) 45(3) *Leonardo* 234.

<sup>53</sup> Matilsky (n40) 37.

<sup>54</sup> Linda Weintraub, *To Life! Eco-Art in Pursuit of a Sustainable Planet* (University of California Press, 2012) 9.

<sup>55</sup> TJ Demos, 'Contemporary Art and the Politics of Ecology: An Introduction' (2013) 27(1) *Third Text (Special Issue: Contemporary Art and the Politics of Ecology)* 1; David J Curtis, 'Creating Inspiration: The Role of The Arts in Creating Empathy for Ecological Restoration' (2009) 10(3) *Ecological Management & Restoration* 174. See generally Murray Edelman, *From Art and Politics: How Artistic Creations Shape Political Conceptions* (Chicago University Press, 1995); Andrew Brown, *Art and Ecology Now* (Thames and Hudson, 2014).

<sup>56</sup> Arto Haapala, 'The Interplay of Works of Art and Natural Phenomena' in Arnold Berleant (ed), *Environment and the Arts: Perspectives on Environmental Aesthetics* (Ashgate, 2002) 47, 54.

<sup>57</sup> Matilsky (n40) 57-58.

<sup>58</sup> See Demos (n55); Basil Sunday Nnamdi, Obari Gomba and Frank Ugiomoh, 'Environmental Challenges and Eco-Aesthetics in Nigeria's Niger Delta' (2013) 27(1) *Third Text (Special Issue: Contemporary Art and the Politics of Ecology)* 65.

<sup>59</sup> Eg Guy Abrahams, Bronwyn Johnson, and Kelly Gellatly (eds), *Art+Climate=Change* (Melbourne University Press, 2016).

<sup>60</sup> See CLIMARTE: Arts for a Safe Climate, <<https://climarte.org>>.

<sup>61</sup> See Artwise curators, *Here Today...*, <<http://artwisecurators.com/projects/here-today/>>.

<sup>62</sup> Alison Bracker (ed), *Vita Vitale: La Biennale di Venezia, 2015* (Heydar Aliyev Foundation, 2015); John Wiseman and Fay Chomley, 'Wrong Way Time: Climate Change, Ecology and Art at the Venice Biennale' *ClimArte Newsletter* (18 December 2015).

<sup>63</sup> See Christine Macel, Luz Gyalui and Flavia Fossa Margutti (eds), *La Biennale di Venezia: 57 Esposizione Internazionale d'Arte: Viva Arte Viva* (SIAE, 2017); Ralph Rugoff (ed), *May You Live in Interesting Times: Biennale Arte 2019*, Catalogue of the 58th International Art Exhibition (SIAE, 2019).

and *Skulptur Projekte Münster 2017*.<sup>64</sup> The exhibition *In the Balance: Art for a Changing World* at Sydney's Museum of Contemporary Art in 2010 is another example of curated collections of art directed at environmental activism.<sup>65</sup>



Figure 4.6: Janet Laurence, *Deep Breathing Resuscitation for the Reef*, 2015, various materials, images and film projections, along with museum specimens, Muséum national d'Histoire naturelle, Grande Galerie de l'Évolution, Jardin des Plantes, Paris and the Palais de la Porte Dorée, Aquarium Tropical, Paris. Source: Artist

The political instrumentalism of ecological art is highlighted through exhibitions that are staged in conjunction with international meetings responsible for implementing and developing international protections for the environment. CarbonArts, for example, has been active in staging exhibitions of art in association with treaty processes concerning the environment.<sup>66</sup> A world-wide ArtCOP21 was held in 2015 to coincide with the negotiations in Paris of a new agreement under the *United Nations Framework Convention on Climate Change*.<sup>67</sup> Artist Janet Laurence was one of the artists included in that art festival. Her work *Deep Breathing*

<sup>64</sup> See Quinn Latimer, Adam Szymczyk (eds), *The Documenta 14 Reader* (Prestel Verlag, 2017); *Skulptur Projekte Münster 2017* <<https://www.skulptur-projekte-archiv.de/en-us/2017/>>.

<sup>65</sup> *In the Balance: Art for a Changing World* at Sydney's Museum of Contemporary Art in 2010; see also arts programme at Glenorchy Art and Sculpture Park (GASP), Tasmania.

<sup>66</sup> See eg CarbonArts-World Health Organisation, *Breathe*, (Projects, 19 May 2015) <<http://www.carbonarts.org/projects/breathe/>>; See also art for World Environment Day: UN Environment, '12 art installations to be unveiled across Asia-Pacific to mark World Environment Day', Press Release 30 May 2018; World Environment Day, 'Turning Air Pollution into Art', 24 May 2019 <<https://www.worldenvironmentday.global/story/turning-air-pollution-art>>.

<sup>67</sup> United Nations Framework Convention on Climate Change 9 May 1992 (entered into force 21 March 1994) 1771 UNTS 107. See <<http://www.artcop21.com>>; See CLIMARTE 'Art Provokes and Inspires at Climate Conference', (Blog post 21 December 2015) <<https://climarte.org/art-provokes-and-inspires-at-climate-conference/>>.

*Resuscitation for the Reef* (fig 4.7) was a sculptural installation comprising natural specimens of coral placed among mirrors, blown glass, petri dishes, vials and beakers, some upended, mimicking the coral in their chaotic protrusions, rounded shapes and diverse sizes. The objects, joined by threads and hoses, were encased in Perspex to create *Wunderkammers*,<sup>68</sup> cabinets of curiosities which in 16<sup>th</sup> century Europe displayed myriad objects not yet subject to modern scientific classification. The work ‘curated’ the environment in all the senses of that word. The world created was primordial and wondrous, one that preceded Western science, but which could be saved by it. Here, an ecosystem is preserved as a memory, to be studied as a curiosity unknown to a future world. A Romantic environmental aesthetic, distinct from scientific value, is, literally, put on a pedestal, where reverence might translate to care.

That Janet Laurence might be called an ‘eco-artist’ raises several long-debated concerns for the ‘political’ in aesthetic philosophy for the arts.<sup>69</sup> It is not clear what, if anything, distinguishes the work of Laurence and other eco-artist candidates from other ‘environmental’ art. How is Laurence and others – like Fiona Hall, whose *'Ghost Net' Tapa* (2011) shows an enormous net lost at sea embalming living creatures, or Mandy Martin, who paints the scars from open-cut mining and nuclear fuel towers with the expressive swipes and smudges of European Romanticism,<sup>70</sup> – different from artists such as John Wolseley with his gossamer traces of flora and fauna,<sup>71</sup> James Morrison’s paintings of vibrant jungles and magical menageries (fig 4.7), or Raymond Arnold’s segmented studies of vistas evolving with time (fig 7.10)? Critical analyses of any of these works can readily identify political elements.

James Morrison’s painting, *Sepik River* (2012) (fig 4.7), for example, can be seen on one level in terms of natural beauty. Landscape and seascape have merged, the coral fish and crustacean habitat drained and joined to the land by the hint of a saltwater crocodile nudging into the frame. Vivid and varying colours appear hyperreal, yet they are true to the species. The colours and layering are, literally, outstanding. This is ‘wilderness’, humans are absent, but all eyes are on the human viewer, staring out from the frame. Henri Rousseau’s 19<sup>th</sup> century whimsy is invoked too with the vibrant crowding of exotic flora and fauna.<sup>72</sup>

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<sup>68</sup> Rachel Kent, ‘Janet Laurence: *After Nature*’ Curatorial essay, MCA Sydney, 2019, <<https://www.mca.com.au/artists-works/exhibitions/829-janet-laurence/>>.

<sup>69</sup> See Lydia Goehr, ‘Art and Politics’ in Jerrold Levinson (ed), *The Oxford Handbook of Aesthetics* (Oxford University Press, 2003) 471; Claire Bishop, *Artificial Hells: Participatory Art and the Politics of Spectatorship* (Verso, 2012). See also Desmond Manderson, ‘Here and Now: From “Aestheticizing Politics” to “Politicizing Art”’ (2016) 13 *No Foundations* 1.

<sup>70</sup> See Peter Haynes, *Mandy Martin: Painting 1981-2009* (Canberra Museum and Gallery, 2008).

<sup>71</sup> See Cathy Leahy with Helen McDonald and John Wolseley, *John Wolseley: Heartlands & Headwaters* (National Gallery of Victoria, 2015).

<sup>72</sup> See eg Henri Rousseau *Exotic Landscape*, 1908.



Figure 4.7: James Morrison, *Sepik River*, 2012, oil on linen, private collection. Photo: Darren Knight Gallery

Yet political elements can also be constructed from the painting. Animals indigenous also to Australia meet with the flora edging the Sepik River in Papua New Guinea, the colony within the colony. The other's other, empire twice removed, the river itself once named for a German Empress. The Royal spoonbill of Oceania substituted for the Roseate spoonbill of the Amazon. It is not the only species seemingly at home yet out of place in the Sepik – the Golden Conure, also from the Amazon, would be unlikely to meet in the wild the Cassowary lurking at a distance in the foliage. The ubiquitous wader, possibly a godwit or curlew, migrates vast distances between the hemispheres. Displaced animals belonging in a foreign place. The river of the title is unseen in the image, though it is perhaps its dry bed that hints at a lost habitat. A river that connects ecosystems, eventually flowing to the Bismarck sea, the oceans that challenge territorial borders. The mottled purple serpent – the river animated in indigenous law stories – snakes through the image as a riparian proxy. Drought resistant succulents meet tropical vines but behind, layers below, is a possible hint of European foliage.

The artists could be seen to celebrate a distinctly Antipodean environmental aesthetic.<sup>73</sup> But not all of them take aim overtly at political process. Laurence exhibits her work in contexts like ArtCOP21 intended to make a political intervention. She chooses environmental subjects and titles for her works that refer to matters in the political domain. Laurence, like Hall and Martin,<sup>74</sup> articulates a political intention for her work.<sup>75</sup> Morrison, Wolseley and Arnold less so. But their intentions – political or otherwise – do not determine the meanings that any one viewer might take from their works.

### 2.2.3 Art of the environment

Regardless of the political aspirations of the artist, any environmental art could, I suggest, make a political intervention that is ultimately reflected in law. That art can engage and provoke popular and ultimately national and international policy debate on environmental causes has been observed by Finis Dunaway and other scholars.<sup>76</sup> The photographs of Peter Dombrovskis in Australia, and of Ansel Adams in the United States, are often cited in this context for having influenced law and policy on environmental management.<sup>77</sup> They are, arguably, wilderness art or what aesthetic philosopher John Fisher calls ‘nature art’, exhibiting a ‘favourable regard to nature’ that ‘inspires appreciation of nature’.<sup>78</sup> Drawings by Thomas Moran from which he painted *Grand Canyon of the Yellowstone, 1872* were said to be instrumental in the decision to legislate the area as a national park.<sup>79</sup> Artists such as Nicholas Chevalier were commissioned by governments in the 19<sup>th</sup> century to undertake ‘pictorial surveys’ of colonised lands that would be the subject of legislative intervention.<sup>80</sup>

In my analysis of the photographs in treaty processes in Chapters 5 to 7, I do not set out to demonstrate that the photographs were intended by states parties, or have been received by decision-makers, as depicting a specific characterisation of the environment’s aesthetic value. I seek only to identify visual images in those processes and to develop aesthetic methods to illuminate possible meanings of aesthetic value from those images so that, in the future, such images can be used for the express purpose of denotation. If those images are to have a formal role in decision-making processes, I argue that it is for states to articulate the significance of those images, and for decision-makers to explain how they relate to their decisions.<sup>81</sup>

<sup>73</sup> Cf John Davis, Robert Owen, Ken Unsworth, *Venice Biennale 1978: from Nature to Art, from Art to Nature: Australia* (Visual Arts Board, 1978).

<sup>74</sup> See eg Zsuzsanna Soboslay, ‘Mandy Martin: Eco-worrying’ (2010) 226 *Art Monthly Australia* 30.

<sup>75</sup> See Sally Couacaud (curator), *After Nature: Lauren Berkowitz, Rosemary Laing, Janet Laurence, Louise Weaver* (Lake Macquarie City Art Gallery, 2005).

<sup>76</sup> See Finis Dunaway, *Seeing Green: The Use and Abuse of American Environmental Images* (University of Chicago Press, 2015); Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law* (Allen & Unwin, 1993); Meghan Robidoux and Jason F Kovacs, ‘Public Art as a Tool for Environmental Outreach: Insights on the Challenges of Implementation’ (2018) 48 (3) *Journal of Arts Management, Law and Society* 159.

<sup>77</sup> See CLIMARTE Festival 2019, ‘*Peter Dombrovskis: Journeys into the Wild*’, Monash Gallery of Art, <<https://artclimatechange.org/2019/event/dombrovskis-journeys-into-the-wild/>>; Finis Dunaway, ‘The Ecological Sublime’ (2005) 25(2) *Raritan* 78.

<sup>78</sup> Fisher (n51) 673.

<sup>79</sup> Angela L Miller ‘The Fate of Wilderness in American Landscape Art’ in Alan C Braddock and Christoph Irmscher (eds), *A Keener Perception: Ecocritical Studies in American Art History* (University of Alabama Press, 2009) 85.

<sup>80</sup> Marjorie J. Tipping, ‘Chevalier, Nicholas (1828–1902) *Australian Dictionary of Biography* (Melbourne University Press, vol 3, 1969).

<sup>81</sup> See Chapter 8, part 3.

In the next section, I will identify and explain aesthetic methods for analysing what I will be calling ‘art of the environment’ – art depicting the natural environment or analysed with reference to the natural environment. These methods are, I maintain, relevant to an aesthetic analysis of the photographs of the environment used in treaty processes.

### 2.3 Analysing art of the environment

In the introductory chapter to this thesis, I described different approaches to understanding the photograph of the Monarch Butterfly Biosphere Reserve (fig 1.1) from the perspective of aesthetic philosophy for the arts. Those approaches to analysing and interpreting the image identified matters of form but they also contextualised the image in contemporary art, in socio-political matters of Empire and in environmentalism. Nelson Goodman in *The Languages of Art* advances an aesthetic theory that sees visual representation as ‘denotation’ which is construed in accordance with conventions – habits or schemes for interpretation that are acquired by a viewer of the image through life or study.<sup>82</sup>

#### 2.3.1 Visual precedent

One of the ‘conventions’ or techniques that I used to give significance to the photograph of the Monarch Butterfly Biosphere Reserve was that of using other images – in that case from the contemporary artwork of Diana Thater (fig 1.2) – to articulate a narrative about nature and the place of humans in nature. It is an approach or method of aesthetic analysis that generates meaning from visual connections.<sup>83</sup> It situates images in the context of visual histories or precedents.<sup>84</sup> This technique of visual referencing could be distinguished from aesthetic analyses of visual representations from a sociological or political perspective or from a position of the natural sciences. Art historians and critics commonly examine artwork with reference to a socio-political context.<sup>85</sup> Visual representations in art of the environment – particularly ecological or eco-art – have been a particularly rich source of scholarship from the perspective of ‘eco-criticism’.

#### 2.3.2 Eco-criticism

The turn to eco-criticism in aesthetic philosophy has been focused in large part on literature.<sup>86</sup> However, aesthetic scholars have transposed those methods to visual art.<sup>87</sup> Eco-critical analyses of art examines environmental subjects through the lens of social and natural history with the intention of exposing ‘false assumptions’ about the state of the environment ‘while pointing the way to a more sustainable future.’<sup>88</sup> Art historians Alan Braddock and Christoph Irmscher refer to eco-critical art history as a ‘probing and pointedly ethical integration of visual analysis, ecocultural interpretation, and environmental history’ which ‘pays sharper attention

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<sup>82</sup> Nelson Goodman, *Languages of Art: An Approach to a Theory of Symbols* (The Bobbs-Merrill Co Inc, 1968).

See also Richard Eldridge, *An Introduction to the Philosophy of Art* (Cambridge University Press, 2003) 32.

<sup>83</sup> See Desmond Manderson, ‘Introduction: Imaginal Law’ in Desmond Manderson (ed), *Law and the Visual: Representations, Technologies and Critique* (University of Toronto Press, 2018) 3 (‘Imaginal Law’), citing Erwin Panofsky, *Studies in Iconology* (Oxford University Press, 1939) and Ernst Hans Gombrich, *Art and Illusion: A Study in the Psychology of Pictorial Representation* (Phaidon, 1977).

<sup>84</sup> See Jerrold Levinson, ‘Aesthetic Contextualism’ in Jerrold Levinson (ed), *Aesthetic Pursuits: Essays in Philosophy of Art* (Oxford University Press, 2016) 17.

<sup>85</sup> On strategies for understanding art generally, see Eldridge (n82) 128.

<sup>86</sup> See eg Cheryll Glotfelty and Harold Fromm (eds), *The Ecocriticism Reader: Landmarks in Literary Ecology* (University of Georgia Press, 1996); Greg Garrard, *Ecocriticism* (Routledge, 2<sup>nd</sup> ed, 2012); Ken Hiltner (ed), *Ecocriticism: The Essential Reader* (Routledge, 2014).

<sup>87</sup> Eg Braddock and Irmscher (n79).

<sup>88</sup> Ibid 19.



to the environmental embeddedness of art within a world that is both stubbornly real and infinitely vulnerable.’<sup>89</sup>

Eco-criticism is not limited to art that actively engages law and policy on environmental protection that Barbara Matilsky calls ecological art.<sup>90</sup> It can also be applied to art of the environment that does not have a stated political or social purpose and, as such, I maintain that it could be engaged to analyse photographs used in treaty practice. There are, however, issues that arise in aesthetic philosophy which might complicate the use of art methods in this context which I address in the next section.

#### 2.4 Issues for aesthetic philosophy

In Chapters 5 to 7, I examine photographs of the environment that are used in treaty processes for their significance to the aesthetic value of the environment. In those chapters, I rely on some of the concepts and methods developed by art theorists to describe, analyse and attribute significance to the photographs in treaty processes. This raises several questions for aesthetic philosophy. First, whether characterisations of aesthetic value consistent with the philosophy of environmental aesthetics can be understood from photographs. Secondly, whether *any* image can have aesthetic qualities. Thirdly, there is the matter of environmental hermeneutics and its relevance to the interpretation of environmental images. I will consider each in turn below.

##### 2.4.1 Art methods for environmental aesthetics

Aesthetic philosopher John Fisher asks ‘can we experience nature aesthetically (albeit indirectly) or experience the aesthetic properties of nature through appreciating nature art?’<sup>91</sup> Aesthetic philosophers, such as Allen Carlson or Emily Brady, maintain a distinction between the appreciation of art and of the environment that would likely preclude the use of aesthetic method to characterise the environment’s aesthetic value.<sup>92</sup> The arguments offered by philosophers in favour of appreciating the environment in terms analogous to art do not necessarily support a positive response to Fisher’s question. Janna Thompson’s analysis contemplates an artistic analysis of the environment ‘in situ’ as opposed to an analysis of art representing the environment.<sup>93</sup>

The question of using aesthetic methods developed for the arts to understand the aesthetic value of the environment as developed by philosophers of environmental aesthetics is further complicated in respect of the medium of photography.<sup>94</sup> Referring to Allen Carlson’s defence of an aesthetic appreciation of the natural environment distinct from that of art, Fisher observes:

Carlson’s argument raises the question whether we can experience the beauty of a natural environment by appreciating the beauty of a photograph of that environment. However, might not nature art exhibit how a part of nature actually appeared at a certain moment from a certain point of view? Even though limited and incomplete, why must

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<sup>89</sup> Ibid 4. See also Alan C Braddock, ‘From Nature to Ecology: The Emergence of Ecocritical Art History’ in John Davis, Jennifer Greenhill and Jason LaFountain (eds), *A Companion to American Art* (Blackwell, 2015) 447, 448; Alan C Braddock, ‘Ecocritical Art History’ (2009) 23(1) *American Art* 24.

<sup>90</sup> See further Matilsky (n40) 4. See also Weintraub (n54) 9; Miles (n44).

<sup>91</sup> Fisher (n51) 674.

<sup>92</sup> See Chapter 2, part 2.3.

<sup>93</sup> Janna Thompson, ‘Aesthetics and the Value of Nature’ (1995) 17(3) *Environmental Ethics* 291. See Chapter 2, part 2.3.

<sup>94</sup> Fisher (n51).

a representation be seen as necessarily unable authentically to exhibit some of the aesthetic qualities of the represented objects or scenes?<sup>95</sup>

Scholars of aesthetics have debated whether the images in photographs are 'transparent' to the physical place or thing depicted.<sup>96</sup> Some scholars maintain that photographs are a replication of what would have been seen with the naked eye by any person there in the place and time it was taken. André Bazin, for example, maintained that photographic images 'are the object itself'.<sup>97</sup> Roger Scruton took the view that photographs were a substitute for their subject.<sup>98</sup> Contrasting photography with painting, Scruton said 'if one finds a photograph beautiful, it is because one finds something beautiful in its subjects. A painting may be beautiful, on the other hand, even when it represents an ugly thing.'<sup>99</sup> Kendall Walton described the notion of representation in photography in terms of 'transparency' whereby the viewer of a photographic image sees through the image to the object in it.<sup>100</sup> This position was maintained by one of the pioneers of photography, Louis Daguerre, who was quoted to say: 'The daguerreotype is not merely an instrument which serves to draw nature... [it] gives her the power to reproduce herself.'<sup>101</sup> This despite the fact that early photographs of landscapes were created from spliced negatives in order that the land or the sky were neither under- or over-exposed.<sup>102</sup>

The commitment to photography as verisimilitude has been contradicted by other scholars who argue instead that they are a mediated image. Joel Snyder and Neil Walsh Allen, for example, state:

The notion that a photograph shows us "what we would have seen had we been there ourselves" has to be qualified to the point of absurdity. A photograph shows us "what would have seen" at a certain moment in time, from a certain vantage point if we kept our head immobile and closed one eye and if we saw the equivalent of a 150-mm or 24-mm lens and if we saw things [in the colour and printed format of the photograph].<sup>103</sup>

Barbara Savedoff concurs with Snyder and Allen, though she acknowledges that something of the belief in photographic mimesis is never quite abandoned by a critical viewer, giving photographs a quality that is distinct from other forms of representational art.<sup>104</sup> For those scholars who conceive of photographs as mediated, it is possible to contemplate photographs as representational art – pictures or images available for aesthetic reflection. Trevor Pateman

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<sup>95</sup> Ibid 667, 674.

<sup>96</sup> Nigel Warburton, 'Photography' in Levinson (n6) 614; see also Stecker (n8) 190-2.

<sup>97</sup> André Bazin, 'The Ontology of the Photographic Image' (1945), reprinted in A Bazin, *What is Cinema?* tr H Gray (University of California Press, 1967) 9, 14, cited in Warburton (n96) 615.

<sup>98</sup> Roger Scruton, 'Photography and Representation' in Roger Scruton, *The Aesthetic Understanding: Essays in The Philosophy of Art and Culture* (Methuen, 1983) 102 at 111, cited in Warburton (n96) 616.

<sup>99</sup> Ibid 114, quoted in Warburton (n96) 617.

<sup>100</sup> Kendall Walton, 'Transparent Pictures: On the Nature of Photographic Realism' (1984) 11 *Critical Inquiry* 246.

<sup>101</sup> Louis Daguerre quoted in Barbara Savedoff, *Transforming Images: How Photography Complicates the Picture* (Cornell University Press, 2000) 48.

<sup>102</sup> Ibid, 87.

<sup>103</sup> Joel Snyder and Neil Walsh Allen, 'Photography, Vision and Representation' (1975) 2(1) *Critical Inquiry* 143, 151-2; See also Nigel Warburton, 'Seeing Through "Seeing Through Photographs"' (1988) 28 *British Journal of Aesthetics* 173; WJT Mitchell, *The Reconfigured Eye: Visual Truth in the Post-Photographic Era* (MIT Press, 1994).

<sup>104</sup> Savedoff (n101).

discusses the difference in terms of photograph as ‘record’ and as ‘art’,<sup>105</sup> while Patrick Maynard speaks of ‘detection’ and ‘depiction’.<sup>106</sup>

Finis Dunaway expresses little tolerance for the distinction, stating:

While modern cultural critics fretted over the reproduction of reality, wondering if images estranged viewers from the physical world, environmental reformers expressed little anxiety over the status of nature in an age of mechanical reproduction. Their enthusiasm for the camera rested on the belief that it could elicit an emotional response in spectators, awakening them to the beauty of nature and arousing their concern for its protection.<sup>107</sup>

When photographs are understood as a subject of aesthetic analysis rather than as purported verisimilitude, they can be understood, I maintain, in conceptual terms. This includes in terms of the concepts and values that underscore environmental aesthetics. Consistent with the positions of Snyder and Allen, and with Savedoff, I maintain that the same kinds of methods used to analyse a landscape painting – for example by reference to other artworks in that genre or by reference to the socio-political context in which it was created – can be applied to photographs of the environment, even if that photograph can also for other purposes, including legal purposes, constitute a record or document of the place it depicts.

In response to Fisher, I argue that such analysis can, on the basis explained below, extend to a description of aesthetic appreciation of the environment in terms of environmental aesthetics. For example, the photograph of the Monarch Butterfly Biosphere Reserve (fig 1.1), at the very outset of Chapter 1, was included in a nomination file submitted to the World Heritage Committee.<sup>108</sup> I maintain that my description of it provided an understanding of the natural environment in terms of the philosophy of environmental aesthetics. The form and expressive qualities of the photograph, combined with my personal experiences and amateur knowledge of biology, allowed an aesthetic appreciation of the environment informed by the philosophy of environmental aesthetics. In doing so, and on the basis explained in part 3 of this Chapter, I treat the photographs as representations for interrogation in the same way some aesthetic theorists approach visual art.<sup>109</sup>

I used these methods for my description of Pierre Huyghe’s *After ALife Ahead* (fig 4.1) at the beginning of this Chapter. For all its contrivances, the artwork directed me to think about the elements that make an environment ‘natural’ – not focussed on the bright colours, symmetrical patterns or melodious sounds associated with a neo-classical natural beauty. And it made me reflect critically on human imaginings of nature, as well as the seemingly dogged insistence of nature to carry on regardless of human disruption – as if we do not matter. To my mind, the art represented an environmental sensibility, an aesthetic evocation in art of an aesthetic appreciation of the environment that I could describe in words. I note however, that my

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<sup>105</sup> See Trevor Pateman, ‘Photography’ in Trevor Pateman, *Key Concepts: A Guide to Aesthetics, Criticism and the Arts in Education* (Taylor and Francis, 2016) 138.

<sup>106</sup> Patrick Maynard, *The Engine of Visualization: Thinking Through Photography* (Cornell University Press, 1997).

<sup>107</sup> Finis Dunaway, *Natural Visions: The Power of Images in American Environmental Reform* (University of Chicago Press, 2005) xviii.

<sup>108</sup> Mexico, *Monarch Butterfly Biosphere Reserve*, Nomination file to World Heritage Committee (January 2007).

<sup>109</sup> Levinson (n6) 3.

description of *After ALife Ahead* was based on my physical experience of the installation when I visited it in person. I was immersed in the material ‘environment’ of the artwork. As a sculptural installation in a physical space, it engaged all my senses. Had I relied only on the photograph of the work, it is not certain that I would have interpreted it in the same way. As discussed next, the capacity for an image to evoke the environment’s aesthetic value might depend on its aesthetic quality as ‘art’.

#### 2.4.2 Aesthetic quality of image

I do not think that the photograph I took of Pierre Huyghe’s *After ALife Ahead* (fig 4.1) with my mobile phone captures the complexity of the space and the senses and ideas on the natural environment that my visit activated: it is backlit, low resolution and the foreground is out of focus. I intended it as a record for my research and a reminder of my experience of the space. Had a skilled artist taken the photograph, or had I taken one that better captured my aesthetic experience of the environment through Huyghe’s artwork, it might have enabled a viewer of the photograph to understand the installation in ways more evocative of an aesthetic experience contemplated by philosophers of environmental aesthetics. An aesthetic analysis of an image requires aesthetic qualities in the image to allow a Babushka doll-style appreciation of the image as an appreciation of the artwork as an appreciation of the environment.

This then raise a further question for aesthetic philosophy as to whether methods for understanding art can be properly applied to describe any image, regardless of the context or purpose of its production or the aesthetic qualifications of the person producing it. This is a question about what constitutes art.<sup>110</sup> For this thesis, I subscribe to the view that all visual images bear meaning. As explained in Chapter 7, I maintain that even images used by states parties for decorative purposes – purportedly absent meaning – can be interpreted for their aesthetic import.<sup>111</sup> Meaning can be ascribed in myriad ways but I understand aesthetic analysis to organise those meanings in a manner that can be communicated and replicated by others. In Goodman’s terms, aesthetic philosophy creates conventions for articulating visual denotations.<sup>112</sup>

As explained in Chapters 5 to 7, there are for example photographs used in the decision-making processes of each of the treaties that are small and low resolution. In the case of images that are not produced by artists or for artistic purposes, aesthetic theory for the arts can still be engaged to describe aesthetic elements. What was a record for me of Pierre Huyghe’s artwork is an image for someone else – a representation to be interpreted. The intention of the photographer of the Monarch Butterfly Biosphere Reserve (fig 1.1) – whether to record an event or create a work of art, did not preclude my interpretation of the representation from an aesthetic perspective.

#### 2.4.3 Environmental hermeneutics

Writing on the relationship between philosophical hermeneutics and environmental ethics, Martin Drenthen explains that ‘[e]nvironmental hermeneutics starts out from the assumption that the world we live in always already has significance because it is always already infused with meanings.’<sup>113</sup> Drenthen goes on to explain that ‘[e]nvironmental hermeneuticists have

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<sup>110</sup> See Stecker (n8).

<sup>111</sup> See Chapter 7, part 4.1.

<sup>112</sup> Goodman (n82).

<sup>113</sup> Martin Drenthen, ‘Environmental Hermeneutics and the Meaning of Nature’ in Stephen M Gardiner and Allen Thompson (eds), *The Oxford Handbook of Environmental Ethics* (Oxford University Press, 2017) 162, 166.

shown that humans understand themselves not just through texts and narratives but also through the meaningful places in which they find themselves.’<sup>114</sup> He concludes that:

By explicating the interpretational base of our being-in-the-world and articulating those preexisting meanings and interpretations that already play a role in how we act and think, hermeneutics will force us to have a second look at the meanings we often take for granted.<sup>115</sup>

As I attempt in this thesis to develop meanings of the environment’s aesthetic value from photographs for legal process, I make the same assumptions for interpretation as environmental hermeneuticists but I come full circle, returning to the image in legal process as a static proxy for the ‘meaningful places’ that are the subject of an interpreted experience. So, I use aesthetic methods for the arts, to understand the aesthetic value of the environment in terms of the philosophy of environmental aesthetics, relying on photographic images as a vehicle for interpretation of place. It is, however, not enough to consider questions that arise for aesthetic philosophy from my analysis of photographs in the treaty processes. The treaty processes are conducted under the authority and in accordance with international law. As such, I must also consider the approach of law to aesthetics. The nature and meaning of images in law, and the role of conventions from aesthetic philosophy in defining and translating those images for law, has occupied the scholarship of legal theorists discussed in the next part of this Chapter.

### 3. AESTHETICS OF IMAGE AS ART IN LAW

So far in this Chapter, my focus has been on the aesthetic value of the environment in terms of the aesthetic philosophy of the arts. I now turn to understandings of aesthetic philosophy in law. Formulations of ‘aesthetics’ in law are principally in the domain of legal theory or ‘jurisprudence’ – the philosophical study of law done well.<sup>116</sup> Jurisprudents have engaged aesthetic philosophy in the interdisciplinary study of law and humanities.<sup>117</sup> Their conception of aesthetics is associated with the philosophical study of the arts, adapted to theorise several aspects of common and civil law traditions, including the place of image in law.<sup>118</sup> Jurisprudential scholarship on image and law has been named such things as legal iconography,<sup>119</sup> visual jurisprudence<sup>120</sup> and imaginal law.<sup>121</sup> As will be explained in this part,

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<sup>114</sup> Ibid 170.

<sup>115</sup> Ibid 171. See further Forrest Clingerman, Brian Treanor, Martin Drenthen, and David Utsler (eds), *Interpreting Nature: The Emerging Field of Environmental Hermeneutics* (Fordham University Press, 2013).

<sup>116</sup> On meanings of jurisprudence, see eg: Margaret Davies, *Asking the Law Question* (Thomson Reuters, 4<sup>th</sup> ed, 2017) 1; cf Ann Genovese, Shaun McVeigh and Peter Rush, ‘Lives Lived with Law: An Introduction’ (2016) 20 *Law Text Culture* 1, 2 (jurisprudence as ‘a training in *persona* and office’); Olivia Barr, *A Jurisprudence of Movement: Common Law, Walking, Unsettling Place* (Routledge, 2016) 58 (‘minor jurisprudence’ of movement).

<sup>117</sup> Austin Sarat, Matthew Anderson and Cathrine O Frank (eds), *Law and the Humanities: An Introduction* (Cambridge University Press, 2010); Maksymilian Del Mar and Peter Goodrich (eds), *Legal Theory and the Humanities* (Ashgate, 2014); Peter Goodrich, ‘Law by Other Means’ (1998) 10 *Cardozo Studies in Law and Literature* 111.

<sup>118</sup> See eg Costas Douzinas and Lynda Nead, ‘Introduction’ in Costas Douzinas and Lynda Nead (eds), *Law and the Image: The Authority of Art and the Aesthetics of Law* (University of Chicago Press, 1999) 1; Adam Gearey, *Law and Aesthetics* (Hart Publishing, 2001) 25. Cf Roberta Kvelson, *Law and Aesthetics* (Peter Lang, 1992).

<sup>119</sup> Douzinas and Nead, *ibid* 11.

<sup>120</sup> Richard K Sherwin, ‘Visual Jurisprudence’ (2012-13) 57 *New York Law School Law Review* 11 (‘Visual Jurisprudence’).

<sup>121</sup> Manderson, *Imaginal Law* (n83).

image is, for these purposes, variously defined but it has included visual art and other graphic images as distinct from images apparent in law's literary or metaphorical language.<sup>122</sup>

### 3.1 Law and image

Jurisprudents have used perspectives from aesthetic philosophy to argue that, despite a preponderance of the prosaic word in written texts and verbal language of law, image is a legitimate manifestation of law and legal authority.<sup>123</sup> Scholars Costas Douzinas and Lynda Nead, among others, observe that a one-time intimacy between law and image dissipated in 17<sup>th</sup> century Anglo-European law, evolving away from visual emblems towards written text, as an iconoclastic secular state wrenched legal authority from the Roman Catholic Church.<sup>124</sup> Image in forms graphic or as 'painted words' was seen as circumspect, possibly anathema, to law.<sup>125</sup> Douzinas and Nead together with other scholars of visual jurisprudence have, however, challenged the presumed sovereignty of the word in law.<sup>126</sup> As explained below, several scholars have examined the extent to which image was ever exiled from the legal domain, highlighting the myriad ways in which images as graphic or literary devices continue to populate legal form and thinking.

#### 3.1.1. Visual literacy

Legal theorists addressing the place of image in law have called for visual literacy in legal method and legal education.<sup>127</sup> Those charged with making and applying the law, these scholars suggest, should recognise and understand the role of image in law. Legal methods and sources must be expanded to openly encompass aesthetic understandings of image. There is, otherwise, a risk that justice will be undone by image. Legal theorist Peter Goodrich, for example, points to the interpretive significance of graphic images reproduced in judgments of United States courts.<sup>128</sup> Legal scholar Richard Sherwin highlights the risk of context being excluded by the selective framing of photographs or videos proffered in evidence before courts.<sup>129</sup> He also describes the emotive powers of image as a potential source of bias, where a photographic or video image informs legal judgments but is not recognised as having done so.<sup>130</sup> Peter Rush and Andrew Kenyon critique verbal imagery in case law as betraying the bias within judgments.<sup>131</sup> Alison Young warns that law's ignorance of artistic conventions can lead to 'misjudgements' of images,<sup>132</sup> while Costas Douzinas points to the common law's

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<sup>122</sup> See generally Jessica Silbey 'Images in/of Law' (2012-13) 57 *New York Law School Law Review* 171. See also Christine Haight Farley, 'Imagining the Law: Art' in Sarat, Anderson and Frank (n117) 292.

<sup>123</sup> See Costas Douzinas, 'The Legality of the Image' (2000) 63 *Modern Law Review* 813 ('Legality'). See generally Peter Goodrich and Valérie Hayaert (eds), *Genealogies of Legal Vision* (Routledge, 2015).

<sup>124</sup> See eg Douzinas and Nead (n118) 8.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> See Richard K Sherwin, *Visualizing Law in the Age of the Digital Baroque: Arabesques and Entanglements* (Routledge, 2011) 40 ('Arabesques'); Zenon Bańkowski, Maksymilian Del Mar and Paul Maharg (eds), *The Arts and the Legal Academy Beyond Text in Legal Education* (Ashgate, 2013); Desmond Manderson, 'Bodies in the Water: On Reading Images More Sensibly' (2015) 27(2) *Law and Literature* 279 ('Bodies').

<sup>128</sup> Peter Goodrich, 'Imago Decidendi: On the Common Law of Images' (2017) 1(1) *Brill Research Perspectives in Art and Law* 1, 14 ('Imago').

<sup>129</sup> Sherwin, *Arabesques* (n127) 38-42.

<sup>130</sup> Ibid 39.

<sup>131</sup> Peter D Rush and Andrew T Kenyon, 'Alter Egos: The Mise-en-Scène of Law and Aesthetics' in Andrew T Kenyon and Peter D Rush (eds), *An Aesthetics of Law and Culture: Text, Images, Screens* (Emerald Publishing, 2004) 1.

<sup>132</sup> Alison Young, 'Aesthetic Vertigo: Disgust and the Illegitimate Touching of Art' in Alison Young, *Judging the Image: Art, Value, Law* (Routledge, 2004) 20.



problematic engagement with the aesthetics of art.<sup>133</sup> Katherine Biber and Mehera San Roque describe images that are ‘troubling in what they say about law’ and that ‘cause trouble for law’.<sup>134</sup> In the context of these different literatures, ‘image’ is conceived in different ways discussed below. For these scholars, image is commonly distinguished from the prosaic expression of law in words, written or spoken.

### 3.1.2 Defining image

The ‘images’ analysed in jurisprudential scholarship on law and aesthetics assume myriad forms that I identify and interrogate for my analysis of photographs of the natural environment used in international treaty processes. In the thesis, I assume vantages of different disciplinary orientations – international law, philosophy of art and philosophy of environmental aesthetics – to attribute different conceptions of image to the different roles of the photographs in the decision-making processes under treaties. For reasons related to my earlier discussion of representation,<sup>135</sup> I use for the thesis the typology of images espoused by art historian WJT Mitchell to interrogate the photographs in those treaty processes.

Mitchell explains that image can be understood as ‘optical’ projections, ‘mental’ memories, ‘graphic’ representations, ‘verbal’ metaphors and ‘perceptual’ associations.<sup>136</sup> Each, Mitchell explains, is characterised in terms of different intellectual disciplines. His conception of ‘graphic’ images pertaining to the disciplines of art and design is particularly important for my examination of photographs used in international treaty processes. Broadly construed, Mitchell’s graphic image would likely extend to a wide range of visual arts, including photography. I maintain, however, that Mitchell’s conception of graphic image would also extend to graphic images in law, including the photographs used in international legal processes that I identify and examine in this thesis, as well as the kinds of graphic images that have been examined under the mantle of visual jurisprudence.<sup>137</sup> Mitchell’s graphic image would include, for example, ancient legal emblems,<sup>138</sup> photographic and video evidence,<sup>139</sup> graphic images in judgments,<sup>140</sup> and comic book-style illustrations in legal contracts.<sup>141</sup> It would also include the visual art used by visual jurists to interrogate law and legal concepts.<sup>142</sup>

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<sup>133</sup> On *Whistler v Ruskin* (1878), Douzinas, ‘Legality’ (n123) 827-830.

<sup>134</sup> Katherine Biber and Mehera San Roque, ‘The Trouble with Pictures’ 10 *Law·Text·Culture* (2006) (Special Issue) 1, 2.

<sup>135</sup> See above part 2.4.1.

<sup>136</sup> WJT Mitchell, *Iconology: Image, Text, Ideology* (University of Chicago Press, 1986) 10. See also Costas Douzinas, ‘A Legal Phenomenology of Images’ in Ben-Dor (n118) 247 (‘Legal Phenomenology’); Maksymilian Del Mar, ‘Thinking in Images in Legal Theory’ in M Del Mar and C Michelson (eds), *The Anxiety of the Jurist* (Ashgate, 2013).

<sup>137</sup> Manderson, *Imaginal Law* (n83) 1, citing WJT Mitchell.

<sup>138</sup> Peter Goodrich, *Legal Emblems and the Art of Law* (Cambridge University Press, 2014) (‘Legal Emblems’). See also Piyel Haldar, ‘The Tongue and the Eye: Eloquence and Office in Renaissance Emblems’ in Peter Goodrich and Valérie Hayaert (eds), *Genealogies of legal vision* (Routledge, 2015) 152. Cf Michael Widener and Mark S Weiner, *Law’s Picture Books: The Yale Law Library Collection* (Talbot Publishing, 2017).

<sup>139</sup> Sherwin, *Arabesques* (n127); Biber and San Roque (n134).

<sup>140</sup> Goodrich, ‘Imago’ (n128).

<sup>141</sup> Adrian Keating and Camilla B Andersen ‘A Graphic Contract: Taking Visualisation in Contracting a Step Further’ (2016) 2 *Journal of Strategic Contracting and Negotiation* 10; cf Thomas Giddens *On Comics and Legal Aesthetics: Multimodality and the Haunted Mask of Knowing* (Routledge, 2018).

<sup>142</sup> Eg Desmond Manderson, *Danse Macabre: Temporalities of Law in the Visual Arts* (Cambridge University Press, 2019) (‘Danse Macabre’); Young (n132).



Mitchell's graphic image in terms of art and design is different from his 'optical' image, associated with the study of physics and aligned with light on material objects and spaces. It is the projection on the eye of an image created by light reflected off a physical surface. The 'optical' image is what is elsewhere described by aesthetic philosopher Jacques Rancière as a 'naked' image.<sup>143</sup> Mitchell's 'mental' image is associated with psychology, referring to memories and ideas. Mitchell's 'verbal' image refers to metaphorical or descriptive images associated with literature or literary theory – those images from law that are analysed by scholars such as Rush and Kenyon, and by Ed Morgan, among others.<sup>144</sup>

Mitchell's catch-all 'perceptual' image is the most abstract form in his image family. He says it captures the 'strange creatures that haunt the border between physical and psychological accounts of imagery.'<sup>145</sup> It might be characterised as a combination of each of his other forms of image; it is possibly that image conceptualised in linguistic theory as 'signs' – the confluence of a concept and an utterance.<sup>146</sup> It is perhaps perceptual images that Richard Sherwin describes as 'quickly activat[ing] patterns of seeing and feeling that we have internalized from a lifetime of watching.'<sup>147</sup> Art historian Simon Schama explores image in terms of landscape and memory, possibly like Mitchell's perceptual image, arguing that landscape is a cultural construct developed over time and in the context of a particular place – it is a socialised but personal sense of place.<sup>148</sup> Perceptual image might also be the kind of image contemplated by social scientist Sheila Jasanoff when she described an image of humanity in the popular imagination derived from a graphic image – the first photograph of Earth from space.<sup>149</sup>

WJT Mitchell's typology of image does not include a perspective from the discipline of law. While scholars of visual jurisprudence do not necessarily define 'image' in their examination of law and aesthetics, some have made distinctions that correlate with part of Mitchell's typology such that image for law's purposes could assume any and all of the disciplinary orientations Mitchell identifies. Costas Douzinas and Lynda Nead, for example, refer to 'painted words' and 'iconophilic text' in a manner likely contemplated in Mitchell's 'verbal' image.<sup>150</sup> Writing elsewhere, Douzinas describes three forms of image: the object of vision, mental representations and works of art.<sup>151</sup> His 'object of vision' might be understood for Mitchell's purposes as an optical image and his 'works of art' as included in Mitchell's graphic images. Douzinas' 'mental' representations possibly relate to Mitchell's mental images for psychology but they might also incorporate the 'perceptual' in Mitchell's family of images. Douzinas explains his distinction between images in the following terms:

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<sup>143</sup> Jacques Rancière, *The Future of Image* [tr Gregory Elliott] (Verso, 2007[2003]).

<sup>144</sup> Rush and Kenyon (n131); Ed Morgan, *The Aesthetics of International Law* (University of Toronto Press, 2007).

<sup>145</sup> Mitchell (n136) 10.

<sup>146</sup> See Ferdinand de Saussure, 'Nature of the Linguistic Sign' in Ferdinand de Saussure, *Course in General Linguistics* [tr Roy Harris] (Bloomsbury, 2013) 75

<sup>147</sup> Sherwin, *Arabesques* (n127) 2.

<sup>148</sup> Schama (n40).

<sup>149</sup> Sheila Jasanoff, 'Heaven and Earth: The Politics of Environmental Images', in S Jasanoff and M Martello (eds), *Earthly Politics: Local and Global in Environmental Governance* (MIT Press, 2004) 31; Irene J. Klaver 'Landscapes of the Environmental Imagination: Ranging from NASA and Cuyahoga Images to Kiefer and O'Keeffe Paintings' in Drenthen and Keulartz (n5) 135; Lawrence Buell, *The Environmental Imagination: Thoreau, Nature Writing, and the Formation of American Culture* (Belknap Press, 1995) (n86). Cf David Morgan, *Images at Work: The Material Culture of Enchantment* (Oxford University Press, 2018).

<sup>150</sup> Douzinas and Nead (n118) 8.

<sup>151</sup> Douzinas, 'Legal Phenomenology' (n136) 247.

Watching a fishing boat pass in the tranquil waters of a Greek island in August, imagining a fishing boat pass while cloistered in the austere environs of a central London office and seeing a painting of a fishing boat in a gallery are experientially different activities; all three are enabled however by the same specular operation, the support and continuity the image offers to consciousness. We are not able to ‘see’ or recognise the painting of the fishing boat without the memory and imagination of a fishing boat; nor would we be able to ‘see’ or recognise a fishing boat passing by without the imagistically supported words that refer to ‘fishing’, ‘boat’ or the ‘sea’.<sup>152</sup>

In a comprehensive review of the field of aesthetic jurisprudence occupied with image – what he calls ‘imaginal law’ – Desmond Manderson conceives of image in at least two ways: conceptual and physical.<sup>153</sup> His conceptual images are abstractions while his physical images – possibly Mitchell’s graphic images – are ‘artworks, photographs, representations, and the like’.<sup>154</sup> Elsewhere Manderson describes image as inclusive of ‘mental image’ but different from ‘imagination or the imaginary’.<sup>155</sup>

While Douzinas’ trio of images, and Manderson’s binary of the conceptual and physical image, correspond to elements of Mitchell’s typology of images, neither quite accounts for the distinctions I make in this thesis to explain the understandings of photographic image from the vantages of international law, art theory and the philosophy of environmental aesthetics. As I explain in detail in Chapters 5 to 7: international law’s treatment of photographs, as proxies for reality, correspond to Mitchell’s optical image; art theory could characterise the photographs in terms of Mitchell’s graphic images; while the philosophy of environmental aesthetics might be seen to adopt Mitchell’s perceptual image or no image at all. But as I use a specific kind of graphic image – visual art – to develop understandings of the environment’s aesthetic value projected from photographs, I will in the next part consider the ways in which art, particularly visual art, has been conceived for legal scholarship.

### 3.2 Image as visual art in law

Art has been characterised in myriad ways in the study of law and aesthetics or, more broadly, law and humanities. It is described by Costas Douzinas and Lynda Nead in terms of ‘law’s art’ and ‘art’s law’,<sup>156</sup> while Jani McCutcheon and Fiona McGaughey conceive of ‘law in art’ and the ‘art in law’.<sup>157</sup> Christine Haight Farley adds prepositional variety with her consideration of the ‘law of art’ and the ‘art of law’ before providing a detailed assessment of the variety of ways in which art encounters law under the moniker ‘art law’.<sup>158</sup> The interdisciplinary scholarship addresses different art forms. It ranges from the many scholars

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<sup>152</sup> Ibid.

<sup>153</sup> Manderson, *Imaginal Law* (n83) 3, 4.

<sup>154</sup> Ibid.

<sup>155</sup> Manderson, *Danse Macabre* (n142) 16-17.

<sup>156</sup> Douzinas and Nead (n118) 11.

<sup>157</sup> Jani McCutcheon and Fiona McGaughey, ‘Introduction’ in Jani McCutcheon and Fiona McGaughey (eds), *Research Handbook on Art and Law* (Edward Elgar, 2020) 1.

<sup>158</sup> Farley (n122). The law of art includes law’s regulation of the arts, see eg: Dougal Phillips, ‘The Dilemma of Artistic Works: How Can the Court Make Aesthetic Decisions?’ (2014) 32(1) *Copyright Reporter* 1-13; Jani McCutcheon and Natalie Skead, ‘The Art of Crime: The Application of Literary Proceeds of Crime Confiscation Legislation to Visual Art’ (2018) 22(3) *Media and Arts Law Review* 253. The art of law includes law’s methods or ‘theatre’, see eg: Haldar (n124); Pierre Schlag, ‘The Aesthetics of American Law’ (2002) 115 *Harvard Law Review* 1047. Cf Gary Bagnall, *Law as Art* (Dartmouth Publishing, 1996).

who engage literature and literary devices for law,<sup>159</sup> including Ed Morgan in connection with international law,<sup>160</sup> to the relatively few jurists who have for example examined law in connection with other arts such as music.<sup>161</sup> Relevant to my thesis is the legal scholarship that uses aesthetic theory and methods developed for visual art in a philosophical examination of law.<sup>162</sup>

In my examination of the photographs used in treaty processes that determine the environment's aesthetic value, I draw on concepts employed in the study of law and aesthetics. My examination of photographic images with reference to methods of art theory and to visual artworks leads me to rely on the insights of those scholars of law and aesthetics who have attended specifically to visual art as images in or for the law. Desmond Manderson organises the scholarship on law and image as inclusive of art, describing it in terms of visual representations of law, visual technologies in law and aesthetic critiques of law where 'image' includes visual art.<sup>163</sup> Manderson has used an aesthetic analysis of visual art to interrogate the temporal elements of common law.<sup>164</sup> He has considered the relevance of JMW Turner's *The Slave Ship* (1840) to a critical analysis of Australia's law and policy on asylum seekers.<sup>165</sup> Alison Young engages visual art to examine law and legal concepts, describing in the process the different acts of writing, making and being art.<sup>166</sup> Katherine Biber and Mehera San Roque also consider visual art in relation to law.<sup>167</sup> Legal scholars have also used visual art as a basis for their examination of international law. Hilary Charlesworth has, for example, lectured on 'The Art of International Law' at The Hague Academy of International Law.<sup>168</sup> Others have engaged specific artworks to interrogate concepts of international law though not necessarily from the perspective of image and aesthetic theory.<sup>169</sup>

The use of aesthetic method by scholars to engage visual art in understandings of law is instructive for my thesis. They demonstrate ways in which aesthetic method can be adapted to give significance to visual representations for law. Like them, I use in Chapters 5 to 7 concepts and methods developed in the aesthetic contemplation of visual art. The objects of my analyses are, however, not works of art in a formal sense. They are photographic images created or used

<sup>159</sup> See eg Sarat, Anderson and Frank (eds), (n117); see also David Kennedy, 'Critical Legal Theory' in Susan Tiefenbrun (ed), *Law and the Arts* (Greenwood Press, 1999) 124.

<sup>160</sup> Morgan (n144); Ed Morgan, 'New Evidence: The Aesthetics of International Law' (2005) 18(2) *Leiden Journal of International Law* 163. Cf Philippe Sands 'East-West Street: A Song of Good and Evil', performed at Hamer Hall, 21 February 2018.

<sup>161</sup> Eg Desmond Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (University of California Press, 2000); James EK Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (Oxford University Press, 2015); Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (Routledge, 2013).

<sup>162</sup> See eg Manderson, *Danse Macabre* (n142); Young (n132). See also Sophie Doherty, 'Susanna the Slut: Depictions of Rape Victims in Law and in Art' (Conference Paper, Art in Law in Art Conference, Art Gallery of Western Australia, 4-5 July 2017).

<sup>163</sup> Manderson, *Imaginal Law* (n83). See Silbey (n122).

<sup>164</sup> Manderson, *Danse Macabre* (n142) 16.

<sup>165</sup> Manderson, 'Bodies' (n127). See also Desmond Manderson, 'Not Drowning, Waving: Images, History, and the Representation of Asylum Seekers' in Marianne Dickie, Dorota Gozdecka and Sudrishti Reich (eds), *Unintended Consequences: The Impact of Migration Law and Policy* (ANU Press, 2016) 159.

<sup>166</sup> Young (n132) 1.

<sup>167</sup> Biber and San Roque (n134) 2.

<sup>168</sup> Summer Course, July 2019. See also ABC Radio National, Big Ideas programme, 'In Politics and Law, Does Art Matter?' 13 November 2019.

<sup>169</sup> See Sarah Joseph, 'Art and Human Rights Law' in McCutcheon and McGaughey (n157) 389; Isobel Roele, 'We Are Making a New World' in Shane Chalmers and Sundhya Pahuja (eds), *Handbook on International Law and the Humanities* (Routledge, forthcoming).

in decision-making processes of international law. My examination of photographic images nevertheless approaches them as I might works of art, employing aesthetic methods, including reference to visual artworks, to develop meanings of the environment's aesthetic value.

In the next part, I consider the extent to which aesthetic methods associated with visual art have been used in the specific context of international environmental law or in the related but more general fields of international law and domestic environmental law.

### 3.3 Arts in international environmental law

Scholars of international law and legal theorists of aesthetics have examined international law in light of aesthetic theory or with reference to visual art.<sup>170</sup> However, scholars writing on international environmental law and the arts have not necessarily situated their work within the scholarship on law and aesthetics. Scholars assuming Third World Approaches to International Law have incorporated aesthetic elements into their analysis of international environmental law. Legal scholars Stephen Humphreys and Yoriko Otomo, for example, analyse the cultural origins of international environmental law with reference to Romantic poetry in 19<sup>th</sup> century Britain.<sup>171</sup> They are critical of the influence of Romanticism on the development of international environmental law but they do not engage legal theory on aesthetics in their critique.<sup>172</sup> Usha Natarajan and Kishan Khoday also examine cultural histories of international environmental law relying in large part on an anthropological perspective as opposed to aesthetic sources.<sup>173</sup> International environmental law scholar, Michael Bowman, dismisses claims of Romantic influence in what he calls international 'wildlife' law but he does not invoke aesthetic theory in that task.<sup>174</sup>

Some legal scholars have used visual artworks to analyse environmental law in domestic spheres. A proponent of critical thinking in environmental law,<sup>175</sup> Andreas Philippopoulos-Mihalopoulos has written about the 'solar balloon',<sup>176</sup> a creation of Argentinian-born architect turned artist Tomás Saraceno who has collaborated with a multidisciplinary team to make air balloons, for transporting people, that are powered by the sun.<sup>177</sup> Philippopoulos-

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<sup>170</sup> Peter D Rush and Maria Elander, 'Working Through the Cinematography of International Criminal Justice: Procedures of Law and Images of Atrocity' (2018) 6(1) *London Review of International Law* 17. Cf Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press, 2019).

<sup>171</sup> Stephen Humphreys and Yoriko Otomo, 'Theorizing international environmental law' in Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 797.

<sup>172</sup> Ibid 805-810.

<sup>173</sup> Usha Natarajan and Kishan Khoday, 'Locating Nature: Making and Unmaking International Law' (2014) 27 *Leiden Journal of International Law* 573, 583-5, citing Vassos Argyrou, *The Logic of Environmentalism: Anthropology, Ecology and Postcoloniality* (Berghahn Books, 2005).

<sup>174</sup> Michael Bowman, 'Law, Legal Scholarship and the Conservation of Biological Diversity: 2020 Vision and Beyond' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Elgar Online, 2016) 3, 13. Cf Tim Stephens, 'What Is the Point of International Environmental Law Scholarship in the Anthropocene?' in Ole W Pedersen (ed), *Perspectives on Environmental Law Scholarship: Essays on Purpose, Shape and Direction* (Cambridge University Press, 2018) 121.

<sup>175</sup> Andreas Philippopoulos-Mihalopoulos, 'Critical Legal Thinking in Environmental Law' in Andreas Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Routledge, 2011) 18 ('*Law and Ecology*'); Andreas Philippopoulos-Mihalopoulos, 'The Sound of a Breaking String: Critical Environmental Law and Ontological Vulnerability' (2011) 2(1) *Journal of Human Rights and the Environment* 5.

<sup>176</sup> Andreas Philippopoulos-Mihalopoulos, 'Lighter-than-air: The Law of the Anthropocene' in Art catalogue for Tomas Saraceno's 'Monument to the Anthropocene' (2014).

<sup>177</sup> Tomás Saraceno <<https://studiotomassaraceno.org>>; <<http://aerocene.org>>. See also Tomás Saraceno in *May You Live in Interesting Times*, Biennale Arte 2019 (58th International Art Exhibition) Venice, Italy.

Mihalopoulos provides an account of Saraceno's solar balloon referencing the geological era of the Anthropocene, a concept he posits as a concept of 'law'. This treatment of Saraceno's creation applies critical legal theory to an art object – albeit engineered to function as a viable form of transport – aimed at addressing climate change.

Elsewhere, in a contribution to *Law and Ecology: New Environmental Foundations* edited by Philippopoulos-Mihalopoulos,<sup>178</sup> Mark Halsey examines the protection of natural heritage from a perspective of critical legal studies. He discusses famous artworks – icons of cultural heritage such as Jackson Pollock's *Blue Poles* and da Vinci's *Mona Lisa* – to draw analogies in his critical analysis of natural heritage.<sup>179</sup> Also engaging art in the analysis of environmental law, Afshin Akhtar-Khavari analyses the concept of environmental justice with reference to Edvard Munch's *The Scream*.<sup>180</sup> David Schorr has used art and art history to narrate the development of environmental law addressing atmospheric pollution.<sup>181</sup> Benjamin Richardson has examined the use of art and art practice as community participation in environmental protection.<sup>182</sup>

These legal scholars have examined concepts in environmental law, to varying extents and in different ways, through visual art. They have used aesthetic representations to interrogate or narrate environmental law. Few directly reference scholars of jurisprudence on law and aesthetics to explain or justify their methodology but they demonstrate how the arts can be employed to interrogate issues specific to environmental law.<sup>183</sup> Viewed together, their approaches to engaging visual art in the analysis of environmental law demonstrate a variety of ways in which the jurisprudence on law and aesthetics can intersect critical thinking on environmental law. Their approaches are instructive for an aesthetic analysis of international environmental law from a perspective of the arts. My examination of photographs of the environment in international treaty decision-making for this thesis extends the work of these legal scholars on aesthetic theories and methods for the arts to understand image in terms of aesthetics developed for the natural environment in the philosophy of environmental aesthetics that I examined in Chapter 2.

The 'aesthetic' value of the environment as a term expressed in international environmental law has received limited attention in the legal literature from the perspective of aesthetic philosophy – as it relates to the arts or to the environment.<sup>184</sup> The environment's aesthetic value as a legal or policy concept in a more general sense has instead been addressed largely from a doctrinal perspective in legal scholarship on domestic planning and land use laws,<sup>185</sup>

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<sup>178</sup> See Mark Halsey, 'Majesty and Monstrosity: Deleuze and the Defence of Nature' in Philippopoulos-Mihalopoulos, *Law and Ecology* (n175) 214.

<sup>179</sup> Ibid 216.

<sup>180</sup> Afshin Akhtar-Khavari, 'Fear and Ecological (in)Justice in Edvard Munch's The Scream of Nature' (2015) 2(6) *Naveiñ Reet: Nordic Journal of Law* 93.

<sup>181</sup> David B Schorr, 'Art and the History of Environmental Law' (2015) 2(2) *Critical Analysis of Law* 322.

<sup>182</sup> Cf Benjamin J Richardson, 'Climate Change Law: Encounters with Aesthetics and Art' (2018) 3-4 *Climate Law* 279; Benjamin J Richardson, Emily Barritt and Megan Bowman, 'Beauty: A Lingua Franca for Environmental Law?' (2019) 8(1) *Transnational Environmental Law* 59; Benjamin J Richardson, 'Aesthetics and Environmental Law: Valuing Tasmania's 'Ordinary' Nature' (2018) 27(1) *Griffith Law Review* 1.

<sup>183</sup> Halsey (n178).

<sup>184</sup> Cf Alexander Gillespie, *International Environmental Law, Policy and Ethics* (Oxford University Press, 2<sup>nd</sup> ed, 2014).

<sup>185</sup> Eg John J Costonis, 'Law and Aesthetics: A Critique and a Reformulation of the Dilemmas' (1982) 80 *Michigan Law Review* 335.

and, as explained in Chapter 2, from the perspective of legal philosophy concerned with environmental ethics.<sup>186</sup>

#### 4. CONCLUSION

The conceptions of aesthetics in law identified and examined in this Chapter are different from understandings of aesthetic value that I considered from legal perspectives in the previous Chapters 2 and 3. In Chapter 2, I explained how scholars such as Alexander Gillespie have contemplated aesthetic value as one of several environmental values that are the foundation of international environmental law. Gillespie and others have associated the environment's aesthetic value with natural beauty and subjective judgement within a broader context of environmental ethics. Noting that such scholars of international environmental law have not analysed the term 'aesthetic' with reference to international legal principles of treaty interpretation, I proceeded in Chapter 3 to develop a doctrinal account of aesthetic value for international environmental treaties that relies on the written sources of interpretation typically consulted for the interpretation of international law. My account pointed to both narrow conceptions of aesthetic value as synonymous with natural beauty or with cultural and ethical values of the environment. This contrasts with philosophers of environmental aesthetics such as Emily Brady who have characterised aesthetic value as distinct from, though related to, these values of the environment.<sup>187</sup>

These conceptions of 'aesthetic' value in the philosophy of international environmental law, and in my doctrinal account of treaty interpretation, are different from the understanding of aesthetics for the field of visual jurisprudence explained in this Chapter. Scholars of what Desmond Manderson has called 'imaginal law' have focussed on aesthetic conceptions developed for the arts.<sup>188</sup> They have not addressed questions of aesthetic value as it concerns the natural environment in the specific case of international environmental law. I will nevertheless draw from their use of aesthetic methods for the arts applied to law – in the work, for example, of Desmond Manderson and of Alison Young – to develop aesthetic understanding of the photographs used in treaty decision-making to determine aesthetic value.

Separately, these different conceptions of aesthetic value for law provide an incomplete account; together, however, they highlight the complexities that arise in the contemplation of the environment's aesthetic value for international environmental law. It is to these complexities that I now turn to consider with reference to photographs of the environment used in the decision-making processes that determine aesthetic value under international environmental treaties. I will examine in Chapter 5 the *World Heritage Convention* before looking to the *Whaling Convention* in Chapter 6 and the *Biodiversity Convention* in Chapter 7. I look to photographs in part because I consider that from a jurisprudential perspective, their role in international environmental decision-making demands examination and explanation. Aesthetics for the arts and visual jurisprudence is important to this analysis. But I also do this to better understand meanings of the environment's aesthetic value for international environmental law. In this task, I rely on the philosophy of environmental aesthetics and seek to address objections from those scholars to a consideration of the environment's aesthetic value with reference to the arts. The meaning of the environment's aesthetic value that I develop with aesthetic methods vary and they are not (cannot be) comprehensive of all the

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<sup>186</sup> Eg Gillespie (n184). See Chapter 2.

<sup>187</sup> Brady, *Aesthetics of Environment* (n3). See Chapter 2.

<sup>188</sup> Manderson, *Imaginal Law* (n83).

meanings that might arise from the images – a point to which I will return in my concluding Chapter 8.



## CHAPTER 5 VALUING AESTHETICS OF WORLD NATURAL HERITAGE

EXHIBIT: WANGECHI MUTU, *THE END OF CARRYING ALL* (2015)



Figure 5.1: Wangechi Mutu, *The End of Carrying All*, 2015, 3 screen animated video (colour, sound), 10 minutes, looped, courtesy of Gladstone Gallery, New York, Victoria Miro, London and Susanne Vielmetter, Los Angeles, © Wangechi Mutu

Most people were standing to watch Wangechi Mutu's animated video installation *The End of Carrying All* (2015) (fig 5.1).<sup>1</sup> I chose to sit on the floor, arms around my shins and chin resting on my knees, as I stared at the three large screens, mesmerised by the woman climbing a hillside.

Wrapped in floral print fabric, a Kenyan khangas perhaps, she climbed with purpose but her pace was ponderous: she had somewhere she needed to be but she had things on her mind too. Literally. On her head she carried a basket of what appeared, at least at first, to be fruit and vegetables, a bag of grain. She swatted insects about her legs and adjusted her dress as distant mountain peaks came into view. Birds occasionally passed in flocks and she occasionally passed a tree. A distinctively fan-shaped tree of East Africa, a tangle of branches with only dabbles of leaves, trees still sparse in Kenya despite all the efforts of planting urged by Wangari Maathai. The wind howled, birds squawked, locusts swarmed. And all around her an amber glow emanated from a sky soon to sleep or to wake.

Up and up she went, sashaying as if to a song. And, as she climbed, the cornucopia atop her head grew. Soon her basket contained a sneaker, a bicycle wheel, a satellite dish and an oil rig. A prairie barn expanded into an electric lit skyscraper. Her back bent as she laboured under the increasing weight on her head. With the wind came ominous tolls of church bells and the siren sounds of an urban streetscape. A sleeping sky it was – the orange faded to black. As

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<sup>1</sup> Cf Elspeth Van Veen, 'Layered Wanderings: Epistemic Justice through the Art of Wangechi Mutu and Njideka Akunyili Crosby' (2019) 21(3) *International Feminist Journal of Politics* 488.

she neared the top of the hill – a precipice – her load metamorphosed into a sluggish formless phosphorescing beast that consumed her, pitching over the edge into the abyss as the hillside erupted and a nuclear light engulfed the scene leaving the screens white.

It was not as I wanted it to end for her but she seemed not to know it was coming.

## 1. INTRODUCTION

Wangechi Mutu's *The End of Carrying All* (fig 5.1) addresses issues of ever-increasing consumption indifferent to the natural environment. Yet such concerns for sustainability, and differentiated responsibilities for environmental protection as between the rich North and the poor South, would come late to international environmental law. In this Chapter, I consider how images of the environment might inform the protection of natural heritage under the 1972 *World Heritage Convention*.<sup>2</sup> That treaty was adopted in an era of environmental protection dominated by a largely Western preoccupation with preserving natural beauty absent humans, before a need for limits on consumption implied in the concept of 'sustainable development' would emerge in international environmental law.<sup>3</sup>

My analysis and findings in this Chapter address my specific question in the thesis on how images of the natural environment could be used to give significance to the environment's aesthetic value in international environmental law. I identify images of the natural environment, including photographs, that are submitted by states parties in their nominations of natural properties for World Heritage status. I then examine those images for meanings relevant to World Heritage determinations of the 'outstanding universal value' of natural heritage from an 'aesthetic' point of view.<sup>4</sup> In this task, I demonstrate ways in which environmental images can be used to articulate understandings of the environment's aesthetic value, using aesthetic methods developed for visual art.<sup>5</sup> I incorporate considerations in the philosophy of environmental aesthetics, where the environment's aesthetic value is characterised by philosophers such as Emily Brady, in terms of multisensorial experience shaped by imagination, emotion and knowledge.<sup>6</sup>

My attention to images, and my methods for analysing them, are also relevant to my broader question in the thesis around images in international law.<sup>7</sup> Environmental images are used in the process of inscribing natural heritage in the World Heritage List. I argue that they should be recognised by the World Heritage Committee as relevant to determinations of outstanding universal value from an aesthetic 'point of view'.<sup>8</sup> I maintain that even if they are properly characterised as subjective, aesthetic methods should be employed formally in the World Heritage inscription process as part of a thorough and responsible evaluation, and reasoned

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<sup>2</sup> *Convention for the Protection of the World Cultural and Natural Heritage*, adopted 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*').

<sup>3</sup> Karin Mickelson, 'South, North, International Environmental Law, and International Environmental Lawyers' (2000) 11 (1) *Yearbook of International Environmental Law* 52. See also Alexander Gillespie, *The Long Road to Sustainability: The Past, Present, and Future of International Environmental Law and Policy* (Oxford University Press, 2018).

<sup>4</sup> *World Heritage Convention* (n2) art 2.

<sup>5</sup> See Chapter 4, parts 2.3 and 2.4.1.

<sup>6</sup> Emily Brady, *Aesthetics of the Natural Environment* (Edinburgh University Press, 2003) ('*Aesthetics of Environment*') 237-8. See Chapter 2, part 2.2.

<sup>7</sup> See Chapter 1, 2. See also Chapter 4, part 3.1.

<sup>8</sup> *World Heritage Convention* (n2) art 2.

determination, of the natural environment's aesthetic value. I suggest that photographic images have a particular role in comprehending aesthetic value in the decision-making processes of an international body such as the World Heritage Committee.

This Chapter describes in part 2 the process and criteria used by the World Heritage Committee to inscribe natural heritage in the World Heritage List. I revisit matters that I explained for the purposes of my treaty interpretation in Chapter 3. Part 3 identifies the verbal and photographic images of the environment used in the inscription process of five World Heritage properties recognised for their natural beauty and aesthetic importance in Australia, Chad, China, Kenya and Mexico. In part 4, I analyse the World Heritage images with reference to aesthetic methods for the arts and the philosophy of environmental aesthetics. Part 5 considers the relevance of aesthetic method to future inscriptions of natural heritage in the World Heritage List on an aesthetic basis. Although I acknowledge that World Heritage decisions are highly politicised,<sup>9</sup> my focus here is law and legal process – recognising all the while the intimacy between law and politics, public international law being a much-lauded exemplar of that union.<sup>10</sup>

## 2. WORLD HERITAGE DETERMINATIONS OF AESTHETIC VALUE

As explained in previous chapters of this thesis, the *World Heritage Convention* protects natural heritage for its 'outstanding universal value' from, among others, an 'aesthetic ... point of view'.<sup>11</sup> The other points of view from which the outstanding universal value of natural heritage is judged under the treaty are science, conservation and natural beauty.<sup>12</sup> The consideration of the natural environment's aesthetic value is separate from any assessment of the aesthetic value of 'cultural heritage'.<sup>13</sup> In this part, I recall the process for inscribing natural properties on the World Heritage List, elaborating on the criteria for consideration of the environment's aesthetic and other values by the World Heritage Committee.<sup>14</sup> This provides the background to my identification of images used in the inscription process in the subsequent part 3 of this Chapter.

### 2.1 Process for World Heritage inscription

The inscription of properties on the World Heritage List is a threshold requirement in the implementation of the *World Heritage Convention*. Once listed, benefits such as assistance, including financial assistance, can be granted for the conservation and management of World Heritage properties under the treaty.<sup>15</sup> Sanctions – such as moving a property to the World

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<sup>9</sup> See eg S Javed Maswood, 'Kakadu and the Politics of World Heritage Listing' (2000) 54(3) *Australian Journal of International Affairs* 357; Christina Cameron and Mechtild Rössler, *Many Voices, One Vision: The Early Years of the World Heritage Convention* (Ashgate, 2013) 236-238. In connection with cultural heritage, see Sophia Labadi, *UNESCO, Cultural Heritage, and Outstanding Universal Value Value-Based Analyses of the World Heritage and Intangible Cultural Heritage Conventions* (AltaMira Press, 2013).

<sup>10</sup> See eg Martti Koskenniemi, 'What is International Law For?' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 5<sup>th</sup> ed, 2018) 28.

<sup>11</sup> *World Heritage Convention* (n2) art 2.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid* art 1 defines three kinds of 'cultural heritage', including 'sites' that are 'works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.' See below part 5.1. See also Chapter 3, part 3.1.2.

<sup>14</sup> See Chapter 3, part 3.2.1.

<sup>15</sup> *World Heritage Convention* (n2) art 13.

Heritage in Danger List and, ultimately, removal from the World Heritage List – can also arise where a state fails to protect a listed property.<sup>16</sup>

The *World Heritage Convention* establishes the World Heritage Committee, an international body of 21 experts elected by the states parties.<sup>17</sup> The World Heritage Committee inscribes properties of outstanding universal value in the World Heritage List and oversees the administration of benefits and sanctions.<sup>18</sup> Decisions of the World Heritage Committee to inscribe properties may require determinations of ‘aesthetic’ value.<sup>19</sup> Negative determinations of aesthetic value might arise in cases where properties are refused inscription, moved to the World Heritage in Danger List, or removed from the World Heritage List.<sup>20</sup> For the purposes of this Chapter, however, I will limit my inquiry to the positive decisions to inscribe properties on the World Heritage List on an aesthetic basis.

The *Operational Guidelines for the Implementation of the World Heritage Convention* (‘*Operational Guidelines*’) is the principal document prescribing procedures for attaining and maintaining the World Heritage imprimatur.<sup>21</sup> It describes the process of inscription as commencing with tentative listing followed by nomination of properties by states parties. Evaluations undertaken by the International Union for the Conservation of Nature (IUCN) inform the World Heritage Committee’s assessment of the outstanding universal value of natural heritage.<sup>22</sup>

## 2.2 Criteria for World Heritage inscription

The concept of ‘outstanding universal value’ is described in the *Operational Guidelines* as ‘significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity’.<sup>23</sup> A finding of ‘outstanding universal value’ for any given property is determined by the World Heritage Committee on the basis of ten criteria for cultural and natural heritage contained in the *Operational Guidelines*. A property can be inscribed on the basis of one or more criteria,<sup>24</sup> and it can be inscribed in the World Heritage List as either cultural or natural heritage, or as a mix of both.<sup>25</sup> The *Operational Guidelines* require states parties nominating properties for World Heritage status to justify the application of the criteria to the nominated property both in its own right and relative to other properties inscribed in the World Heritage List on the basis of the same criteria.<sup>26</sup>

Four of the World Heritage Committee’s criteria for outstanding universal value relate to natural heritage. Three of those criteria appear to relate to the ‘scientific’ and ‘conservation’

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<sup>16</sup> Ibid art 11(4).

<sup>17</sup> *World Heritage Convention* (n2) art 8(1)).

<sup>18</sup> Ibid art 11(2), art 13(6).

<sup>19</sup> See below, part 2.2.

<sup>20</sup> See eg World Heritage Committee, *Great Barrier Reef (Australia)*, Agenda Item 7B. State of Conservation of World Heritage Properties Inscribed on the World Heritage List, Decision 38 COM 7B.63, 38<sup>th</sup> sess, UN Doc WHC-14/38.COM/16 (7 July 2014); Australia, *State Party Report on the State of Conservation of the Great Barrier Reef World Heritage Area* (2019) discussing impacts on ‘natural beauty’.

<sup>21</sup> World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc WHC.19/01 (10 July 2019) (‘*Operational Guidelines*’) [49].

<sup>22</sup> Ibid [37].

<sup>23</sup> Ibid [49].

<sup>24</sup> Ibid [77].

<sup>25</sup> Ibid [46].

<sup>26</sup> Ibid [132.3].

points of view in the definition of natural heritage in the *World Heritage Convention*.<sup>27</sup> The remaining criterion – known as criterion (vii) – appears to correspond to the ‘aesthetic’ and ‘natural beauty’ points of view in that definition. It describes natural properties as having outstanding universal value if they ‘contain superlative natural phenomena’ or are ‘areas of exceptional natural beauty and aesthetic importance’ (criterion (vii)).<sup>28</sup>

The wording and numbering of what is now criterion (vii) have changed since its adoption by the World Heritage Committee in 1977.<sup>29</sup> Until the equivalent to criterion (vii) was amended in 1994 to include ‘aesthetic importance’,<sup>30</sup> its only reference to a point of view in the definition of natural heritage in the *World Heritage Convention* had been to ‘natural beauty’.<sup>31</sup> More than half of the natural properties on the World Heritage List have been inscribed on the basis of criterion (vii) or its equivalent since 1977.<sup>32</sup> Only nine properties have been listed on the sole basis of criterion (vii),<sup>33</sup> three of which were inscribed after 1994 when the criterion was amended to refer to ‘aesthetic importance’.<sup>34</sup>

### 3. WORLD HERITAGE IMAGES OF AESTHETIC VALUE

In this part, I identify images of the environment’s aesthetic value currently used in the documentation supporting the inscription of natural properties in the World Heritage List. In Chapter 4, I explained different forms of ‘image’.<sup>35</sup> The images used in the World Heritage inscription process take the form of ‘verbal’ images in the descriptions of World Heritage properties. They also take the form of ‘graphic’ images, specifically photographs, submitted to the World Heritage Committee by the states parties in their files nominating natural properties for World Heritage status. Together, these are what I call ‘World Heritage images’. I argue that the World Heritage images have juridical significance, or significance for law. However, the formal rules and practices of the World Heritage Committee do not explain whether, and if so how, images are relevant to determinations of natural beauty and aesthetic importance for the purposes of natural heritage criterion (vii). I maintain that a preference for

<sup>27</sup> Ibid [77] (viii) [‘major stages of earth’s history’]; (ix) [ecological and biological evolutionary processes]; and (x) [natural habitats for the conservation of biological diversity]. See discussion below (n96) and accompanying text.

<sup>28</sup> *Operational Guidelines* (n21) [77].

<sup>29</sup> World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc CC-77/CONF.001/8 (30 June 1977).

<sup>30</sup> World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc WHC/2/Revised (February 1994), [44(a)(iii)].

<sup>31</sup> See eg World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc WHC/2/Revised (27 March 1992) [36(a)(iii)].

<sup>32</sup> As at December 2019, 146 properties out of 252 natural and mixed heritage sites had been identified under the Convention to be of outstanding universal value for the purposes of criterion (vii): World Heritage List <<http://whc.unesco.org/en/list/>>.

<sup>33</sup> Eight properties are inscribed on the World Heritage List, *ibid*. A ninth property, Belarus Belovezhskaya Pushcha State National Park, had also been inscribed under the natural heritage criterion (iii) (equivalent to criterion (vii)): World Heritage Committee, *Report*, 16th sess, UN Doc WHC-92/CONF.002/12 (14 December 1992) 37. It was however subsequently incorporated into another property inscribed under other criteria: World Heritage Committee, *Białowieża Forest (Belarus/Poland)*, Decision 38 COM 8B.12, 38<sup>th</sup> sess, UN Doc WHC-14/38.COM/16 (7 July 2014).

<sup>34</sup> These were the 2008 inscriptions of the Monarch Butterfly Biosphere Reserve in Mexico and the Mount Sanqingshan National Park in China as well as the 2012 inscription of the Lakes of Ounianga in Chad. See below in this part.

<sup>35</sup> WJT Mitchell describes ‘image’ in terms of graphic, optical, perceptual, mental and verbal images, WJT Mitchell, *Iconology: Image, Text, Ideology* (University of Chicago Press, 1986) 10. See Chapter 4, part 3.1.2.



objective methods has compromised the use of images in the evaluation of the environment's aesthetic value in the World Heritage inscription process.

I have limited my study of World Heritage images to the documentation of five properties inscribed on the World Heritage List. Three are natural heritage properties that were inscribed in the World Heritage List on the sole basis of criterion (vii), after 1994 when 'aesthetic importance' had been included: Monarch Butterfly Biosphere Reserve in Mexico;<sup>36</sup> Mount Sanqingshan National Park in China;<sup>37</sup> and Lakes of Ounianga in Chad.<sup>38</sup> The other two properties examined are examples of properties inscribed on the basis of criterion (vii) in combination with other criteria.<sup>39</sup> The Kenya Lakes System of the Great Rift Valley was inscribed as a natural heritage property in 2011 on the basis of three natural heritage criteria, including criterion (vii).<sup>40</sup> The Tasmanian Wilderness in Australia is a mixed cultural and natural heritage property first inscribed in 1982 and justified with reference to seven criteria, including all four of the natural heritage criteria.<sup>41</sup>

### 3.1 Verbal images in descriptions of outstanding universal value

Nominations of properties for inscription in the World Heritage List must include a proposed Statement of Outstanding Universal Value ('OUV Statement').<sup>42</sup> Proposed OUV Statements must 'make clear why the property is considered to merit inscription on the World Heritage List'.<sup>43</sup> The World Heritage Committee adopts OUV Statements as part of its decision to inscribe properties in the World Heritage List.<sup>44</sup> OUV Statements are being adopted on a retrospective basis for properties, like the Tasmanian Wilderness, which were inscribed prior to 2007 when the practice of OUV Statements commenced.<sup>45</sup>

The descriptions of Chad's Lakes of Ounianga and Australia's Tasmanian Wilderness in World Heritage documentation contain particularly vivid verbal images. Inscribed in the World Heritage List in 2012, the OUV Statement for the Lakes of Ounianga states:

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<sup>36</sup> World Heritage Committee, *Monarch Butterfly Biosphere Reserve (Mexico)*, Decision 32 COM 8B.17, 32<sup>nd</sup> sess (2008), UN Doc WHC-08/32.COM/24Rev (31 March 2009) ('MBBR Inscription').

<sup>37</sup> World Heritage Committee, *Mount Sanqingshan National Park (China)*, Decision 32 COM 8B.6, 32<sup>nd</sup> sess (2008) UN Doc WHC-08/32.COM/24Rev (31 March 2009) ('Mount Sanqingshan Inscription').

<sup>38</sup> World Heritage Committee, *Lakes of Ounianga (Chad)*, Decision 36 COM 8B.7, 36<sup>th</sup> sess (2012), UN Doc WHC-12/36.COM/19 (undated) ('Lakes of Ounianga Inscription').

<sup>39</sup> World Heritage List (n32).

<sup>40</sup> World Heritage Committee, *Kenya Lake System in the Great Rift Valley (Kenya)*, Decision 35 COM 8B.6, 35<sup>th</sup> sess (2011) UN Doc WHC-11/35.COM/20 (7 July 2011) ('Great Rift Valley Inscription').

<sup>41</sup> The Tasmanian Wilderness was inscribed under criteria (iii)(iv)(vi)(vii)(viii)(ix)(x): World Heritage Committee, *Western Tasmania Wilderness National Parks (Australia)*, Decision CONF 015 VIII.20, 6<sup>th</sup> sess (1982), UN Doc CLT-82/CH/CONF.015/8 (17 January 1983) ('Tasmanian Wilderness Inscription'). Note its name was subsequently changed: World Heritage Committee, *Tasmanian Wilderness (Australia)* Decision CONF 004 XV.A, 13<sup>th</sup> sess (1989) UN Doc SC-89/CONF.004/12 (22 December 1989). Inscription under the equivalent criterion (vii) preceded the amendment to refer to 'aesthetic importance'.

<sup>42</sup> *Operational Guidelines* (n21) [132].

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid* [154].

<sup>45</sup> The practice of adopting OUV Statements commenced in 2007 and was introduced in 2005 by World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc WHC.05/2 (2 February 2005). On the process for retrospective OUV Statements for properties inscribed before 2007, see World Heritage Committee, *Reflection on the Preparation of the Next Cycle of Periodic Reporting*, Decision 31 COM 11D.1, 31<sup>st</sup> sess (2007), UN Doc WHC-07/31.COM/24 (31 July 2007).

The property represents an exceptional example of permanent lakes in a desert setting, a remarkable natural phenomenon which results from an aquifer and associated complex hydrological system **which is still to be fully understood**. The **aesthetic beauty** of the site results from a **landscape mosaic** which includes **the varied coloured lakes with their blue, green and /or reddish waters**, in reflection of their chemical composition, surrounded by palms, dunes and **spectacular sandstone** landforms, all of it in the heart of a desert that stretches over thousands of kilometres. In addition, about one third of the surface of the Ounianga Serir Lakes is covered with **floating reed carpets whose intense green colour contrasts with the blue open waters**. Rock exposures which dominate the site offer a **breathtaking view** on all the lakes, of which **the colours contrast with the brown sand dunes separated by bare rock structures**. The **shape and distribution of the lakes**, combined with the effect of **the wind moving the floating vegetation** in the lakes, gives the impression of “**waves of water flowing in the desert**”.<sup>46</sup>[emphasis added]

The lyrical description of the Lakes of Ounianga is reminiscent of the description of the Tasmanian Wilderness provided by the nominating state, Australia. First inscribed in the World Heritage List in 1982, and subsequently amended, the Tasmanian Wilderness does not yet have a retrospective OUV Statement.<sup>47</sup> However, as explained below, the nomination and amending applications have included descriptions relevant to equivalent criterion (vii), and draft OUV Statements prepared by Australia contain references to the site’s aesthetic qualities.

In its 1982 nomination of the Tasmanian Wilderness, for example, Australia referred to ‘natural beauty’, ‘pristine wilderness’ and ‘aesthetically stimulating landforms’. It claimed, however, that ‘[i]n a region so diverse, wild, distinctive and spectacular it would be an arbitrary exercise to list particular landscapes as outstanding’.<sup>48</sup> In a later application to extend the site in 1989, Australia was more specific about the property’s ‘landscape’ qualities. It referred for example to ‘[c]old, deep lakes ... perched among the ranges like secret jewels’, ‘the magnificence of the rugged wilderness’, ‘wonderful views of the jagged skyline’, ‘soft, moist plains, contrasted with the heavy bulk of the ranges’, and a ‘diverse landscape’ of ‘classical grandeur’.<sup>49</sup> It also stated that ‘[a]lthough extinct, sightings of the thylacine ... are still reported from the area.’<sup>50</sup>

A draft retrospective OUV Statement for the Tasmanian Wilderness from 2010 is consistent with the language in Australia’s original applications.<sup>51</sup> In relation to criterion (vii), it provides in part:

The glaciated mountains of the property are aesthetically distinct and outstanding, with **red and gold to dark green tones** in their **blanket** of vegetation, the **dark tones** of

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<sup>46</sup> World Heritage Committee, Statement of Outstanding Universal Value in *Lakes of Ounianga Inscription* (n38) (‘OUV Statement for the Lakes of Ounianga’)

<sup>47</sup> See World Heritage Committee, *Tasmanian Wilderness (Australia)*, Decision 42 COM 7B.61, 4<sup>th</sup> sess (2018) UN Doc WHC/18/42.COM/18 (4 July 2018).

<sup>48</sup> Australia, *Western Tasmania Wilderness National Parks*, Nomination file to World Heritage Committee (11 November 1981) (‘Tasmanian Wilderness Nomination’) 18-19.

<sup>49</sup> Australia, *Tasmanian Wilderness (Australia)*, Request to World Heritage Committee (15 September 1989) (‘Tasmanian Wilderness Request’).

<sup>50</sup> Ibid.

<sup>51</sup> Australia, ‘Draft Retrospective Statement of Outstanding Universal Value’ in *State Party Report on the State of Conservation of the Tasmanian Wilderness World Heritage Area (Australia)* (2010) appendix 3 (‘2010 Draft OUV Statement for the Tasmanian Wilderness’).



their glacial lakes, their **silence** in calm weather and their **clamour** during storms. [...] Lowland areas with their **sweeping green-gold** buttongrass coat, **stark white** metamorphic rocks, **dark waters**, **patches of emerald** rainforest, terraces and flats and typically **dark skies** also present a landscape of outstanding **contrasts** and aesthetic distinction. [...] **Wild rivers carve** through rainforest or moorland uplands and gorges, **plunging** over waterfalls into **foaming eddies** before **snaking darkly under the lime green drapes of ancient** Huon pines and **moss-covered giant** tree ferns to the **lonely waters** of the area's south western shores and towards the lowlands to the north and east.<sup>52</sup> [emphasis added]

A further draft of the retrospective OUV statement in 2015 is less expressive of aesthetic qualities.<sup>53</sup> It nevertheless refers to such things as 'rugged mountain ranges scattered with picturesque tarns', 'wild rivers churning' and 'serene Huon pine reflections'.<sup>54</sup>

The OUV Statement for the Mount Sanqingshan National Park in China references scientific facts, such as 'meteorological effects' and 'granite features'.<sup>55</sup> These are, however, expressly linked to verbal images of scenic quality and natural beauty. The site is described in the OUV Statement as 'landscape of exceptional scenic quality', with 'near and distant vistas', 'fantastically shaped pillars and peaks' and a 'serene atmosphere'. The 'natural beauty' of Mount Sanqingshan is said to derive 'from the juxtaposition of its granite features with the mountain's vegetation enhanced by meteorological conditions which create an ever-changing and arresting landscape.'<sup>56</sup>

The verbal images apparent in the descriptions of these World Heritage properties in Chad, Australia and China, can be distinguished from the scientific and quantitative descriptions for the two other properties considered for this Chapter. The paragraph dedicated to criterion (vii) in the OUV Statement for the Monarch Butterfly Biosphere Reserve is focussed on quantitative superlatives and scientific facts, such as the numbers and percentages of butterflies migrating to the property each year.<sup>57</sup> I quoted the relevant paragraph in Chapter 1 of the thesis.<sup>58</sup> Similarly, the justification for the application of criterion (vii) to the Great Rift Valley also focusses on scientific information, highlighting geological and biological processes. It refers, for example, to 'massed congregations of birds on the shores of the lakes including up to 4 million Lesser Flamingos which move between the three lakes' and 'the steep escarpment of the Rift Valley and associated volcanic features'.<sup>59</sup>

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<sup>52</sup> Ibid.

<sup>53</sup> Australia, 'Draft Retrospective Statement of Outstanding Universal Value' in International Council on Monuments and Sites and International Union for Conservation of Nature, *Reactive Monitoring Mission to the Tasmanian Wilderness, Australia: Mission Report* (23 - 29 November 2015) annex 8.

<sup>54</sup> Ibid. Note a revised draft retrospective Statement of Outstanding Universal Value provided to the World Heritage Centre by Australia on 2 October 2019 does not appear to have been published as at 1 December 2019: Australia, *State Party Report on the State of Conservation of the Tasmanian Wilderness World Heritage Area (Australia)* (1 December 2019) 14.

<sup>55</sup> World Heritage Committee, Statement of Outstanding Universal Value in *Mount Sanqingshan Inscription* (n37) ('OUV Statement for Mount Sanqingshan').

<sup>56</sup> Ibid.

<sup>57</sup> World Heritage Committee, Statement of Outstanding Universal Value in *MBBR Inscription* (n36) ('OUV Statement for MBBR').

<sup>58</sup> Chapter 1, part 1.

<sup>59</sup> World Heritage Committee, Statement of Outstanding Universal Value in *Great Rift Valley Inscription* (n40) ('OUV Statement for Great Rift Valley').

The emphasis on quantitative and scientific elements for the properties in Mexico and Kenya produces prosaic descriptions that are less expressive of verbal images than those for the other properties. I return to address this distinction in part 3.3.2. I note that there is nevertheless some reference to aesthetic concepts in the documentation for those two properties. The introductory paragraph of the OUV Statement for the Monarch Butterfly Biosphere Reserve, for example, refers to the beating wings of the butterflies sounding ‘like light rain’.<sup>60</sup> The concentration of butterflies is described as ‘dramatic’.<sup>61</sup> The OUV Statement for the Great Rift Valley refers to ‘the landscape backdrop’ and the ‘outstanding wildlife spectacle’.<sup>62</sup>

As explained next, the verbal images in the OUV Statements for the five properties appear to correspond, to greater and lesser extents, with images of aesthetic value depicted in photographs that were submitted by the states parties in their nomination of the properties for inscription in the World Heritage List.

### 3.2 Photographic images in nomination files

The nomination files for the five World Heritage properties examined in this Chapter contained a variety of graphic images, including the photographs of the sites reproduced below.

#### 3.2.1 *Monarch Butterfly Biosphere Reserve*

In my introductory Chapter 1, I analysed a photograph that Mexico included in its nomination of the Monarch Butterfly Biosphere Reserve for World Heritage status (fig 1.1).<sup>63</sup> It was one of 23 photographs included in the nomination file. Several were of butterflies, particularly butterflies en masse (eg fig 5.2), but some also showed the landscape (eg fig 5.3).

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<sup>60</sup> OUV Statement for MBBR (n57).

<sup>61</sup> Ibid.

<sup>62</sup> OUV Statement for Great Rift Valley (n59).

<sup>63</sup> Mexico, *Monarch Butterfly Biosphere Reserve*, Nomination file to World Heritage Committee (January 2007) (‘MBBR Nomination’).

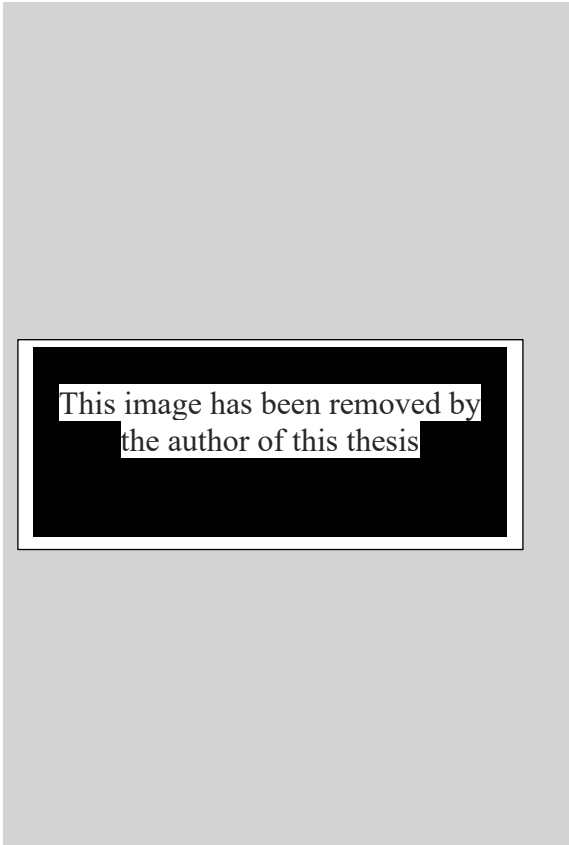


Figure 5.2: 'Picture 2. Monarch Clusters in an Oyamel Tree: Monarch butterflies display their full activity in the spring' in MBBR Nomination (n63) 4. Photo: Carlos Gottfried, March 1999

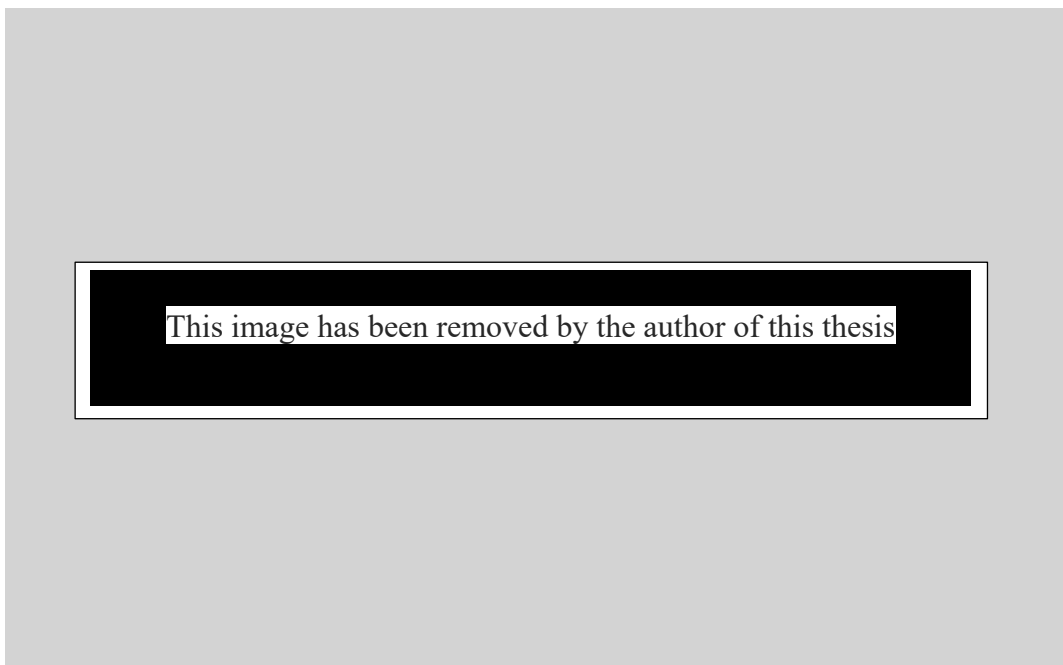


Figure 5.3: 'Picture 14. Transverse Neovolcanic Axis: Helicopter view with the Nevado de Toluca in the foreground, Popocatepetl and Iztaccíhuatl in the center, and between them, in the background, the Pico de Orizaba' in MBBR Nomination (n63) 34. Photo: Carlos Gottfried, January 1995

### 3.2.2 Mount Sanqingshan

China's World Heritage nomination file for Mount Sanqingshan contained 68 photographs – in addition to 35mm slides, a DVD, and a photo album.<sup>64</sup> Many of the still photographs depict the geological formations and flora and fauna described in writing in the nomination file. Some depict seasonal changes or meteorological effects such as 'Nanqing peak forest' (fig 5.4). Most of the photographs have literal titles naming the place or describing the features depicted while others suggest aesthetic qualities such as 'Thousands peaks showing lovely scenery',<sup>65</sup> 'Colourful road amid cloud',<sup>66</sup> and 'Awfully stirring billows' (fig 5.5).<sup>67</sup>

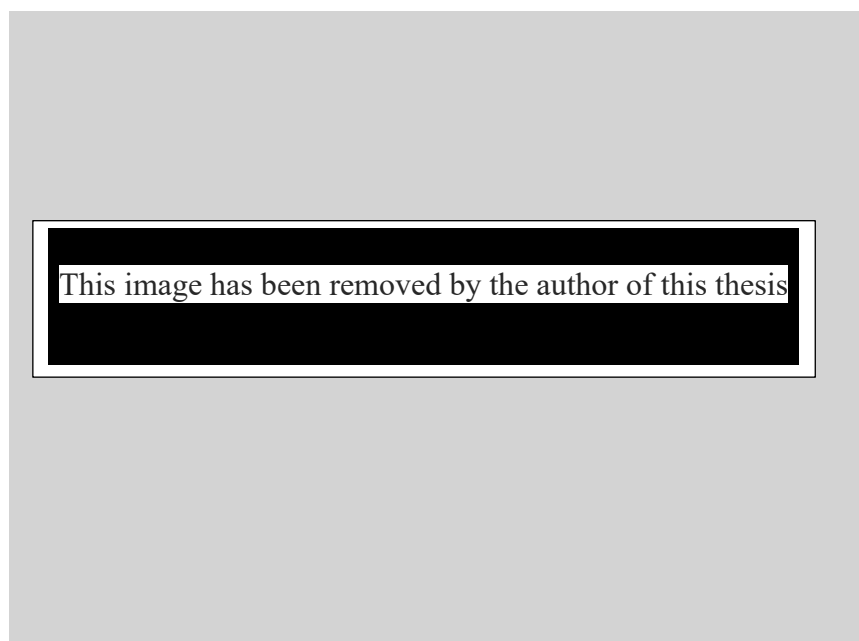


Figure 5.4: 'Photo 2.48 Nanqing peak forest' in Mount Sanqingshan Nomination (n64) 60

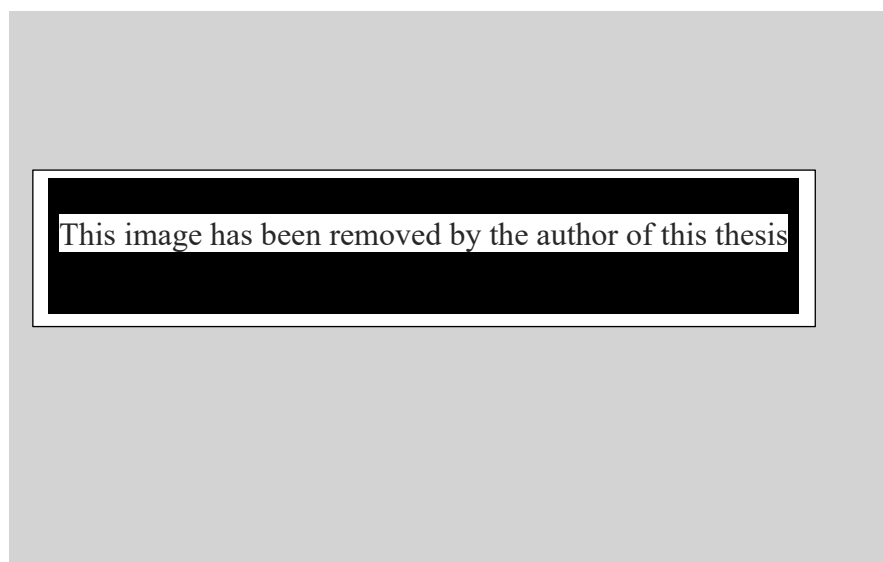


Figure 5.5: 'Photo 2.59 Awfully stirring billows' in Mount Sanqingshan Nomination (n64) 71

<sup>64</sup> China, *Mount Sanqingshan National Park*, Nomination file to the World Heritage Committee (undated, assessed 2008) ('Mount Sanqingshan Nomination').

<sup>65</sup> 'Photo 2.52 Thousands peaks showing lovely scenery', *ibid* 66.

<sup>66</sup> 'Photo 2.58 Colourful road amid cloud', *ibid* 71.

<sup>67</sup> Other photographs have titles suggesting spiritual experiences such as 'Photo 2.56 Sanqing divine light', *ibid* 70.

### 3.2.3 Lakes of Ounianga

Chad's nomination file for the Lakes of Ounianga contained 61 photographs of the area.<sup>68</sup> Most have detailed captions describing what is depicted (eg fig 5.6). The captions for the photographs accompanying the description of natural beauty and aesthetic values include language such as 'striking beauty' and 'impressive view'.<sup>69</sup>

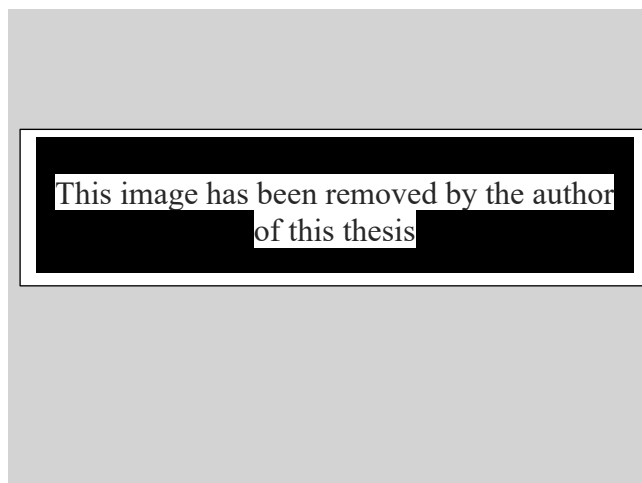


Figure 5.6: 'Photo 7: Une dune se trouvant à droite et qui se jette dans le lac Yoan' [A dune featured on the right spills into the Yoan Lake, tr author], in Lakes of Ounianga Nomination (n68) 10. Photo: © Sven Oehm. Source: World Heritage Centre

### 3.2.4 Kenya Lakes System

Photographs, several of bird flocks (eg fig 5.7), were included in Kenya's nomination file for the Great Rift Valley.<sup>70</sup>

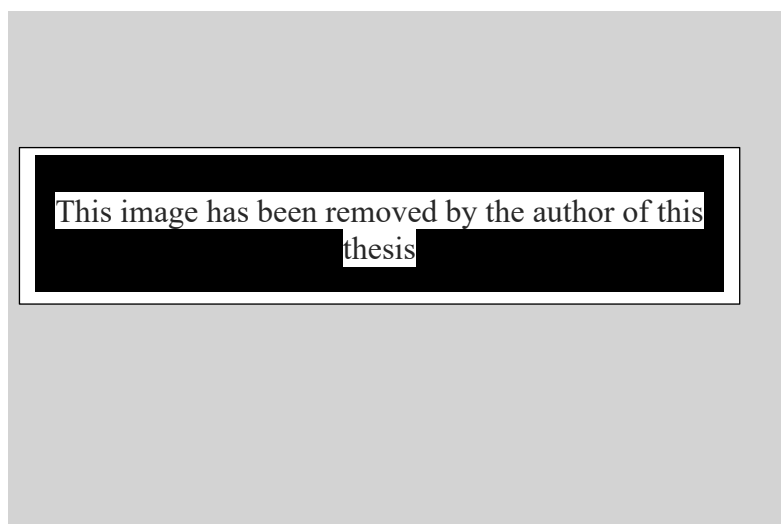


Figure 5.7: 'Figure 7 Lesser flamingo feeding in Lake Bogoria' in Great Rift Valley Nomination (n70) 42. Photo: © NMK

<sup>68</sup> Chad, Lakes of Ounianga, Nomination file to the World Heritage Committee (January 2011) ('Lakes of Ounianga Nomination') iii-v (list) and annex A.

<sup>69</sup> 'Photo 27: Des rochers formés par les vents. Les structures sont exceptionnelles et d'une beauté frappante' and 'Photo 29: Vue impressionnante vers le lac Boukou, direction de regard vers le Nord', *ibid*, 24.

<sup>70</sup> Kenya, *Kenya Lake System in the Great Rift Valley*, Nomination file to the World Heritage Committee (2010) ('Great Rift Valley Nomination').

### 3.2.5 Tasmanian Wilderness

At least two photographs accompanied Australia's nomination document for the Tasmanian Wilderness in 1982, and some photographs were included in the application to extend the area in 1989 (eg fig 5.8).<sup>71</sup>

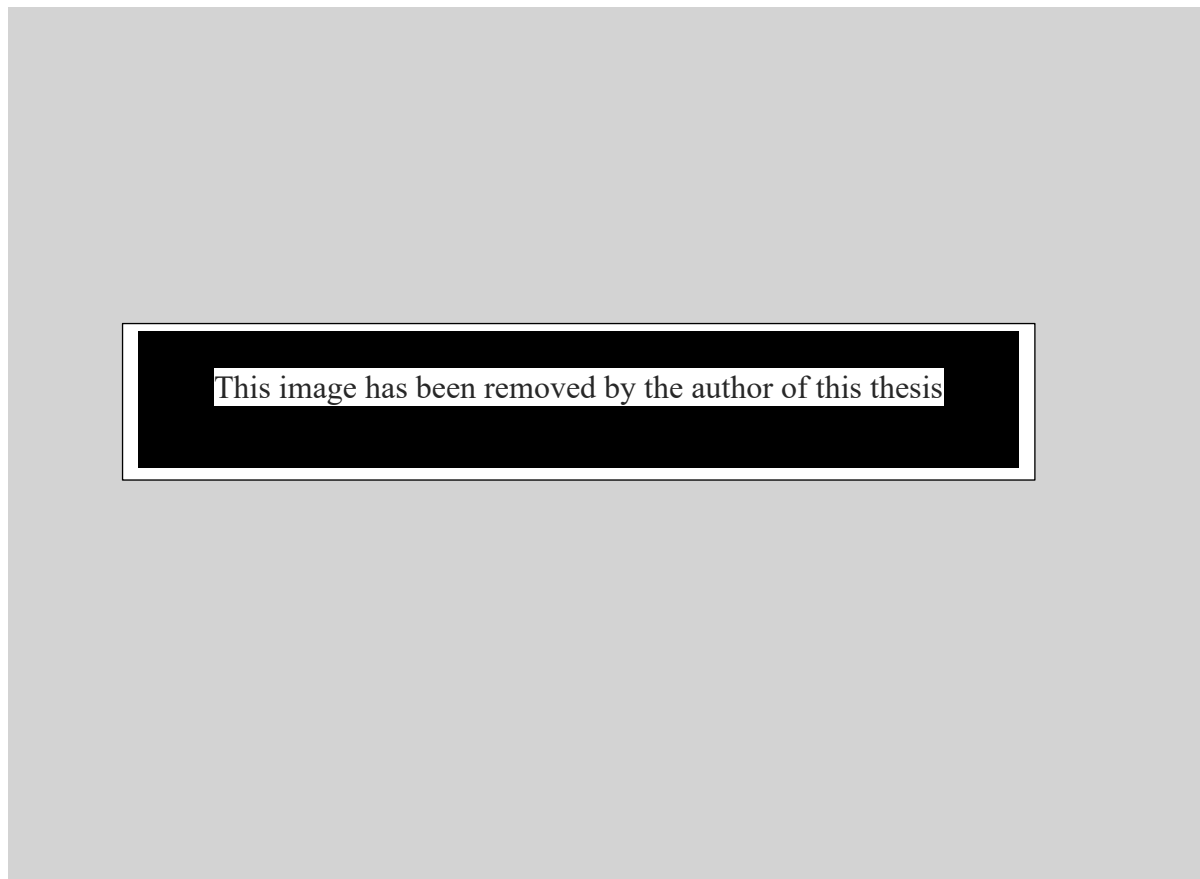


Figure 5.8: 'Plate 10 South East Cape from Pindars Peak', in Tasmanian Wilderness Request (n49) 131. Source: G Dixon

### 3.3 Use of World Heritage images

I maintain that World Heritage images could have juridical significance in the World Heritage inscription process in the sense that they could have meanings relevant to the decisions made in that process. As explained below, the World Heritage formally adopts OUV Statements containing verbal images and it requires the submission of photographs to substantiate nominations. I argue, however, that requirements under the *World Heritage Convention* for 'objective' methods of evaluation have compromised the reasoned use of images to represent the environment's aesthetic value in the World Heritage inscription process.

#### 3.3.1 Juridical significance of images

The verbal images of World Heritage appear in proposed and adopted OUV Statements. As noted earlier, these are documents prepared by states to 'make clear why the property is considered to merit inscription on the World Heritage List'.<sup>72</sup> They may be amended, then ultimately adopted, by the World Heritage Committee as part of the decision to inscribe a

<sup>71</sup> Tasmanian Wilderness Nomination (n48) 10; Tasmanian Wilderness Request (n49) 131.

<sup>72</sup> *Operational Guidelines* (n21) [132].

nominated property in the World Heritage List.<sup>73</sup> As such, I argue that the OUV Statements justify the World Heritage Committee's determination of outstanding universal value. They are like statements of reasons that might be provided for the purposes of administrative law requirements in domestic jurisdictions.<sup>74</sup> Cumulatively and relative to other inscriptions, OUV Statements document the practice of the World Heritage Committee in its application of the criteria for outstanding universal value, constituting a form of precedent. This includes – at least since 1994 – the inscription of natural heritage for its 'aesthetic' importance, combined in the relevant criterion (vii) with 'natural beauty'.<sup>75</sup>

However, the formal rules and practices of the World Heritage Committee do not explain whether and, if so how, verbal images in the OUV Statements are relevant to determinations of 'natural beauty and aesthetic importance' for the purposes of natural heritage criterion (vii). They do not explain, for example, why natural beauty or aesthetic points of view are represented in the 'fantastically shaped' rocks of Mount Sanqingshan, the 'colour contrasts' of the Lakes of Ounianga and the Tasmanian Wilderness, or the 'massed congregations' and 'concentrations' of animals in the Kenya Lakes System or the Monarch Butterfly Biosphere Reserve.<sup>76</sup>

I argue that the photographic images used in the inscription process, as distinct from the verbal images,<sup>77</sup> also have juridical significance. They form part of the record of World Heritage nominations. The *Operational Guidelines* require states parties to provide 'documentation necessary to substantiate the nomination', including 'images of a quality suitable for printing'.<sup>78</sup> In addition, the format of nominations requires states to 'provide a sufficient number of recent images (prints, slides and, where possible, electronic formats, videos and aerial photographs) to give a good general picture of the property'.<sup>79</sup> To the extent that the photographs justify nominations of properties for World Heritage status, they attest to the conception of natural beauty and aesthetic value held by individual states parties for the purposes of criterion (vii). However, nominating states must also contextualise their justifications with reference to properties already listed on the basis of a given criterion.<sup>80</sup> I argue that the photographs form part of this comparative justification and, as such, they are a form of precedent. They are indicative of the practice of all the parties as to the meanings of 'natural beauty' and 'aesthetic' points of view in the definition of natural heritage.<sup>81</sup>

However, World Heritage rules on the use of photographs in the process of nominating properties for inscription in the World Heritage List make no specific mention of how the graphic images might be used to support reliance on criterion (vii). A *World Heritage Resource Manual* provides only limited guidance on the use of photographs in World Heritage

<sup>73</sup> *Operational Guidelines* (n21) [154].

<sup>74</sup> See generally Benedict Kingsbury, 'Global Environmental Governance as Administration Implications for International Law' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 63-84.

<sup>75</sup> Retrospective statements reflect the reasons at the time of inscription: ICOMOS, ICCROM, IUCN and UNESCO World Heritage Centre, *Guidance on the Preparation of Retrospective Statements of Outstanding Universal Value for World Heritage Properties* (July 2010) 8.

<sup>76</sup> See above part 3.2.

<sup>77</sup> See Chapter 4, part 3.1.2.

<sup>78</sup> *Operational Guidelines* (n21) [132].

<sup>79</sup> *Operational Guidelines* (n21) annex 5 ('Properties for inscription on the World Heritage List' Nomination Format) [7a]. The World Heritage emblem is also protected: *Operational Guidelines* (n21) part VIII.

<sup>80</sup> *Operational Guidelines* (n21) [132.3] ('comparative analysis').

<sup>81</sup> See Chapter 3, part 3.2.1.



nomination files.<sup>82</sup> It indicates that criterion (vii) contains two concepts. It says that the first concept (superlative natural phenomena), ‘can often be objectively measured and assessed’.<sup>83</sup> Of the second concept (exceptional natural beauty and aesthetic importance), it says that it ‘is harder to assess’ but ‘[m]erely asserting these qualities without a robust supporting argument is insufficient’.<sup>84</sup> It adds that ‘providing attractive photographs is inadequate’.<sup>85</sup> The *Resource Manual* advises that images giving a ‘general picture of the property’, in accordance with the *Operational Guidelines*, ‘should portray the potential Outstanding Universal Value of the property, as well as its context.’<sup>86</sup> It further warns that ‘[p]oor quality images are of no use.’<sup>87</sup>

Ultimately, these rules do not explain the relevance of photographs to determinations of outstanding universal value on the basis of natural beauty or aesthetic points of view under article 2 of the *World Heritage Convention*. The *Operational Guidelines* do not specify, for example, *how* photographs can ‘substantiate the nomination’,<sup>88</sup> or *how* they might ‘give a good general picture of the property’.<sup>89</sup> The *Resource Manual* does not elaborate on *what* constitutes an ‘attractive’ photograph.<sup>90</sup> Nor does it explain *why* an ‘attractive’ photograph is inadequate to the task of justifying aesthetic value. It provides no guidance as to *why* or *how* ‘[p]oor quality images are of no use’ in portraying ‘the potential Outstanding Universal Value of the property’.<sup>91</sup>

The lack of formal guidance from the World Heritage Committee on how images can be used to represent the environment’s aesthetic value is related, I maintain, to the emphasis on ‘objective’ grounds in the practice of justifying ‘outstanding universal value’ under criterion (vii).

### 3.3.2 Objective evaluation of outstanding universal value

As explained earlier, criterion (vii) is understood to contain two concepts: (1) superlative natural phenomena and (2) natural beauty and aesthetic importance. There is no further subdivision as between the terms ‘natural beauty’ and ‘aesthetic importance’: according to the *Resource Manual*, those terms together form part of the second concept.<sup>92</sup> States parties to the *World Heritage Convention* have been advised to justify their nominations with respect to either or both of the two concepts.<sup>93</sup>

An IUCN study of the application of criterion (vii) found a tendency in World Heritage documentation to rely on measurable elements to describe the ‘superlative natural phenomena’ mentioned in the first concept in criterion (vii).<sup>94</sup> Superlatives are used to refer to the longest

<sup>82</sup> World Heritage Centre ‘Preparing World Heritage Nominations’ *World Heritage Resource Manual* (UNESCO, 2<sup>nd</sup> ed, 2011) (*‘Resource Manual’*) 121.

<sup>83</sup> *Ibid* 40.

<sup>84</sup> *Ibid*.

<sup>85</sup> *Ibid* 60.

<sup>86</sup> *Ibid* 121.

<sup>87</sup> *Ibid* 98.

<sup>88</sup> *Operational Guidelines* (n21) [132].

<sup>89</sup> *Ibid* annex 5.

<sup>90</sup> *Resource Manual* (n82) 60.

<sup>91</sup> *Ibid* 98, 121.

<sup>92</sup> *Ibid* 40. See Chapter 3 on the extent to which this conflation is consistent with treaty interpretation.

<sup>93</sup> *Ibid*.

<sup>94</sup> Nora Mitchell, *Study on the Application of Criterion (vii): Considering Superlative Natural Phenomena and Exceptional Natural Beauty within the World Heritage Convention* (Report for the International Union for the Conservation of Nature, World Heritage Study N° 10, 2013) (*‘IUCN Study’*) 21.

river, the oldest trees, the deepest lake, the tallest mountain, the largest herd. The study observed that this first concept is not often distinguished from ‘areas of exceptional natural beauty and aesthetic importance’, the so-called second element of criterion (vii).<sup>95</sup> Research commissioned by the Australian Government found that where inscriptions are based on multiple natural heritage criteria, the descriptions for criterion (vii) generally replicate the descriptions for the natural sciences criteria (viii) to (x).<sup>96</sup> The report concluded that scientific values ‘drive the nomination and inscription of properties’.<sup>97</sup>

By this analysis, the descriptions in the OUV Statements for the Monarch Butterfly Biosphere Reserve and the Kenya Lakes System, both tending towards quantitative measures of aesthetics, are more representative of World Heritage justifications under criterion (vii) than the qualitative verbal images in the World Heritage documentation describing the natural beauty or aesthetic importance of the Lakes of Ounianga, Mount Sanqingshan and the Tasmanian Wilderness.

The preference for measurable or objective features in the practice of describing properties for criterion (vii) appears consistent with the rules and guidance on the World Heritage determination process. The *Operational Guidelines* require the decisions of the World Heritage Committee to be based ‘on objective and scientific considerations’.<sup>98</sup> The *Resource Manual* mentioned earlier emphasises the need for objective method with respect to aesthetic criterion (vii). It states that ‘standards applied under this criterion are expected to meet a global standard of proof’.<sup>99</sup> It indicates that nominated properties should be compared with properties previously inscribed under criterion (vii), including a ‘comparison of measurable indicators of scenic value’.<sup>100</sup> These rules and guidance likely stem from the *World Heritage Convention* itself. The treaty states in its preamble that World Heritage shall be protected ‘in accordance with modern scientific methods’.<sup>101</sup>

The IUCN maintains that, in contrast to the first concept in criterion (vii), the evaluation of exceptional natural beauty and aesthetic importance ‘tends to be more subjective’.<sup>102</sup> Participants at an IUCN workshop in 2005 ‘noted that “aesthetics” is a personal and emotionally based response (not just visual but including a range of senses and associative responses), and therefore the concept is rooted in a community/culture’.<sup>103</sup> They went further to say ‘that application of this criterion has been previously mainly descriptive and often using a “eurocentric” approach, and that there is a need to provide better guidance on its understanding and application.’<sup>104</sup>

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<sup>95</sup> Ibid, 28.

<sup>96</sup> Context Pty Ltd, *Defining the Aesthetic Values of the Great Barrier Reef* (Final Report, commissioned by the Australian Government, Department of Sustainability, Environment, Water, Population and Communities, February 2013) 10.

<sup>97</sup> Ibid 14. See also *IUCN Study* (n94) 21.

<sup>98</sup> *Operational Guidelines* (n21) [23]. Scientific expertise of the Advisory Bodies also informs the decision-making process, *ibid* [37]. See also IUCN, ‘Terms of Reference for the IUCN World Heritage Panel’ (approved November 2015) (‘IUCN Terms of Reference’).

<sup>99</sup> *Resource Manual* (n82) 40.

<sup>100</sup> Ibid.

<sup>101</sup> *World Heritage Convention* (n2) preamble. The term ‘scientific methods’ is not defined and could extend beyond the natural sciences to social and other sciences.

<sup>102</sup> IUCN, *Outstanding Universal Value Standards for Natural World Heritage: A Compendium on Standards for Inscriptions of Natural Properties on the World Heritage List* (IUCN, 2008).

<sup>103</sup> Ibid 9.

<sup>104</sup> Ibid.

I contend that the practice of evaluating outstanding universal value on ‘objective’ grounds, combined with the characterisation of natural beauty and aesthetic value as ‘subjective’, has undermined the evaluation of ‘natural beauty’ and ‘aesthetic’ points of view for the purposes of criterion (vii) and, ultimately, article 2 of the *World Heritage Convention*.<sup>105</sup> The World Heritage Committee has no formal method for understanding these points of view – either together, or as distinct terms. Nor has it formally articulated a role for images in justifying natural beauty or aesthetic value. However, in ways I explained in Chapters 2 and 4, theories for understanding the environment’s aesthetic value, and methods for identifying and analysing representations of that value, exist in the field of aesthetic philosophy. In the next part, I use aesthetic methods for analysing the arts, and considerations from the philosophy of environmental aesthetics, to develop meanings for an aesthetic point of view from the World Heritage images.

#### 4. AESTHETIC REFLECTIONS ON WORLD HERITAGE IMAGES

The images that I have identified in processes of World Heritage determinations of aesthetic value are significant in ways understood and debated among philosophers of aesthetics. In this part, I analyse the World Heritage images to reveal associations with aesthetic conventions prevalent in 19<sup>th</sup> century Western European and British landscape art. I then undertake a critical analysis of the images in light of eco-critical theory for the arts. I close by considering the World Heritage images from the perspective of the philosophy of environmental aesthetics. Later in part 5, I argue that aesthetic method and theories could be properly employed in future World Heritage inscription processes to identify and evaluate the aesthetic value of natural heritage from photographic images.

##### 4.1 Landscape aesthetic in World Heritage images

I contend that many of the verbal images of the five properties examined for this Chapter reflect the language of artistic movements that have explored the human experience of the natural environment. Specifically, they recall the Romantic conceptions of natural beauty, the sublime and the picturesque developed through 19<sup>th</sup> century Western European and British landscape.<sup>106</sup>

The verbal images in the descriptions of Chad’s Lakes of Ounianga, China’s Mount Sanqingshan and Australia’s Tasmanian Wilderness, are particularly evocative of a Romantic landscape ideal. The varied and contrasting colours, the ‘dominating’ rocks, ‘breathtaking views’ and the mystery of a hydrological system ‘still to be fully understood’,<sup>107</sup> at the Ounianga Lakes, invoke the Romantic sublime. The description of Mount Sanqingshan refers to ‘near and distant vistas’ and ‘a landscape of exceptional scenic quality’.<sup>108</sup> Such aesthetic concepts are, I suggest, also apparent in the ‘red and gold to dark green tones’ of vegetation, the ‘silence’ and ‘clamour’ of glacial lakes, ‘stark white’ rocks against ‘dark waters’, and carving wild rivers, plunging waterfalls and foaming eddies ‘snaking darkly under the lime green drapes of ancient Huon pines and moss-covered giant tree ferns’ of the Tasmanian Wilderness.<sup>109</sup> The mention of the possibility that the exotic thylacine might have returned from the dead lends still further mystery to that enchanted place.

<sup>105</sup> Cf James Thorsell, ‘Scenic Natural Beauty: How Can it be Judged?’ (2012) 63 *World Heritage* 8.

<sup>106</sup> See Chapter 4, part 2.1.1.

<sup>107</sup> OUV Statement for Lakes of Ounianga (n46).

<sup>108</sup> OUV Statement for Mount Sanqingshan (n55).

<sup>109</sup> 2010 Draft OUV Statement for the Tasmanian Wilderness (n51).

Indeed, the verbal images of the Tasmanian Wilderness could well describe the paintings of John Glover, a British-born artist who settled in Australia in the 19<sup>th</sup> century. Glover painted scenes of both a real and imagined Tasmanian landscape in a European style.<sup>110</sup> His painting *A Mountain Torrent* (fig 5.8) was done during his time in Tasmania but it is reputedly based on sketches made when he was still in Britain, possibly from the Welsh or Lakes Districts.<sup>111</sup> There jagged rocks are softened by the daubs of trees and shrubs while a raging river threatens to overwhelm the human figure perched precariously on a makeshift bridge. A wary – possibly more knowing – dog looks on. Though so small against the majestic mountainside, the plight of the figure in these indifferent surrounds attracts all the attention of an observer of the work.



Figure 5.9: John Glover, *A Mountain Torrent*, 1837, oil on canvas on plywood. Source: National Gallery of Victoria

Even the more scientifically oriented OUV Statements analysed for this Chapter contain verbal images that reflect artistic ideas of landscape. As explained earlier, the concentration of butterflies in the Monarch Butterfly Biosphere Reserve is described as ‘dramatic’.<sup>112</sup> The OUV statement for the Great Rift Valley describes natural beauty in terms of the ‘landscape backdrop’ and ‘wildlife spectacle’.<sup>113</sup>

I contend that studies commissioned by IUCN, and by the Australian Government, of the application of criterion (vii),<sup>114</sup> support a conclusion that the Romantic language of the five properties is typical of properties inscribed for the natural beauty and aesthetic importance.

<sup>110</sup> See also discussion of critical perspectives on Glover’s work in Chapter 7.

<sup>111</sup> See Joseph Brown Collection, National Gallery of Victoria, ‘John Glover, *A Mountain Torrent*, 1837’ <<https://www.ngv.vic.gov.au/custom/screens/josephbrown/index.php?artistid=1870&chapter=2>>.

<sup>112</sup> OUV Statement for MBBR (n57).

<sup>113</sup> OUV Statement for Great Rift Valley (n59).

<sup>114</sup> *IUCN Study* (n94); Context Pty Ltd (n96).

Those studies found, for example, common references in the documentation generated throughout the inscription process to concepts of diversity, combination, abundance, contrast, dramatic impact, seasonal changes, weather and light effects, scale, majesty, depth, steepness and wilderness, as well as descriptions of landscapes that are said to be rising, falling, towering, scenic, spectacular, wild and ‘free from human influence’.<sup>115</sup>

Viewed as depictions of landscape, I maintain that the photographic images submitted by states in their nominations of the five properties exhibit the same qualities of natural beauty, the sublime and the picturesque that I have observed in connection with the verbal images.<sup>116</sup> The photograph of glacial lakes in the Tasmanian Wilderness (fig 5.8), for example, shows the ‘secret jewels’ described in the nomination file to justify world heritage inscription for the area’s natural beauty. The jagged peaks of the Nevado de Toluca in Mexico’s photograph (fig 5.3) present a picturesque scene. The congregations – of butterflies in Mexico (fig 5.2) or birds in Kenya (5.7) – are the prized assemblages of natural beauty as understood in 19<sup>th</sup> century Europe and Britain.<sup>117</sup> However, the aesthetic conventions apparent in the photographic images are not exclusive to a Western European ideal of landscape. They are also reflected in ancient Chinese art.<sup>118</sup> The photographs of ‘Nanqing peak forest’ (fig 5.4) and ‘Awfully stirring billows’ (fig 5.5) included in China’s nomination of Mount Sanqingshan evoke ancient Chinese landscape conventions still referenced in the work of contemporary Chinese artists. For example, in a series titled *Pulse (Mountain)* (2019), Chinese artist Cai Guo-Qiang shows splintered contours evocative of the mountain ridges that represent ‘life force’.<sup>119</sup>

I will in the next section use insights from artworks to analyse the World Heritage images from the eco-critical perspectives I explained in Chapter 4.

#### 4.2 Eco-critical approaches to World Heritage images

Much contemporary art addresses environmental concerns. Using an ‘eco-critical’ approach, I can examine environmental images in the arts through the lens of ethics, in light of the social, political and natural sciences.<sup>120</sup> I commenced this Chapter with a description of Kenyan-born artist Wangechi Mutu’s animated video, *The End of Carrying All* (2015) (fig 5.1). Set against a Romantic landscape, it critiques the economic models of sustained development in industrialised countries in the North and warns of the impacts of consumption on the natural environment. The woman climbing the hillside starts out by carrying her daily needs before her simple fare turns into an overloaded collection of modern trappings. The environment that once nourished her is destroyed by wealth. By her dress, by the trees, a viewer understands this to be East Africa: transformation from subsistence to consumption – literally, in the end, as her load turns into an all-consuming beast – is set against the background of perpetual colonial exploitation.

<sup>115</sup> Context Pty Ltd (n96) 11. See also *IUCN Study* (n94) 33.

<sup>116</sup> See above part 3.1.

<sup>117</sup> Also adopted in scholarly descriptions of aesthetic value in international environmental law, see Chapter 2 part 3.2.3.

<sup>118</sup> See eg Roderick Whitfield, ‘Landscape: China, People’s Republic of’ in *Grove Art Online* (Oxford University Press, 2003).

<sup>119</sup> See further Lesley Ma, Cai Guo-Qiang and Yuko Hasegawa, *The Transient Landscape* (Council of Trustees of the National Gallery of Victoria, 2019).

<sup>120</sup> Alan C Braddock and Christoph Irmscher (eds), *A Keener Perception: Ecocritical Studies in American Art History* (University of Alabama Press, 2009) 4. See Chapter 4, part 2.3.2.

A critical perspective is also evident in the work of Ghanaian-born artist, John Akomfrah. His video installation *Vertigo Sea* (2015) juxtaposes archival, dramatic and documentary footage on a triptych of screens. At several stages, it shows sea mammals – whales, seals – and polar bears, in colourful splendour and in black and white harpooned carnage. It also shows reenactments of slaves tossed from boats to their death and asylum seekers drowned and washed ashore. The desecration of nature and the loss of human life play out together, leaving the viewer to reflect on where her sympathies – and those of the international community – lie. Akomfrah's subsequent work, *The Elephant in the Room – Four Nocturnes* (2019) (fig 5.10), is another potent critique of historic concepts of natural beauty in art.<sup>121</sup> Also a video installation, it alternates spectacular scenes from Ghana's natural environment with images of people, displaced and migrating through a barren desert landscape. Akomfrah's work prompts questions about the relevance of international protections for charismatic animals to the lives of people fleeing war, persecution and poverty, matters of significance in the artist's country of birth.<sup>122</sup>



Figure 5.10 John Akomfrah, *The Elephant in the Room – Four Nocturnes*, 2019. Courtesy Lisson Gallery. Photo by David Levene

The environmental perspectives evident in Mutu and Akomfrah's works could be contrasted with the Romantic depictions of flora and fauna in many of the contemporary environmental artworks produced by Northern artists.<sup>123</sup> UK artist Tacita Dean's *Majesty (Portrait)* (2006) pays homage to the ancient oak trees of Britain. The image depicts, the artist explained, the significance of the tree and her own sense of self and place.<sup>124</sup> Her exhibition *Landscape*, including her film *Antigone*, depicts natural wonders in a manner that evokes awe and mystery.<sup>125</sup> French-born artist Pierre Huyghe's video, *A Journey That Wasn't* (2005),<sup>126</sup> documents his trip with fellow artists and scientists to Antarctica, showing a barren and inhospitable landscape in which humans are alien while penguins and seals belong.

<sup>121</sup> See Ghana Pavilion, Biennale Arte 2019 (58th International Art Exhibition) Venice <<https://ghanainvenice.org>>.

<sup>122</sup> See also Alison Bracker (ed), *Vita Vitale: La Biennale di Venezia, 2015* (Heydar Aliyev Foundation, 2015).

<sup>123</sup> See eg Cathy Leahy with Helen McDonald and John Wolsley, *John Wolsley Heartlands and Headwaters* (National Gallery of Victoria, 2015); Various artists, *Nature/Revelation*, exhibition at Ian Potter Museum of Art, University of Melbourne, 2015. Cf Cai Guo Qiang, *Falling Back to Earth*, exhibition at Queensland Art Gallery: Gallery of Modern Art, 2013.

<sup>124</sup> Tacita Dean, interview with artist, video on show at the Fondation Louis Vuitton, Paris, May 2015.

<sup>125</sup> See Alan Hollinghurst, Alexandra Harris and Ali Smith, *Tacita Dean: Landscape, Portrait, Still Life* (The National Gallery, Royal Academy of Arts, National Portrait Gallery, 2018).

<sup>126</sup> Collection of Fondation Louis Vuitton, Paris. Exhibited at TarraWarra Museum of Art, Australia, 2015.

Yet the approaches in these and other contemporary works from artists addressing environmental issues from the perspective of the North could also be understood as a critique of the Romantic ideals.<sup>127</sup> This is apparent, for example, in the work of artists Justy Phillips and Margaret Woodward. They challenge aesthetic conventions and explore the transportation of aesthetic ideals in nature from Britain to Australia in their work *Fall of the Derwent* (2015-2016) (fig 5.11). In a performative element, they walked the rivers Derwent in England's Lakes District and in Tasmania, then documented their aesthetic experience of those places in written text. The text was published as a book, downloaded and generated in print from the project's website.<sup>128</sup> Each download was unique, the text arranged and extracted in different ways so the artists were not in control of the execution of their work: its construction was 'random'. In written text, and in black and white with only a few photographs of a polluted waterway, the work does not present in the way of Glover's *Mountain Torrent* (fig 5.9). But it projects a highly evocative image of an aesthetic experience of place. As in Glover's work, a human figure is present in *Fall of the Derwent* – a man 'in a sweat-stained cornflower collar', but the scale is small – a leech, a hook – more intimate, more personal and, possibly, truer to human experiences of the environment. It is also expressed as verbal images.



Figure 5.11: Justy Phillips and Margaret Woodward, *Fall of the Derwent*, 2015-2016, still from 'a published event'. Source: GASP

<sup>127</sup> Eg Fiona Hall, *Wrong Way Time* Australian Pavillion, Biennale Arte 2015, 56th International Art Exhibition, Venice; Taryn Simon, *Paperwork, and the Will of Capital* (2015) (fig 2.1); Janet Laurence, *Deep Breathing Resuscitation for the Reef* (2015) (fig 4.7).

<sup>128</sup> Justy Phillips and Margaret Woodward, *Fall of the Derwent*, 2015-2016, <http://www.apublishedevent.net/projects/fall-of-the-derwent>.



Looking upon the World Heritage images from an eco-critical perspective, I make three observations. First, the natural beauty and aesthetic points of view – two different points of view identified in article 2 of the *World Heritage Convention* – have been treated as one, conflated in a Romantic landscape ideal. Secondly, the Romantic ideal is one that emerged in Western Europe and Britain in the 19<sup>th</sup> century. It is an aesthetic preference that is culturally and historically situated. Thirdly, it idealises an environment absent humans. When I imagine humans into the environments depicted in the World Heritage images, I think on the various forms of sustenance that the environment provides, within limits, to all people. I see among the flocks of birds in the Kenya Lakes System (fig 5.7), Mutu's woman, ascending and progressing but ultimately consumed by consumption. I consider the harm done to the environment by some humans, with consequences for other humans. Seeing sand dunes around Chad's Lakes of Ounianga (eg fig 5.6), I reflect on Akomfrah's images of people displaced and deserted (fig 5.10). In the images of Mexico's Monarch Butterfly Biosphere Reserve (eg fig 5.3), I am aware of the effects of mining, and of climate change, on the butterflies and their habitat, and the risks to people who try to protect them.<sup>129</sup> I see in China's Mount Sanqingshan 'Nanqing peak forest' (fig 5.4) environments constructed through culture, resonating today in artworks such as those by Cai Guo-Qiang.<sup>130</sup> Seeing the photograph of glacial lakes in the Tasmanian Wilderness (fig 5.8), I am reminded of works by Phillips and Woodward (fig 5.11), the migration and reorientation of aesthetic preferences for environments. I am conscious of how aesthetics transposed contributed to the displacement in Tasmania – and in other colonised places – of Indigenous peoples and their aesthetic conceptions of the environment.<sup>131</sup>

As explained earlier in Chapter 4, Romantic ideals about nature persist in art practice today.<sup>132</sup> Some scholars argue that the Romantic landscape ideal is universal – whether as a function of human evolution or because of the migration of aesthetic preferences with colonialism and globalisation.<sup>133</sup> However, eco-criticism cautions against universalism, promoting pluralised and context-driven understandings of the environment's aesthetic value.<sup>134</sup> On this basis, I maintain that the projection of a 19<sup>th</sup> century Western European and British Romantic ideal of the environment in World Heritage images does not reflect an aesthetic preference commonly held today by all 193 states parties to the *World Heritage Convention*. Nor is it a definition of aesthetic value that is necessarily supported by the international principles of treaty interpretation explained and applied in Chapter 3.<sup>135</sup> There I explained that the terms 'natural beauty' and 'aesthetic' points of view in article 2 of the *World Heritage Convention* should be interpreted to have different meanings. I also suggested that an evolutive approach to treaty interpretation would support a meaning of aesthetic value informed by contemporary developments in the philosophy of environmental aesthetics.

In the next section, I examine the World Heritage images in light of the philosophy of environmental aesthetics. There I offer an account of the environment's aesthetic value as an alternative to the Romantic ideal undone by my critical reflection.

<sup>129</sup> See eg World Heritage Committee, *Monarch Butterfly Biosphere Reserve (Mexico)*, Decision 43 COM 7B.27, 43<sup>rd</sup> sess, UN Doc WHC/19/43.COM/18 (23 July 2019); IUCN, *Reactive Monitoring Mission Report for Monarch Butterfly Biosphere Reserve (Mexico)* (World Heritage Committee, 2018).

<sup>130</sup> See Ma et al (n119).

<sup>131</sup> See discussion in Chapter 7; see also Julie Gough with James Boyce, Brigita Ozolins, Khadija von Zinnenburg Carroll, *Fugitive History: The Art of Julie Gough* (UWA Publishing, 2018).

<sup>132</sup> See Chapter 4, part 2.1.4.

<sup>133</sup> See Chapter 4, part 2.1.2.

<sup>134</sup> Cf Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press, 2011).

<sup>135</sup> See Chapter 3, part 3.5.

### 4.3 Environmental aesthetics

In Chapter 2, I described a range of views among philosophers of environmental aesthetics as to whether aesthetic appreciation of the natural environment is developed through an objective, cognitive evaluation or a subjective, non-cognitive impression of the natural environment. I identified Emily Brady's integrated aesthetic model as a hybrid of these approaches.<sup>136</sup> She characterises the aesthetic value of the natural environment in the subjective terms of sensorial perception, shaped by imagination and emotion. But she also recognises that it is informed by knowledge, including Western scientific knowledge and cultural knowledge, which is shared among a given epistemic community.<sup>137</sup>

Together with other philosophers,<sup>138</sup> Brady's views on environmental aesthetics are critical of the Romantic ideal apparent in 19<sup>th</sup> century Western European and British landscape art: framing the environment and emphasising visual qualities does not offer a comprehensive account of the aesthetic appreciation of the natural environment suggested by her integrated aesthetic model.<sup>139</sup> In addition to developing a critical account, though, her aesthetic appreciation is also normative: she, along with other philosophers of environmental aesthetics, understands that there are ways in which the aesthetic value of the environment can be judged well.<sup>140</sup>

As I explained earlier in Chapter 2, I understand Brady to be offering an account of aesthetic value that is exquisite and profound.<sup>141</sup> I take her model to incorporate ineffable affect and meaningful engagement. Hers is not a trivial luxury – it is an aesthetic value worthy of consideration on equal terms with other environmental values.<sup>142</sup> Brady nevertheless understands that different environments might be meaningful in aesthetic terms in different ways, and for different reasons, for different people and communities.<sup>143</sup> To my mind, she promotes a pluralised understanding of the environment's aesthetic value.

I consider that some of the World Heritage images can be understood to depict an exquisite and profound aesthetic value. In my introductory Chapter 1, for example, I described a photograph of Mexico's Monarch Butterfly Biosphere Reserve (fig 1.1) in such terms. I maintain that other photographs submitted with the nominations of the five properties studied for this Chapter could also be described in this way. Those photographs with expressive qualities – such as the image of swarming butterflies at the Monarch Butterfly Biosphere Reserve (fig 1.1) or those of jagged peaks and billowing clouds at China's Mount Sanqingshan (figs 5.3 and 5.4) – are well-placed for an analysis of an exquisite and profound aesthetic value.

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<sup>136</sup> Brady, *Aesthetics of Environment* (n6); see further Chapter 2, part 2.2.1.

<sup>137</sup> Ibid 237–8. For discussion of situated interpretations for law, see Iain Scobbie, 'A View of Delft: Some Thoughts About Thinking About International Law' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 5<sup>th</sup> ed, 2018) 51, 63. See generally Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press, 2015) 147.

<sup>138</sup> Eg Allen Carlson, *Aesthetics and the Environment: The Appreciation of Nature, Art and Architecture* (Routledge, 2000) ('*Aesthetics and Environment*') 45.

<sup>139</sup> Brady, *Aesthetics of Environment* (n6).

<sup>140</sup> Jonathan Maskit, 'On Universalism and Cultural Historicism in Environmental Aesthetics' in Martin Drenthen and Jozef Keulartz (eds), *Environmental Aesthetics: Crossing Divides and Breaking Ground* (Fordham University Press, 2014) 41, 44.

<sup>141</sup> See Chapter 2, part 2.2.

<sup>142</sup> See Chapter 2, part 2.2.5.

<sup>143</sup> Brady, *Aesthetics of Environment* (n6).

That the images might also present a Romantic ideal of nature does not preclude another vantage, informed by environmental aesthetics.

It is, however, the photographs – as opposed to the verbal images – that I contend are best suited to a representation of the environment’s aesthetic value. I maintain that graphic images provide visual cues which can be described, using concepts and methods developed for the visual arts, to comprehend the environment’s aesthetic value in complex ways contemplated in the philosophy of environmental aesthetics.<sup>144</sup>

My willingness to engage photographs to represent the environment’s aesthetic value is, however, problematic for environmental aesthetics. Many philosophers of environmental aesthetics agree that the aesthetic appreciation of the natural environment is different from aesthetic appreciation of the arts. I explained the reasons offered by different scholars in Chapter 2.<sup>145</sup> For many philosophers, there is a distinction between aesthetic judgment of an art object, created by a person, and the aesthetic experience that comes from being immersed in an environment that is naturally formed.<sup>146</sup>

The reasons for disqualifying aesthetic methods for the arts from the aesthetic appreciation of the environment would, I suggest, call into question my use of aesthetic concepts and methods, developed for the arts, to describe the environment’s aesthetic value from photographs. I agree that the environment’s aesthetic value judged from a photograph is not the same as judging aesthetic value in an environment. I maintain, however, that aesthetic methods for the arts can be employed to describe the environment’s aesthetic value in terms contemplated in the philosophy of environmental aesthetics.<sup>147</sup> Like my description of the photograph of butterflies in the Monarch Butterfly Biosphere Reserve (fig 1.1) in Chapter 1, aesthetic methods for the visual arts can describe a multisensory experience of a place, augmented by imagination, emotion and knowledge.

For reasons explained in the next part, I argue that photographic images provide an approximation of the aesthetic experience of place in a form suited to institutional decision-making and international law. Aesthetic methods from the arts, and considerations from the philosophy of environmental aesthetics, should be used to give images and aesthetic value of the environment meaning in the World Heritage inscription process.

## 5. AESTHETIC METHOD FOR WORLD HERITAGE DETERMINATIONS

I have so far demonstrated how aesthetic philosophy, as it concerns the arts and the environment, brings critical insights to understandings of the environment’s aesthetic value, and to the relevance of images, in the World Heritage inscription process. I have shown that aesthetic forms – verbal images and photographs – are used in the process of inscribing natural heritage on the World Heritage List but that there is no guidance as to the significance of images to determinations of outstanding universal value. An absence of guidance has, I suggest, allowed uncritical uses of images in ways that might be at odds with international law. In this

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<sup>144</sup> On visual art and the appreciation of nature, see Chapter 4 part 2. See also Marta Tafalla ‘From Allen Carlson to Richard Long: The Art-Based Appreciation of Nature’ (2010) 2 *Proceedings of the European Society for Aesthetics* 491.

<sup>145</sup> See Chapter 2, part 2.3.

<sup>146</sup> See *ibid.*

<sup>147</sup> See Chapter 2, part 2.4.1.

part 5, I consider how aesthetic philosophy might be applied in the future practice of inscribing natural heritage in the World Heritage List. I advocate the continued use of images, particularly photographs, with formal guidance on how aesthetic method can be used to identify aesthetic values represented in those images. I argue that aesthetic forms – such as images, including photographs – and aesthetic methods, can be used in the World Heritage inscription process without falling foul of the international principle of legality.

### 5.1 Expert guidance on images of the environment's aesthetic value

I maintain that graphic images representing the environment's aesthetic value are necessary in the administration of World Heritage inscriptions. They document the claims and determinations of aesthetic value in a form that can be reproduced in the administrative process. Site visits, such as field evaluations by IUCN for nominated properties, form part of the inscription process and provide the immersive experience contemplated in the philosophy of environmental aesthetics.<sup>148</sup> But absent a site visit by all 21 members of the World Heritage Committee, decisions to inscribe properties in the World Heritage List are based 'on the papers' – papers that, by my account, currently include images, both verbal and graphic. The images are, I suggest, an institutional approximation of the first-hand appreciation of environmental spaces on which environmental aesthetics is premised.<sup>149</sup>

Guidance on methods used to understand meanings of the environment's aesthetic value from photographic images is, I contend, required for the proper functioning of the decision-making processes. The *Operational Guidelines* need to be amended to explain how photographs can 'substantiate the nomination',<sup>150</sup> or how they might 'give a good general picture of the property',<sup>151</sup> with respect to an aesthetic point of view. They should also be amended to address how representations of aesthetic value differ from that of natural beauty. As explained in Chapter 3, international rules require the interpretation of a term in a treaty in a way that makes it effective, including a meaning that is distinct from other terms in the treaty. As article 2 of the *World Heritage Convention* refers separately to natural beauty and aesthetic points of view, those terms should not be conflated.

I argue that aesthetic methods for the arts, and considerations in the philosophy of environmental aesthetics, can be used to guide states parties and the World Heritage Committee on the significance of photographs to determinations of 'outstanding' and 'universal' aesthetic value for the purposes of article 2 of the *World Heritage Convention*. I maintain that aesthetic methods and environmental aesthetics can be used to develop pluralised meanings of aesthetic value that are nevertheless of 'outstanding universal value' in the sense that they are exquisite and profound.<sup>152</sup> Aesthetic methods and environmental aesthetics could also be used to explain how criterion (vii) could be applied in a manner that distinguishes between natural beauty and aesthetic points of view.

In this task, the World Heritage Committee could be guided by experts in aesthetic theories, methods and forms. The World Heritage Committee already has a process for drawing on aesthetic expertise for the purposes of justifying its criterion concerning the aesthetic value of

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<sup>148</sup> See *Operational Guidelines* (n21) annex 6 ('Evaluation Procedures of the Advisory Bodies for Nominations').

<sup>149</sup> Brady, *Aesthetics of Environment* (n6). See Chapter 2, part 2.2.2.

<sup>150</sup> *Operational Guidelines* (n21) [132].

<sup>151</sup> *Ibid* annex 5 [7.a].

<sup>152</sup> See above part 4.3.

cultural heritage.<sup>153</sup> Although the meaning of ‘aesthetic’ is likely different for cultural and natural heritage,<sup>154</sup> the way in which the World Heritage Committee engages aesthetic understandings in respect of cultural heritage could be instructive for natural heritage determinations. Properties nominated under cultural heritage criteria must meet ‘conditions of authenticity’ which are satisfied by reference to credible or truthful ‘information sources’ that permit the ‘elaboration of the specific artistic, historic, social, and scientific dimensions of the cultural heritage being examined.’<sup>155</sup> The *Operational Guidelines* define ‘information sources’ as ‘all physical, written, oral, and figurative sources, which make it possible to know the nature, specificities, meaning, and history of the cultural heritage.’<sup>156</sup>

Such information sources could also be required by the World Heritage Committee for an aesthetic justification for natural heritage – sources prepared and identified by people expert in environmental aesthetics and aesthetic theory as it relates to the natural environment. The World Heritage Committee already looks to ecologists and anthropologists for advice:<sup>157</sup> it can, I submit, also look to aesthetic philosophers.

## 5.2 Using art methods for images

I maintain that the verbal and graphic images arising from World Heritage inscriptions can be analysed from an aesthetic perspective even though they might not constitute ‘art’. It is not clear that any of the photographs would amount to ‘art’ or even ‘good’ art: that would fall to contested positions in aesthetic theory.<sup>158</sup> The photographs are, however, at least for some schools of aesthetic thinking, representations available for aesthetic analysis.<sup>159</sup> That they might have been taken by an amateur photographer, and that they are incorporated into a document produced in the implementation of international law, does not exclude an aesthetic understanding of that image as representation in aesthetic theory.<sup>160</sup>

Some images more than others lend themselves to aesthetic analysis. A preponderance of prosaic language, and emphasis on quantitative measures, in OUV Statements would limit their relevance to understandings of the environment’s aesthetic value. Similarly, the significance of the photographs to determinations of aesthetic value would be impacted by form and presentation. Many of the photographs for the Lakes of Ounianga are, for example, small and in a low resolution, making it difficult to appreciate the aesthetic qualities of the environment they represent.<sup>161</sup> In contrast, the photographs of Mount Sanqingshan National Park are large format and high resolution, making them better objects for aesthetic analysis.

<sup>153</sup> See *IUCN Study* (n94) 44. Note *Operational Guidelines* (n21) [31] (role of Advisory Bodies), [33] (role of International Council on Monuments and Sites in evaluation of the outstanding universal value of ‘cultural heritage’). Both *World Heritage Convention* (n2) art 1 and *Operational Guidelines* (n21) [77] (cultural heritage criterion (iii)) refer to the aesthetic outstanding universal value of cultural heritage.

<sup>154</sup> See Chapter 3, part 3.1.2.

<sup>155</sup> See *Operational Guidelines* (n21) [79-84].

<sup>156</sup> *Ibid* [84]. See also *Resource Manual* (n82) 36.

<sup>157</sup> See *Operational Guidelines* (n21) [33] (ICOMOS) [35] (IUCN).

<sup>158</sup> See Jerrold Levinson, ‘Artistic Worth and Personal Taste’ in Jerrold Levinson, *Aesthetic Pursuits: Essays in Philosophy of Art* (Oxford University Press, 2016).

<sup>159</sup> See generally Barbara Savedoff, *Transforming Images: How Photography Complicates the Picture* (Cornell University Press, 2000).

<sup>160</sup> See further Chapter 4, part 2.4.2.

<sup>161</sup> See eg 6 photos to a page in Lakes of Ounianga Nomination (n68) 10.

The production of images suitable for aesthetic analysis – whether they are verbal or graphic images – requires resources. Writers, photographers and graphic designers are among the many professionals needed to produce images of the environment’s aesthetic value. It might be that a state having jurisdiction over natural heritage valued from an aesthetic point of view does not have the resources required to represent that value in verbal or written form in a nomination under the *World Heritage Convention*. In this respect, I note that Ghana does not have a property inscribed on the World Heritage List for its aesthetic value despite what might be deemed aesthetically valuable environments represented in John Akomfrah *The Elephant in the Room – Four Nocturnes* (2019).<sup>162</sup> The administration of nominations for World Heritage status already provides assistance to some states:<sup>163</sup> assistance with justifications of aesthetic value could also promote the use of photographs representing aesthetic points of view.

### 5.3 Legality of aesthetic method

In international legal practice, the World Heritage Committee would be an international treaty organisation and its accountability is arguably also extended under the *World Heritage Convention* to an international organisation of the United Nations, the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>164</sup> As such, it would be bound by the international ‘principle of legality’ requiring international bodies to act in accordance with the powers conferred on them by the states parties under a governing treaty.<sup>165</sup> To this end, the World Heritage Committee must, in the very least, conform to the ‘internal law’ of the treaty; it might also be subject to ‘external’ laws governing its decision-making.<sup>166</sup>

The requirements of the *World Heritage Convention* and the *Operational Guidelines* are, I maintain, internal laws that apply to the World Heritage Committee in deciding to inscribe properties to the World Heritage List. As noted earlier, the *World Heritage Convention* states in its preamble that World Heritage process shall be protected ‘in accordance with modern scientific methods’.<sup>167</sup> Relatedly, the *Operational Guidelines* require the decisions of the World Heritage Committee to be based ‘on objective and scientific considerations’.<sup>168</sup> Scientific expertise also informs evaluations of properties.<sup>169</sup> Assuming that aesthetic approaches to assessing the aesthetic value of nature are properly characterised as neither scientific nor objective,<sup>170</sup> and leaving aside the fact that science and scientific method have themselves long been impugned as subjective by critical scholars,<sup>171</sup> these internal laws could be seen to preclude the use of aesthetic methods and aesthetic forms such as images.

<sup>162</sup> Ghana’s ‘Tentative List’ of properties for nomination to the World Heritage Committee has, since 2000, included Kakum National Park (Assin Attandanso Reserve) (criteria (vii) and (x)) and Mole National Park ((vii)(viii)(ix)(x)), <<http://whc.unesco.org/en/tentativelists/state=gh>>.

<sup>163</sup> See World Heritage Committee, ‘Item 9 of the Provisional Agenda: Global Strategy for a Representative, Balanced and Credible World Heritage List: 9A. Upstream Process’, Report on the Implementation of the Upstream Process, 43<sup>rd</sup> sess (2019) UN Doc WHC/19/43.COM/9A.Rev (19 June 2019).

<sup>164</sup> See Diana Zacharias, ‘The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution’ (2008) 9 *German Law Journal* 1833, 1843.

<sup>165</sup> On the ‘principle of legality’, see Philippe Sands and Pierre Klein, *Bowett’s Law of International Institutions* (Sweet & Maxwell, 2009) 297. Cf ‘attributed competence’ in Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity Within Diversity* (Martinus Nijhoff, 2011) 157.

<sup>166</sup> Sands and Klein, *ibid* 297. See generally, Kingsbury, (n74).

<sup>167</sup> *World Heritage Convention* (n2) preamble.

<sup>168</sup> *Operational Guidelines* (n21) [23].

<sup>169</sup> *Operational Guidelines* (n21) [31] (role of Advisory Bodies). See also IUCN Terms of Reference (n98).

<sup>170</sup> Cf Carlson (n138).

<sup>171</sup> See eg Philip Kitcher, *Science Truth and Democracy* (Oxford University Press, 2001).



However, the *Operational Guidelines* also require that appraisals made on behalf of the World Heritage Committee ‘must be thoroughly and responsibly carried out.’<sup>172</sup> So even if aesthetic method is characterised as leading to subjective evaluations, I argue that it can as a matter of doctrinal practice be engaged in World Heritage determinations in a ‘thorough’ and ‘responsible’ appraisal. For the purposes of the treaty’s internal law, experts advising the World Heritage Committee on aesthetic values can provide ‘thorough’ and ‘responsible’ appraisals of the aesthetic importance of natural heritage within the terms of the *Operational Guidelines* when they employ aesthetic methods and sources in those appraisals. ‘Thorough’ and ‘responsible’ appraisals would extend, I argue, to developing informed understandings of critical approaches in aesthetic scholarship and considerations in the philosophy of environmental aesthetics.

General principles of international law, and other concepts of ‘good’ law,<sup>173</sup> likely also apply to the World Heritage Committee’s determinations of aesthetic value as part of the external laws that govern international institutions. General principles of international law derived from ‘global administrative law’ require international institutions to reach reasoned decisions.<sup>174</sup> I maintain that reasoned determinations of the environment’s aesthetic value by the World Heritage Committee would require an evaluation and explanation based on aesthetic theories and methods using aesthetic forms.

Consistent with internal and external laws, I argue that aesthetic method and aesthetic forms such as photographs can be used by World Heritage decision-makers without falling foul of the principle of legality.<sup>175</sup> I present this as a doctrinal legal argument in favour of aesthetic method. But it also applies inversely. I maintain that a failure to engage aesthetic method in the World Heritage inscription process, or to explain the relevance of images required by the World Heritage Committee in the nominations of states parties, is not ‘thorough’ and ‘responsible’, or reasoned. Such failure is, I argue, contrary to international law.

## 6. CONCLUSION

In the introduction to their edited collection of essays on *Law and the Image*, Costas Douzinas and Lynda Nead describe verbal and graphic images respectively as ‘painted words’ and ‘icons’.<sup>176</sup> They state that both forms of image were banished from the common law in the aftermath of the European Reformation ‘as too worldly, too sensual and potentially corrupt, too contingent and transient’.<sup>177</sup> The rise of the secular state in 17<sup>th</sup> century Western Europe was pivotal to the development of modern international law.<sup>178</sup> But if the common law unease

<sup>172</sup> *Operational Guidelines* (n21) [23].

<sup>173</sup> See generally Jan Klabbers, ‘The Paradox of International Institutional Law’ (2008) 5 *International Organizations Law Review* 151.

<sup>174</sup> See Kingsbury (n74). See also Benedict Kingsbury, ‘The Concept of ‘Law’ in Global Administrative Law’ (2009) 20 *European Journal of International Law* 23; Benedict Kingsbury, Nico Krisch, Richard B. Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 (3 & 4) *Law and Contemporary Problems* 15; Carol Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17(1) *European Journal of International Law* 187.

<sup>175</sup> Alice Palmer, ‘Legal Dimensions to Valuing Aesthetics in World Heritage Decisions’ (2017) 26(5) *Social & Legal Studies* 581.

<sup>176</sup> Costas Douzinas and Lynda Nead, ‘Introduction’ in Costas Douzinas and Lynda Nead (eds), *Law and the Image: The Authority of Art and the Aesthetics of Law* (University of Chicago Press, 1999) 1, 8.

<sup>177</sup> *Ibid.* See Chapter 4, part 3.1.

<sup>178</sup> Stephen Neff, ‘A Short History of International Law’ in Malcolm D. Evans (ed), *International Law* (Oxford University Press, 5<sup>th</sup> ed, 2018) 3, 11.



with images infected the founding of international law,<sup>179</sup> the extensive use of verbal and photographic images in the World Heritage inscription process suggests such qualms are not held today by the states parties to the *World Heritage Convention*. Persistent reservations about images and attendant anxieties about aesthetic practices in legal process might nevertheless explain the objective methods mandated by the treaty. They might also account for the lack of guidance on how the images used in the inscription process relate to determinations of aesthetic value by the World Heritage Committee.

Yet by its express reliance on an ‘aesthetic’ point of view in the definition of the outstanding universal value of natural heritage, the *World Heritage Convention* requires a determination – a judgement<sup>180</sup> – of aesthetic value. I argue that the World Heritage Committee is required by international law to rely on thorough and responsible appraisals of aesthetic value, and to make a reasoned determination as to the aesthetic value of any natural property it inscribes in the World Heritage List.<sup>181</sup> The philosophy of environmental aesthetics has developed concepts and theories for evaluating the environment’s aesthetic value. Such concepts and theories would, I maintain, be a proper foundation for a reasoned determination of the environment’s aesthetic value under the *World Heritage Convention*. Photographs of those environments are required by, and I submit are necessary to, the decision-making process that is governed by international law. Aesthetic theories and methods for the arts should be employed to understand the aesthetic value of natural heritage represented in those photographs, in a manner distinct from natural beauty and mindful of contemporary developments in the philosophy of environmental aesthetics.

Aesthetic methods and sources adopted for World Heritage purposes might well serve other international legal regimes that protect environmental aesthetics, acknowledging the place of aesthetic value in the mix of values that motivate states to protect the environment through international law. In the next chapter, I analyse the relevance of aesthetic philosophy to the interpretation and enforcement of the *Whaling Convention*.

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<sup>179</sup> See eg Ed Morgan, *The Aesthetics of International Law* (University of Toronto Press, 2007).

<sup>180</sup> On ‘judgement’ in this context, see Desmond Manderson, ‘Judgment in Law and the Humanities’ (2013) 1 *Revista Forumul Judecatorilor* 43.

<sup>181</sup> See above part 5.3.

## CHAPTER 6 THE ART OF IMAGE IN THE *WHALING IN THE ANTARCTIC* CASE

EXHIBIT: CAPTAIN BOOMER, *THE WHY OF THE WHALE* (2018)

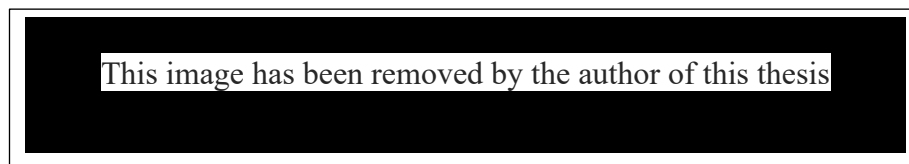


Figure 6.1: Captain Boomer, *The Why of the Whale* (Madrid 2018), sculptural installation. Photo: CiudadDistrito Acción cultural

When a beluga whale was seen off-course in England's River Thames in September 2018,<sup>1</sup> it appeared to be a case of life imitating art: just over a week before, the residents of Madrid had been bemused to find a sperm whale stranded in the Manzanares River. Only this was a model, titled *The Why of the Whale* (fig 6.1), made by the Belgian art collective Captain Boomer. The model had already been sighted in other European cities, created by the artists to disrupt city life as a critique of the city's disruption of ecology.<sup>2</sup>

For Captain Boomer, the whale is ready-made for an aesthetic rendition intended to capture both awe and concern for the natural environment. The whale image is loaded with an aesthetic history from many cultures that lends itself to metaphor. From depictions of whales in prehistoric petroglyphs in Alaska, Norway and South Korea and in ancient Greek art,<sup>3</sup> to the dramatic scenes of whaling and sensitive characterisations of whales in visual and other arts

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<sup>1</sup> Philip Hoare, 'The Lonely Thames Beluga Whale is an Anomaly – and an Omen' *The Guardian* (online 26 September 2018) <<https://www.theguardian.com/commentisfree/2018/sep/26/thames-beluga-whale-omen-changing-climate-gravesend>>.

<sup>2</sup> Captain Boomer Collective, 'The Why of the Whale' <<http://www.captainboomercollective.org/projects/whale/the-why-of-the-whale/>>.

<sup>3</sup> EJ Slijper, *Whales* tr AJ Pomerans (Hutchinson, 1962) 11-14.

seen around the world,<sup>4</sup> a composite ‘super whale’ has been cultivated in many nations as an aesthetic subject associated with other worldly powers and human sensibilities.<sup>5</sup> Captain Boomer’s model could migrate from one city to the next, a universal symbol of all that is wondrous in the natural environment and all that is at risk from human exploitation of it.

In her treatise on the international regulation of whaling, international lawyer Patricia Birnie points out that the whale has long been the subject of artistic representations.<sup>6</sup> But she might well have said that it is the subject of legal representations too.

## 1. INTRODUCTION

Photographic images of whales were used in a dispute before the International Court of Justice (‘ICJ’ or ‘the Court’) in *Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Whaling in the Antarctic)*.<sup>7</sup> The ICJ ultimately agreed with Australia that Japanese whaling in the Southern Ocean violated bans on whaling under the 1946 *International Convention for the Regulation of Whaling (Whaling Convention)*.<sup>8</sup> In the course of the proceedings, Australia presented photographs of bloody harpooned whales, while Japan submitted images of sanitised whale tissue in laboratory settings, in their submissions on the utility or otherwise of lethal methods in scientific research of whales.<sup>9</sup>

I argue that the blended character of photographs, as peddlers of truth in law and masters of construction in aesthetics, makes them curious artefacts in the assessment of the facts and laws contested in *Whaling in the Antarctic*. Yet neither the parties nor the ICJ explained the purpose of the photographs in the proceedings. In this Chapter, I show how an aesthetic understanding of the images can illuminate the legal rhetoric employed by the parties in the *Whaling in the Antarctic* proceedings and explain how the aesthetic value of whales was invoked in the parties’ submissions. For this purpose, I characterise rhetoric as a legitimate persuasive element of legal argument before the ICJ.<sup>10</sup> I rely on scholars such as Costas Douzinas and Lynda Nead in my conception of photographic images as legal rhetoric.<sup>11</sup> I argue that the aesthetic values apparent in the photographs are protected under the *Whaling Convention*. The treaty makes no express mention of aesthetic value. I have argued, however, that the aesthetic value of whales is one of the reasons the states parties adopted at least one of the bans on whaling that was at issue in the dispute – the ban or ‘moratorium’ on commercial whaling.<sup>12</sup>

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<sup>4</sup> Richard Ellis, *Men and Whales* (Knopf, 1991).

<sup>5</sup> Arne Kalland, *Unveiling the Whale: Discourses on Whales and Whaling* (Berghahn Books, 2009).

<sup>6</sup> See Patricia Birnie (ed), *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching* (Oceana Publications, 1985) 63.

<sup>7</sup> *Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Judgment)* [2014] ICJ Rep 226 (‘*Whaling in the Antarctic*’).

<sup>8</sup> *International Convention on the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) (‘*Whaling Convention*’).

<sup>9</sup> See below part 3.1.

<sup>10</sup> See eg Iain Scobbie, ‘Rhetoric, Persuasion, and Interpretation in International Law’ in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press, 2015) 61; see below part 3.3.

<sup>11</sup> Costas Douzinas and Lynda Nead ‘Introduction’ in Costas Douzinas and Lynda Nead (eds), *Law and the Image: The Authority of Art and the Aesthetics of Law* (The University of Chicago Press, 1999) 1.

<sup>12</sup> *Whaling Convention*, Schedule, clause 10(e) (‘Whaling Ban’). See ‘Verbatim Record’, International Whaling Commission, 34<sup>th</sup> Annual Meeting (19–24 July 1982) *Agenda item 6 Ending of Commercial Whaling* 72, 86.

I show how analysis of the images from the perspective of the arts can entertain matters raised in the philosophy of environmental aesthetics that are relevant to the interpretation of the *Whaling Convention*. This addresses my specific concern in the thesis about how images of the natural environment in photographs could be used to make aesthetic value meaningful in international environmental law. My linking of the photographs and rhetoric also relates to the broader question in my thesis on the implications my attention to graphic images might have for the practice of international law in general.

Below in part 2, I describe the findings of the ICJ in *Whaling in the Antarctic* in the context of the debate over commercial whaling in the International Whaling Commission. In part 3, I identify the photographs used in *Whaling in the Antarctic* and analyse their purpose in light of the rules and understandings generally applied to graphic images before the ICJ. I undertake an aesthetic analysis of the whale photographs used in the case in part 4, referencing visual art in Australia and Japan, where whalers and whales alike are revered. I conclude the Chapter with a discussion of aesthetics and the rhetorical function of photographs in proceedings before the ICJ.

## 2. ICJ DECISION IN CONTEXT

The ICJ's decision in *Whaling in the Antarctic* was a pivotal development in a long-standing debate among the parties to the *Whaling Convention* over commercial whaling. The debate began with a recommendation for a moratorium from the 1972 *United Nations Conference on the Human Environment* in Stockholm,<sup>13</sup> and coalesced around the 1982 decision of members of the IWC to place a ban or 'moratorium' on commercial whaling.<sup>14</sup> Following the ICJ's decision, Japan withdrew its consent to be taken to the Court in future whaling matters,<sup>15</sup> and resumed whaling in Antarctica under a new programme.<sup>16</sup> After a further announcement of its intention to withdraw from the treaty altogether, effective in 2019, Japan retreated to its own territorial waters to hunt whales.<sup>17</sup> In this part, I describe developments in the International Whaling Commission leading up to Japan's withdrawal from the *Whaling Convention*,<sup>18</sup> before summarising the decision of the ICJ in *Whaling in the Antarctic*. This introduces my examination in part 3 of the photographs presented by the parties in the proceedings.

### 2.1 Debate in the IWC

The unveiling of Captain Boomer's whale model in Madrid on 14 September 2018 (fig 6.1) corresponded with the final day of the 67<sup>th</sup> meeting of the International Whaling Commission (IWC) far from Spain in the city of Florianópolis, Brazil.<sup>19</sup> On that day, the parties to the *Whaling Convention* passed a resolution reaffirming 'the importance in maintaining the

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<sup>13</sup> The Action Plan for the Human Environment, rec. 33: *Report of the United Nations Conference on Human Environment*, 5-16 June 1972, UN Doc A/CONF.48/14/Rev.1.

<sup>14</sup> Whaling Ban (n12).

<sup>15</sup> *Japan's Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court 15 October 1946* (October 6, 2015).

<sup>16</sup> International Whaling Commission, *Chair's Report of the 67th Meeting*, (10-14 September 2018) ('*Chair's Report*'), annex O.

<sup>17</sup> *Whaling Convention* (n8) Japan - *Note Verbale* (26 December 2018) ('*Japan - Note Verbale*'); see <<https://www.state.gov/depositary-status-lists/>>.

<sup>18</sup> See generally Malgosia Fitzmaurice, *Whaling and International Law* (Cambridge University Press, 2015) 71.

<sup>19</sup> *Chair's Report* (n16).

moratorium on commercial whaling’.<sup>20</sup> The resolution, eponymously titled the ‘Florianópolis Declaration’, is not likely to be binding in international law.<sup>21</sup> The moratorium of which it speaks, however, is binding on parties that have not objected to it. As I explained in Chapter 3, the parties to the *Whaling Convention* agreed in 1982 to amend the treaty to set catch limits for commercial whaling at zero. Some parties to the treaty objected to the ban that would become effective in the 1985/1986 season while others withdrew from the treaty altogether.<sup>22</sup>

In its opening statement to the Florianópolis meeting, Australia observed that ‘[t]he world has changed dramatically over the 70 years since the [Whaling Convention] was first agreed. People across the world now recognise the link between healthy whale populations and healthy oceans, and the many benefits from sustainable whale watching and other eco-tourism activities.’<sup>23</sup> The UK Minister of State for Agriculture, Fisheries and Food said of the Florianópolis Declaration that it had delivered ‘a clear statement from anti-whaling nations on their vision for the future of the IWC; one that is rooted in conservation without the need for commercial or scientific whaling.’<sup>24</sup>

The endorsement of the moratorium at the IWC meeting in Florianópolis was a tin ear response to the long-time efforts of some IWC members, led by Japan, to remove the zero catch limit on commercial whaling from the *Whaling Convention*.<sup>25</sup> Following yet another failed attempt at the Florianópolis meeting to circumvent the moratorium with an amendment to the *Whaling Convention*,<sup>26</sup> Japan gave notice of its intention to withdraw as a party to the treaty effective in 2019.<sup>27</sup> Australia had been strident in its opposition to Japan’s ‘Way Forward’ initiative at the meeting, its Commissioner to the IWC Nick Gales reportedly stating that ‘the debate was not about human rights, “nor is it a debate about the important subject of global food security”, but was a “business proposition” against which there were “legitimate environmental and welfare concerns”’.<sup>28</sup>

The conflict over the moratorium on commercial whaling evident from the Florianópolis Declaration, and Japan’s ‘Way Forward’ initiative at the IWC’s meeting in 2018, has been central to the so-called ‘whale wars’. The states parties are divided over the treaty’s stated purpose of ‘ensuring the conservation of all species of whales while allowing for their sustainable exploitation’.<sup>29</sup> The divisions were poised for a legal resolution after Australia

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<sup>20</sup> International Whaling Commission, *Florianópolis Declaration on the Role of the International Whaling Commission in the Conservation and Management of Whales in the 21<sup>st</sup> Century*, Resolution 2018-5, (‘Florianópolis Declaration’) *Chair’s Report* (n16) annex F.

<sup>21</sup> See *Whaling in the Antarctic* (n7) [46].

<sup>22</sup> See *Whaling Ban* (n12).

<sup>23</sup> Senator Anne Ruston, Assistant Minister for International Development and the Pacific, Australia, *Opening Statement at the 67th Meeting of the International Whaling Commission*, *Chair’s Report* (n16) annex D.

<sup>24</sup> George Eustice, Minister of State for Agriculture, Fisheries and Food, United Kingdom, *Outcomes from the 67th meeting of the International Whaling Commission*, UK Parliament, House of Commons, Written Statement HCWS1055 (1 November 2018).

<sup>25</sup> For historical account, see Gerald Nagtzaam, *The Making of International Environmental Treaties: Neoliberal and Constructivist Analyses of Normative Evolution* (Edward Elgar, 2009) 181ff.

<sup>26</sup> Japan, *The Way Forward of the IWC - IWC Reform Proposal including a Draft Resolution and Proposed Schedule Amendment*, IWC/67/08: *Chair’s Report* (n16) 9.

<sup>27</sup> *Japan - Note Verbale* (n17).

<sup>28</sup> Commissioner Nick Gales quoted in Graham Readfearn, ‘Whaling Vote: Australia tells Japan it has Lost Argument for Killings’, *The Guardian* (online, 14 September 2018).

<sup>29</sup> *Whaling in the Antarctic* (n7) [56], based on *Whaling Convention* (n8) preamble.

complained to the ICJ that Japan's killing of whales in Antarctica violated the moratorium and other bans in the *Whaling Convention*.

## 2.2 The decision in *Whaling in the Antarctic*

In *Whaling in the Antarctic*, the ICJ considered whether Japanese whaling in the Southern Ocean complied with the *Whaling Convention*. At issue were annual whaling permits granted from 2005 by Japan under JARPA II, a research whaling programme allowing for the killing of minke, fin and humpback whales in the Southern Ocean bordering Antarctica.<sup>30</sup> The Court considered whether whaling pursuant to JARPA II was scientific whaling exempted under article VIII of the *Whaling Convention* from restrictions on whaling prescribed in the treaty's Schedule.

Article VIII allows any party to the *Whaling Convention* to 'grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research'. It further provides that such whaling 'shall be exempt from the operation of this Convention.' Under the Schedule, 'an integral part' of the treaty,<sup>31</sup> several restrictions on whaling apply to parties that have not formally objected to them.<sup>32</sup> In particular, clause 10(e) of the Schedule provides for zero catch limits for commercial whaling of all whale species – the ban on commercial whaling discussed earlier – while clause 10(d) bans factory ship whaling of certain species other than minke whales and clause 7(b) prohibits commercial whaling of all species in the Southern Ocean Sanctuary. Japan is subject to each of these restrictions.<sup>33</sup>

In *Whaling in the Antarctic*, Australia argued that Japan's whaling under JARPA II was not for purposes of scientific research within the meaning of article VIII. Lethal method – the killing of whales in order to harvest organs, tissue and other biological samples for analysis – was identified by Australia as being unnecessary for the collection of scientifically relevant information.<sup>34</sup> Japan contested this claim, producing evidence data gathered from whale organs, such as the content of stomachs, was indicative of diet or the presence of mercury from polluted seas.<sup>35</sup>

In its analysis of article VIII, the ICJ considered first whether whaling under JARPA II 'involves scientific research' and, secondly, whether it is 'for purposes of' such research.<sup>36</sup> The Court was at pains to distinguish its 'objective' review of the relationship between the means and ends of Japan's whaling in Antarctica from a review of the ends themselves.<sup>37</sup> Professing that 'it is not called upon to resolve matters of scientific or whaling policy',<sup>38</sup> the Court maintained that '[t]he stated research objectives of a [whaling] programme are the foundation of a programme's design, but the Court need not pass judgement on the scientific merit or

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<sup>30</sup> JARPA II is the abbreviation for *Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic II*.

<sup>31</sup> *Whaling Convention* (n8) art I.1.

<sup>32</sup> Whaling Ban (n12).

<sup>33</sup> Except that Japan could undertake commercial whaling of minke whales in the Southern Ocean Sanctuary if the Whaling Ban were lifted: *Whaling Convention* (n8) note to Clause 7(b).

<sup>34</sup> 'Memorial of Australia', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 9 May 2011) vol I, *List of Figures*, vii and *List of Photographs*, viii.

<sup>35</sup> 'Counter-Memorial of Japan', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 9 March 2012) vol I, various images throughout.

<sup>36</sup> *Whaling in the Antarctic* (n7) [67].

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* [69].

importance of those objectives in order to assess the purpose of the killing of whales under such a programme.’<sup>39</sup>

Japan succeeded on the first but failed on the second part of the ICJ’s analysis under article VIII. As to the first part of its assessment, the Court considered that Japan’s ‘lethal sampling of whales can broadly be characterized as “scientific research”’.<sup>40</sup> JARPA II’s four stated research objectives combined with the systematic collection of data analysed by scientists was enough to satisfy the Court in its first line of inquiry. As to the second part of its assessment, however, the Court concluded that ‘the evidence does not establish that the [JARPA II] programme’s design and implementation are reasonable in relation to achieving its stated objectives.’<sup>41</sup> In addition to addressing issues around sample sizes,<sup>42</sup> the Court expressed concerns about JARPA II’s limited analysis of non-lethal methods,<sup>43</sup> the open-ended time frame,<sup>44</sup> the limited scientific output,<sup>45</sup> and the lack of cooperation with other research institutions.<sup>46</sup>

Finding that whaling not covered by article VIII is subject to the Schedule’s restrictions on whaling,<sup>47</sup> the ICJ decided that Japan’s whaling under JARPA II was largely inconsistent with the relevant bans in the Schedule.<sup>48</sup> In granted relief to Australia, the Court ordered Japan to revoke existing permits under JARPA II and to refrain from issuing new permits under that programme.

### 3. REPRESENTATION OF WHALES BEFORE THE ICJ

In their written and oral submissions to the ICJ, the parties to the *Whaling in the Antarctic* dispute relied on a range of visual images to support their claims.<sup>49</sup> Scientific experts also incorporated visual material into their reports and oral testimony.<sup>50</sup> The visual images comprised maps, graphs and diagrams to illustrate the concepts employed in the submissions. Maps, for example, showed where the Japanese whaling was taking place,<sup>51</sup> graphs showed such things as whale meat production,<sup>52</sup> while diagrams included figurative representations of ecosystem relationships.<sup>53</sup> The submissions also included photographs of whales and whale parts. In this part 3 of the Chapter, I identify the photographs used by the parties in their submissions to the ICJ before describing the ICJ rules and practice on the use of photographs in evidence and as rhetoric.

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<sup>39</sup> Ibid [88].

<sup>40</sup> Ibid [127].

<sup>41</sup> Ibid [227]; conclusions summarised in paras [225 -226].

<sup>42</sup> Ibid [181], [195], [198]; see also ibid, [179].

<sup>43</sup> Ibid [144]; see also ibid (Ad hoc Judge Charlesworth).

<sup>44</sup> Ibid [216].

<sup>45</sup> Ibid [219].

<sup>46</sup> Ibid [222].

<sup>47</sup> Unless constituting aboriginal subsistence whaling, *Whaling Convention* (n8), schedule, cl 13.

<sup>48</sup> *Whaling in the Antarctic* (n7) [231]-[233].

<sup>49</sup> See Memorial of Australia (n34) *List of Figures*, vii; Counter-Memorial of Japan (n35) contains over 20 explanatory graphic images, most of which are identified as ‘figures’.

<sup>50</sup> Eg Statement of Mr Marc Mangel (expert called by Australia) 15 April 2013.

<sup>51</sup> Eg ‘Figure 5’, Memorial of Australia (n34) 90; Counter-Memorial of Japan (n35) 39.

<sup>52</sup> Eg ‘Figure 7’, Memorial of Australia (n34) 106; ‘Figure 3-2’, Counter-Memorial of Japan (n35) 106.

<sup>53</sup> Eg ‘Figure 5-2’, Counter-Memorial of Japan (n35) 238.

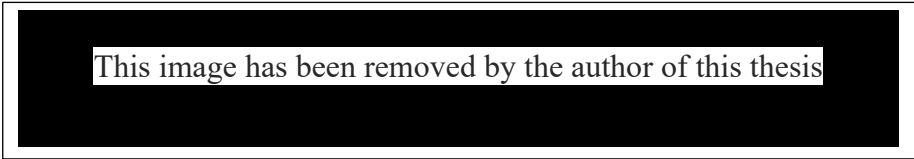


### 3.1 Photographs presented in the case

As explained in detail below, the subject-matter of the photographs proffered by the parties in *Whaling in the Antarctic* was different: Australia presented photographs of Japan's whaling while Japan submitted images of scientific applications of whale tissue.

#### 3.1.1 Australia's photographs

Australia included eight photographs of Japanese whaling in the Antarctic in its written submission to the ICJ.<sup>54</sup> The images appeared in the context of an 'overview' of Japan's whaling practices.<sup>55</sup> Australian officials had taken the photographs during 'direct observation' of Japan's whaling practices in the 2007/08 season. The text preceding the photographs explains that '[k]illing a large animal moving at high speed is difficult and the process may have a range of impacts upon the data that can be collected from the whale. These impacts include damage from the exploding grenade to the body tissues and internal organs or vomiting by the whale which empties its stomach.'<sup>56</sup>



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Figure 6.2: 'Photo 4: A harpooned whale being hauled to the side of one of Japan's whale catcher boats' 'Memorial of Australia', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 9 May 2011) vol I, 99

In the oral proceedings, Australia's images were used again in the course of counsel's description of Japan's whaling methods and the examination of an expert witness.<sup>57</sup> Australia

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<sup>54</sup> Memorial of Australia (n34) *List of photographs*, viii; 96-103.

<sup>55</sup> Ibid 88.

<sup>56</sup> Ibid [3.61], 95.

<sup>57</sup> 'Verbatim Record', *Whaling in the Antarctic* (n7), 26 June 2013 (afternoon) CR 2013/8, 11-12; 'Verbatim Record', *Whaling in the Antarctic* (n7), 27 June 2013 (afternoon) CR 2013/10, 22 (Dr Nick Gales, expert called by Australia); 'Verbatim Record', *Whaling in the Antarctic* (n7), 10 July 2013 (morning) CR 2013/19, 27 (images of two scientists).

projected its photographs on the two large screens flanking the Judges' Bench.<sup>58</sup> For one photograph (fig 6.16), Australia's legal counsel benignly identified 'the gentleman ... with the rifle' ready to shoot a whale not yet dead from the harpoon.<sup>59</sup> In the next day's hearing, a close-up image of a harpooned minke whale (fig 6.2) was described by Australia's then expert witness (later Australia's Commissioner on the IWC), Dr Nick Gales: 'You can see coming out from behind the minke whale's blowhole the harpoon head and it will be presumably bent as the rope comes through from the other side so the whale is being pulled to the bow of the ship'.<sup>60</sup> Photographs of non-lethal methods, including 'tagging', referenced in Dr Nick Gales' written statement to the Court, were also projected on the Court screens.<sup>61</sup>

### 3.1.2 Japan's photographs

Japan included its photographs in its written submission on the necessity of lethal sampling, in support of its claims of scientific endeavour. Each 'photo' was a composite of two images. The source is identified as Japan's Institute of Cetacean Research. One of the images in a composite photograph (fig 6.3) is of a scientist in a white lab coat testing indeterminate whale parts identified in the submission as 'ear plugs'.<sup>62</sup> The other image shows what is presumably the microscopic view of the ear plug tissue. Japan maintained that '[i]ndividual age is obtained by counting growth layers in the earplug which are formed in the external auditory meatus of baleen whales [...] Because of its internal nature, the only way to access the earplugs is by lethal sampling.'<sup>63</sup> Another 'photo' in Japan's Counter-Memorial (fig 6.17) combines two images to depict scientific analysis of mercury in whale muscle,<sup>64</sup> with the accompanying text explaining that the testing for pollutants in whales requires lethal sampling.<sup>65</sup>



Figure 6.3: 'Photo 1 Earplug analysis' (attributed to Institute of Cetacean Research), Counter-Memorial of Japan, *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 9 March 2012) vol I, 171

<sup>58</sup> 'Audio-Visual Record', *Whaling in the Antarctic* (n7), 26 June 2013 (afternoon), available at <<http://www.icj-cij.org/en/multimedia/56e93a6188fa3fe1450a77d2>> (time 01:50) and 'Audio-Visual Record', *Whaling in the Antarctic* (n7), 27 June 2013 (afternoon) <<http://www.icj-cij.org/en/multimedia/56e93a6188fa3fe1450a77d2>> (time 00:23).

<sup>59</sup> Verbatim Record CR 2013/8 (n57) 60 (Philippe Sands QC).

<sup>60</sup> Verbatim Record CR 2013/10 (n57) 22 (Dr Nick Gales).

<sup>61</sup> Ibid; see 'Statement by Dr Nick Gales', *Whaling in the Antarctic* (n7) (15 April 2013), 32-3.

<sup>62</sup> 'Photo 1 Earplug analysis', Counter-Memorial of Japan (n35) 171.

<sup>63</sup> Ibid.

<sup>64</sup> 'Photo 2: Analysis of mercury contained in muscle', *ibid*, 177.

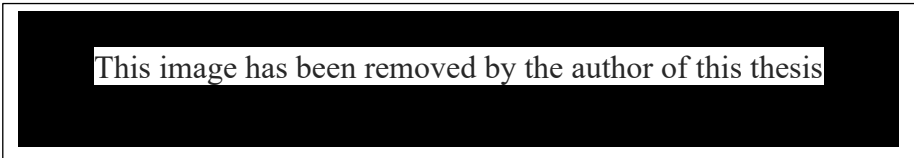
<sup>65</sup> Ibid.

In the course of oral submissions, Japan presented a photographic montage of scientists purportedly working on board a whaling vessel, stating ‘Mr. President, I invite you to look at these photos. They show what the researchers do on board. Japan considers these activities to be scientific, but Australia does not share this point of view.’<sup>66</sup> The montage was included in the Judge’s folder but neither the provenance of the images, nor the procedural grounds upon which the montage was included, are stated in the publicly available records of the proceedings.

Elsewhere in its written submissions, Japan references but does not reproduce photographs of incidents in which ships belonging to the anti-whaling organisation Sea Shepherd Conservation Society ‘rammed’ Japanese whaling vessels.<sup>67</sup> In the oral proceedings, a photograph of two ships was projected on the court screens by counsel for Japan, described as showing a Sea Shepherd ship ‘attacking’ a Japanese scientific research vessel.<sup>68</sup> Counsel referred to the image in the context of Japanese claims that the reduced whale catch was due to the interference from Sea Shepherd as opposed to declining whale meat sales in Japan. It is not clear if the projected image was one of the photos referenced in the footnotes of Japan’s Counter-Memorial because the links to the website provided no longer function.

### 3.1.3 The purpose of the photographs

In its written decision, the ICJ reproduced one figure (fig 6.4) that had been included in Japan’s written submission to illustrate its process for determining whale catch sample size.<sup>69</sup> There was, however, no explanation for why this graphic image – one figure submitted by Japan out of several figures and photographs submitted by both parties – merited inclusion in the decision.<sup>70</sup> Indeed, there is no formal account of the relevance of any of the graphic images, photographic or otherwise, to the proceedings or the Judgment.



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Figure 6.4: ‘Figure 5-4. Necessary annual sample sizes for respective research items under JARPA II, which was calculated by the established statistical procedures’, *Whaling in the Antarctic* (n7) [182]

<sup>66</sup> See ‘Verbatim Record’, *Whaling in the Antarctic* (n7), 3 July 2013 (morning) CR 2013/13, 14; ‘Verbatim Record’, *Whaling in the Antarctic* (n7), 4 July 2013 (afternoon) CR 2013/16, 28 (court tr from French).

<sup>67</sup> Counter-Memorial of Japan (n35) notes 729 and 731.

<sup>68</sup> ‘Verbatim Record’, *Whaling in the Antarctic* (n7), 2 July 2013 (afternoon) CR 2013/12 [75] and [82].

<sup>69</sup> *Whaling in the Antarctic* (n7) [182] reproduced from Counter-Memorial of Japan (n35), 261 (attributed to Institute of Cetacean Research).

<sup>70</sup> Cf Peter Goodrich, ‘Imago Decidendi: On the Common Law of Images’ (2017) 1(1) *Art and Law* 1.

In the next sections, I consider the possible characterisations of the photographs in the proceedings as either evidence or rhetoric. I explain the possible status of the photographs as evidence with reference to ICJ rules and practices; I characterise the rhetorical nature of the photographs as a legitimate function of persuasive legal argument.

### 3.2 Photographs as evidence

Presented in *Whaling in the Antarctic* in the context of factual submissions about lethal methods, the photographs could have been relevant to the proceedings as evidence. Neither the *Statute* nor the *Rules* of the International Court of Justice make explicit mention of visual images or give directions on how they relate to legal process.<sup>71</sup> As a matter of practice, however, visual images such as maps, audio-visual material and photographs have been treated as evidence, received on the same basis as a ‘document’,<sup>72</sup> a term which is otherwise understood to refer to written materials.<sup>73</sup> The International Court of Justice’s apparent acceptance of the photographs in *Whaling in the Antarctic* is consistent with a long history of receiving graphic images as evidence in other cases.<sup>74</sup> In its first contentious case initiated in 1947, photographs of British ships destroyed by mines in the Corfu Channel were submitted in the pleadings.<sup>75</sup> Often presented by parties to prove territorial or maritime boundaries,<sup>76</sup> photographs have also been used to support claims of damage to land.<sup>77</sup> Written claims of genocide have been supported by photographic images of places, events and people’s injuries.<sup>78</sup> Photographs submitted by the parties have also been reproduced by the Court in its written judgments (fig 6.5).

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<sup>71</sup> *Statute of the International Court of Justice* (‘ICJ Statute’) and International Court of Justice, *Rules of Court* (adopted 14 April 1978) (‘ICJ Rules’). This Chapter does not extend to practices with image in other international adjudicatory fora, see eg Chittharanjan F Amerasinghe, *Evidence in International Litigation* (Brill, 2005) 394.

<sup>72</sup> See A Aguilar Mawdsley, ‘Evidence Before the International Court of Justice’ in Ronald St John Macdonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff, 1993) 547.

<sup>73</sup> ‘Document’ is not defined in the *ICJ Statute* or *ICJ Rules*, (n71). Documentary evidence generally includes written materials such as treaties, official records and diplomatic communications: Malcolm N Shaw, ‘Documents in Support’, in *Rosenne’s Law and Practice of the International Court: 1920-2015* (Brill Nijhoff, 2016).

<sup>74</sup> See Anna Riddell and Brendan Plant, *Evidence Before the International Court of Justice* (British Institute of International & Comparative Law, 2009) 283; Eduardo Valencia-Ospina ‘Evidence before the International Court of Justice’ (1999) 1(4) *International Law FORUM du Droit International* 202, 204.

<sup>75</sup> ‘Memorial of the United Kingdom’, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* (International Court of Justice, 30 September 1947) annex 8 [16].

<sup>76</sup> See eg *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain) (Judgment)* [2001] ICJ Rep 40, [109]; *Frontier Dispute (Benin/Niger) (Judgment)* [2005] ICJ Rep 90, [40]; see also Aguilar Mawdsley (n72) 547.

<sup>77</sup> See eg ‘Memorial of the Republic of Nauru’, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, (International Court of Justice, vol 1, April 1990) annex [96], [200]-[201], [211]-[213]; ‘Memorial of The Republic of Hungary’, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, (International Court of Justice, vol 1, 2 May 1994), annex 2, 492; note also ‘Memorial of Slovak Republic’, *ibid*, (International Court of Justice, vol 1, 2 May 1994) xi.

<sup>78</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, [52]; see also ‘Counter-Memorial of the Federal Republic of Yugoslavia’, *ibid*, (International Court of Justice, 23 July 1997) 1118.



Figure 6.5: *Kasikili/Sedudu Island (Botswana v Namibia) (Judgment)* [1999] ICJ Rep 1045, 1069

The ready acceptance of visual images by the ICJ stems from the principle of free admissibility of evidence.<sup>79</sup> Owing its jurisdiction to the voluntary submission of states, the Court accepts all evidence presented in the written pleadings of the parties.<sup>80</sup> Allowing the images to be submitted to the Court does not necessarily mean, however, that it will take them into account in its Judgment. The ICJ is more discerning in its *evaluation* of the evidence than in its acceptance of it. It appears from those cases in which the Court has explained the basis for its evaluation that the ICJ assesses relevance and accords different probative value to different categories of evidence.<sup>81</sup> Probative value has been identified as generally depending on ‘the reliability and neutrality of the source of such evidence’.<sup>82</sup> The Court has explained that it will ‘treat with caution’ evidentiary materials that have been prepared specifically for the purposes of a case and ‘materials emanating from a single source’.<sup>83</sup>

Imagistic evidence has not fared well in the ICJ’s evaluations. Maps are generally considered to be circumspect or false: that maps were historically unreliable and self-serving has justified caution in their evaluation by the Court in the past.<sup>84</sup> Likewise, audio-visual materials have

<sup>79</sup> See Juan José Quintana, *Litigation at the International Court of Justice: Practice and Procedure* (Brill Nijhoff, 2015) 385; Riddell and Plant (n74) 152; Aguilar Mawdsley (n72) 533-4, 539.

<sup>80</sup> Note *ICJ Statute* (n71) art 43(2) (supporting documentation) and art 52 (power to refuse further evidence).

<sup>81</sup> See Robert Kolb, *Elgar Companion to the International Court of Justice* (Edward Elgar, 2014) 314; Riddell and Plant (n74) 234. Visual evidence is sometimes ‘demonstrative or real evidence’: Quintana (n79) 426.

<sup>82</sup> Markus Benzing, ‘Probative value’ in Andreas Zimmermann, et al (eds), *Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2nd ed, 2012) 1267, [114].

<sup>83</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ Rep 168, [61]; *Application of the Genocide Convention* (n78) [213].

<sup>84</sup> See eg *Frontier Dispute (Burkina Faso/Republic of Mali) (Judgment)* [1986] ICJ Rep 554, [61]; *The Temple of Preah Vihear (Cambodia v Thailand) (Judgment)* (Merits) [1962] ICJ Rep 6 (Judge Moreno Quintana), 70-71;

typically been afforded little if any weight. Particular scrutiny of the authenticity and purpose for which audio-visual material was made has led the Court to downgrade the relevance of such evidence in its judgement of the facts.<sup>85</sup> There is less judicial comment from which to assess the Court's approach to photographic images. However similar considerations of relevance and probative value would likely apply.<sup>86</sup> ICJ *Practice Direction IXquater* explains when audio-visual or photographic material not previously included in the written submissions may be allowed at a later stage in the proceedings, requiring for example that the source and circumstances of its making be specified.<sup>87</sup>

Whether the ICJ in *Whaling in the Antarctic* considered any of the images submitted by the parties in terms of evidence is not apparent from the Judgment: it is not uncommon for the Court's evaluation of evidence to go unstated.<sup>88</sup> On the last day of the oral proceedings in *Whaling in the Antarctic*, counsel for Japan made specific mention of the Court's *Practice Direction IXquater* as preventing him from projecting certain images in court.<sup>89</sup> Yet the Court had previously acquiesced to the projection of visual images during oral submissions, including photographs not previously included in written submissions, providing no insight into the Court's treatment of the images.<sup>90</sup>

The photographs in the *Whaling in the Antarctic* proceedings would nevertheless appear to have little if any evidentiary value. Australia's photographs were presented in its written submissions with statements about lethal method being counter-productive to the collection of useful data. Lethal method, it claimed, can damage body tissue and organs and empty stomach contents. The photographs show some damaged tissue but they do not show damage to organs specifically required for scientific analysis. Instead Australia's photographs show that whales were killed by harpoon, a fact that is not denied by Japan. The evidentiary value of Japan's photographs is similarly impugned. They were submitted in the written submissions with statements claiming that lethal method is necessary for the collection of data useful to the aims of the JARPA II programme. The photographs show a technical process. They do not prove that the tissue of whales caught by lethal method under the JARPA II programme was used in that technical process or that it generated data relevant to scientific analysis.

Presumably aware of the flawed nature of the photographs as evidence, the parties might have contemplated a broader purpose for the images they employed. They might, for example, have relied on the photographs as a form of legal rhetoric,<sup>91</sup> enabling their arguments as to the scientific merits, or otherwise, of lethal methods in the research of whales.

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*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Judgment)* [2015] ICJ Rep. 665. See Riddell and Plant (n74) 256; Markus Benzing, 'Maps' in Zimmermann (n82) 1271, [128].

<sup>85</sup> See Riddell and Plant (n74) 287-8.

<sup>86</sup> The Court has requested the origin of photographs and of other visual material presented during oral proceedings, see eg *Application of the Genocide Convention* (n78) 52.

<sup>87</sup> International Court of Justice, *Practice Direction IXquater* (11 April 2013).

<sup>88</sup> Markus Benzing, 'Assessment and evaluation of evidence' in Zimmermann (n82) 1264, [103]. See generally Siyuan Chen, 'Re-Assessing the Evidentiary Regime of the International Court of Justice: A Case for Codifying Its Discretion to Exclude Evidence' (2015) 13 *International Commentary on Evidence* 1.

<sup>89</sup> See 'Verbatim Record', *Whaling in the Antarctic* (n7) 16 July 2013 (morning) CR 2013/23, 17 (M. Alain Pellet).

<sup>90</sup> See eg photographic montage of scientists at work in Verbatim Record CR 2013/13 (n66) 14 and Verbatim Record CR 2013/16 (n66) 28.

<sup>91</sup> See generally Austin Sarat (ed), *Rhetorical Processes and Legal Judgments: How Language and Arguments Shape Struggles for Rights and Power* (Cambridge University Press, 2016). Cf Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan, 1987).

### 3.3 Photographs as rhetoric

In practice, ICJ proceedings are dispassionate, typically devoid of ‘drama’ and emotion.<sup>92</sup> The rules and practice of the International Court of Justice restrict the length and form of written and oral submissions,<sup>93</sup> possibly discouraging ‘heated debate and pungent polemics’ and instead fostering a ‘courteous and business like atmosphere maintained throughout.’<sup>94</sup> To acknowledge rhetoric as a function of legal argument, and still further to characterise graphic image as a rhetorical device, might be a step too far for a habitually dogmatic practitioner of international law. But from a perspective of aesthetic theory, there can be no practice of law without rhetoric.<sup>95</sup> Photographs can in this sense be used in the service of persuasive argument to posit meanings for law – meanings that can underscore or augment written and verbal arguments. In the clinical environs of the ICJ, I suggest that graphic images can serve as a rhetorical device in a very practical sense, adding persuasive significance to legal argument that is otherwise expected to be unsentimental.<sup>96</sup>

Rhetoric for my purposes is the ‘art’ of persuasion in legal argument or the ‘art’ in legal proceedings that contemplates style and performance of written or verbal language. I extend rhetoric to the style and performance of graphic images, including representational images such as photographs. Common law theorist James Boyd White describes rhetoric from the perspective of writing and reading law but,<sup>97</sup> as discussed in Chapter 4 of this thesis, critical legal scholars such as Costas Douzinas and Lynda Nead have interrogated legal rhetoric in terms of ‘image’, which can include graphic images.<sup>98</sup>

By ‘rhetoric’, I do not mean to invoke the rhetoric that is commonly associated with the meta-narratives of international law and politics.<sup>99</sup> I understand rhetoric in a more modest way, as the ‘alchemy’ of legal argument,<sup>100</sup> the advocate’s deft use of image – verbal images in speech or graphic images displayed – to persuade. My characterisation of rhetoric concerns persuasive argument elucidating rather than obfuscating the law.<sup>101</sup> It is for my purposes craft not bombast. This is arguably a classical conception of rhetoric as power in argument before a

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<sup>92</sup> Eg Arthur Eyffinger, *The International Court of Justice* (Kluwer Law International, 1996), 136-7. Cf Judge Rosalyn Higgins, ‘Respecting Sovereign States and Running a Tight Courtroom’ (2001) 50(1) *International and Comparative Law Quarterly* 121, 130. Cf The Hon Michael Black AC QC, ‘The Tasmanian Dam Case: An Advocate’s Memoir’ (2015) 24 (1) *Griffith Law Review* 22.

<sup>93</sup> Quintana (n79) 355.

<sup>94</sup> Eyffinger (n92) 136-7.

<sup>95</sup> See eg Ravit Reichman, ‘Narrative and Rhetoric’ in Austin Sarat, Matthew Anderson and Cathrine O Frank (eds), *Law and the Humanities* (Cambridge University Press, 2010) 377. See also Scobbie (n10); Birju Kotecha, ‘The Art of Rhetoric: Perceptions of the International Criminal Court and Legalism’ (2018) 31(4) *Leiden Journal of International Law* 939.

<sup>96</sup> Cf Gerry Simpson, ‘The Sentimental Life of International Law’ (2015) 3(1) *London Review of International Law* 3.

<sup>97</sup> See James Boyd White, ‘Imagining the Law’ in Austin Sarat and Thomas R Kearns (eds), *Rhetoric of Law* (University of Michigan Press, 1994) 29.

<sup>98</sup> Douzinas and Nead (n11), 8-9.

<sup>99</sup> See eg Martti Koskeniemi, ‘The Politics of International Law’ (1990) 1 *European Journal of International Law* 4.

<sup>100</sup> See Barbara Johnson, ‘The Alchemy of Style and Law’ in Sarat and Kearns (n97) 261.

<sup>101</sup> See eg discussion of contrasting Platonic and Aristotelian traditions of rhetoric in Austin Sarat and Thomas R Kearns, ‘Editorial Introduction’ in Sarat and Kearns (n97) 7.



court,<sup>102</sup> where I position graphic image as exposition not exhibition. Immi Tallgren calls it simply the power of images.<sup>103</sup>

I distinguish my characterisation of image as rhetoric from dogmatic characterisations of image as ‘evidence’ of fact. This is not to claim that rhetoric is irrelevant to the advocate’s presentation of evidence. Rather, I maintain that graphic image can also serve a rhetorical function apart from the evidence of fact, in the presentation of the law.

The rhetorical purchase of the photographs submitted by Australia was indirectly acknowledged in a subsequent domestic legal proceeding. The Australian Government denied a freedom of information request for footage of Japanese whaling on the basis that it would ‘harm relations with Japan’.<sup>104</sup> Overturning the decision, the review authority found that the photographs submitted to the ICJ by Australia in *Whaling in the Antarctic* had already put the imagery in the public domain.<sup>105</sup> However, advocates appearing before the ICJ might be loath to characterise images as rhetoric if the images can be admitted as evidence but function as rhetoric. There is otherwise a risk that judges of the ICJ would dismiss them as a distortion of the law,<sup>106</sup> or as a legitimate but ineffective rhetorical device.

Ultimately, I argue that there is no formal account of graphic image in ICJ practice that explains the parties’ use of the photographs in the *Whaling in the Antarctic* proceedings. The photographs are, I explained earlier, not evidence but nor are they, in my analysis, necessarily irrelevant simply by virtue of being graphic images. In the next part, I use aesthetic method to illuminate a rhetorical function for the photographs. I situate the photographs in visual art in Australia and Japan to analyse the different ways they engage and disengage an aesthetic appeal of whales that is relevant to the parties’ claims in the *Whaling in the Antarctic* dispute. While legal scholars such as Boyd White promote an understanding of verbal images in words and speech of legal argument as rhetoric, I attend to the photographic images as an object for rhetorical analysis.

#### 4. REPRESENTATIONS OF ART IN THE PHOTOGRAPHS

Australia and Japan have a rich history of representing whales in visual art. As demonstrated below, an analysis of the photographs submitted by the parties in the *Whaling in the Antarctic* proceedings in light of select visual artworks representing whales in Australia and Japan, from the 19th to the present century, reveals aesthetic and other values of whales relevant to the depictions in the photographs. The aesthetic method adopted here is one of several strategies for analysing graphic images that was discussed in Chapter 4.<sup>107</sup> I use aesthetic methods relevant to visual art but I take account also of the philosophy of environmental aesthetics. The field of environmental aesthetics addresses the aesthetic value of whales as an animal in the

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<sup>102</sup> See generally Michael H Frost, *Introduction to Classical Legal Rhetoric: A Lost Heritage* (Routledge, 2016).

<sup>103</sup> Immi Tallgren, ‘Come and See? The Power of Images and International Criminal Justice’ 17 *International Criminal Law Review* (2016) 259. See also Peter Rush and Maria S Elander, ‘Working through the Cinematography of International Criminal Justice: Procedures of Law and Images of Atrocity’ (2018) 6 *London Review of International Law* 17.

<sup>104</sup> *Sea Shepherd Australia and Department of Immigration and Border Protection (Freedom of information)* [2017] AICmr 48 (23 May 2017).

<sup>105</sup> *Ibid.*

<sup>106</sup> See below part 5.2.

<sup>107</sup> See Jerrold Levinson, ‘Philosophical Aesthetics: An Overview’ in Jerrold Levinson (ed), *The Oxford Handbook of Aesthetics* (Oxford University Press, 2003) 3. See Chapter 4, part 2.3.

natural environment as opposed to the aesthetic value of the artistic representations of whales. The role of art in understandings of environmental aesthetics concerning wild animals has been acknowledged in aesthetic philosophy,<sup>108</sup> a qualification to the position of those philosophers of environmental aesthetics who maintain a clear division in the aesthetic appreciation of the environment as opposed to the arts.<sup>109</sup>

#### 4.1 Australia's representations of whales in art

From the killing of the first whale off the Australian coast by British whalers in October 1791,<sup>110</sup> to the processing of the last whale at the Western Australian Cheynes Beach Whaling Company in 1978,<sup>111</sup> the image of whales in Australia has found artistic form in a massive and mystical creature of the sea, once to be conquered, now to be revered.<sup>112</sup> By the 1970s, humane considerations came to surpass the waning economic benefits of whaling, leading then Prime Minister Malcolm Fraser to announce the end to whaling in Australia by the close of that decade in the following terms:

There is a natural community concern about an activity which threatens the extinction of any species, particularly when it is directed against a species as special and intelligent as the whale and where there is a fear that the continued existence of these special forms of wildlife are threatened by continued exploitation. [...]The harpooning of these mammals is offensive to many people who regard killing them as inconsistent with the ideals of mankind and without serving any valid economic purpose in mitigation.<sup>113</sup>

Jonathan Delafield Cook's 12-metre-long charcoal drawing of a sperm whale in 2013 depicts what was for the Australian Prime Minister a 'special and intelligent' mammal (fig 6.6). Seemingly suspended in time and space, this delicate whale image goes beyond the *a-situ* representations of 18<sup>th</sup> century natural historians (fig 6.7) with the sense of wonder and serenity it invokes, its individual markings, the scars and scratches of a life at sea, its gaze. The work's arresting scale recalls the actual size of the animal itself. The treatment of whales by humans has been described as a marker of a civilised nation and Delafield Cook's portrayal might well inspire a beneficent attitude towards all species and their habitats.<sup>114</sup> His work suits former leader of the Australian Greens party Bob Brown's understanding of whales as 'mysterious ... unthreatening, amiable or technologically innocent'.<sup>115</sup>

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<sup>108</sup> Emily Brady, 'Aesthetic Value and Wild Animals' in Martin Drenthen and Jozef Keulartz (eds), *Environmental Aesthetics: Crossing Divides and Breaking Ground* (Fordham University Press, 2014) 188, 192 and 199.

<sup>109</sup> See Chapter 2, part 2.3.

<sup>110</sup> 'Letter from Thomas Melville, Captain of Ship Britannia, to Sam. Enderby & Sons, 22 November 1791,' extracted in WJ Dakin, *Whalemen Adventurers: The Story of Whaling in Australian Waters and Other Southern Seas Related thereto from the Days of Sails to Modern Times* (Sirius Books, 1963) 9-11.

<sup>111</sup> See Ellis (n4) 104.

<sup>112</sup> See Kalland (n5) 44. See eg Dakin (n110); Ellis (n4).

<sup>113</sup> Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 4 April 1979, Ministerial Statement 'Whales and Whaling' (Prime Minister Malcolm Fraser).

<sup>114</sup> See Kalland (n5) 18 and 133. See also Sam Vincent, *Blood & Guts: Dispatches from the Whale Wars* (Black Inc, 2014) 40, 136, 193 and 196.

<sup>115</sup> Bob Brown, Letter to the 120 Sea Shepherd Crew in the Southern Ocean, 4 February 2013, available online at <<https://www.facebook.com/Bob.Brown.Foundation/posts/415222831898940>>.



Figure 6.6: Jonathan Delafield Cook, *Sperm Whale II*, 2013, charcoal on primed linen 200x1200cm. Source: Olsen Gallery

Philosopher of environmental aesthetics, Emily Brady, has considered the nature of aesthetic value as it applies to wild animals, applying by analogy some of the theories developed for visual art to understand human responses to the expressiveness of wild animals.<sup>116</sup> She also contemplates the symbolic associations of wild animals as a cultural influence in aesthetic appreciation. Brady would likely characterise Delafield Cook's rendition of the sperm whale, and the political understandings of whales as 'special and intelligent',<sup>117</sup> as related to certain features of whales.<sup>118</sup> This might include their expressive qualities – such as their movement, their sounds and their eyes – as a semblance of human expression.<sup>119</sup>

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<sup>116</sup> Brady (n108); see also Holmes Rolston III, 'Beauty and the Beast: Aesthetic Experience of Wildlife' in Daniel J Decker and R Gary Goff (eds), *Valuing Wildlife: Economic and Social Perspectives* (Westview Press, 1987) 187; Glenn Parsons, 'The Aesthetic Value of Animals' (2007) 29 *Environmental Ethics* 151; Ned Hettinger, 'Animal Beauty, Ethics, and Environmental Preservation' (2010) 32(2) *Environmental Ethics* 115. Cf Glenn Parsons and Allen Carlson, *Functional Beauty* (Oxford University Press, 2008).

<sup>117</sup> Ministerial Statement (n113).

<sup>118</sup> Also 'mysterious ... unthreatening, amiable or technologically innocent', Brown (n115).

<sup>119</sup> Brady (n108).

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Figure 6.7: Pierre Joseph (Abbé) Bonnaterre, 1789, hand coloured copperplate engraving from *The Encyclopédie Méthodique par ordre des matières* [Methodical Encyclopedia by Order of Subject Matter]. Source: Vasari Gallery

The butchering of the mammal with the harpoon head seen in Australia's fourth photograph (fig 6.2) would be jarring, possibly reprehensible, to a viewer more inured to a Delafield Cook-like presentation of whales (fig 6.6). In its eighth photograph (fig 6.8), Australia shows a whale being dragged up the blood-soaked slipway of the whaling vessel, the black ribbed hull of the ship a humpback's underbelly, the slipway a ravenous mouth. The photographs invite judgement on the ethical and aesthetic dimensions of killing whales, relying on the aesthetic of the whale as 'special and intelligent' to impugn Japan's claims that its whaling is for purposes of scientific research. This is the same aesthetic sensibility discussed at the beginning of this Chapter that Captain Boomer invoked with its whale model in the Manzanares River (fig 6.1).

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Figure 6.8: 'Photo 8: A harpooned whale being hauled up the stern slipway of Japan's factory ship, the Nisshin-Marui' in 'Memorial of Australia', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 9 May 2011) vol I, 103

But Delafield Cook's beneficent whale is a relatively recent contribution to artistic portrayals of whales in Australian waters. From the industry's beginnings in Australia, the legacy of European accounts of whales and whaling in art and literature imbued the art of Europeans in Australia, from illustrated logbooks and scrimshaws to large-scale paintings.<sup>120</sup> Nineteenth-century British-born whaler and artist Oswald Brierly developed significant artistic accounts of Australia's whaling. Unlike JWT Turner, whose dramatic British whaling scenes were likely based on depictions from natural history sources,<sup>121</sup> Brierly's elaborate oil paintings command particular authority, drawing on his first-hand experience of whale hunts documented in his 'reminiscences' of whaling in colonial Australia. His recollections of the fear and courage inspired by the whale hunt are expressed in his 1867 painting *Whalers in Twofold Bay, New South Wales* (fig 6.9).

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<sup>120</sup> This Chapter does not address images of whales by Indigenous peoples in Australia, or the participation of Indigenous people in post-settlement whaling in Australia. See further Danielle Clode, *Killers in Eden: The True Story of the Killer Whales and their Remarkable Partnership with the Whalers of Twofold Bay* (Allen & Unwin, 2002) 151. See also John Newton, *A Savage History: Whaling in the Pacific and Southern Oceans* (NewSouth, 2013) 40.

<sup>121</sup> See Alison Hokanson, 'Turner's Whaling Pictures' 73(4) *The Metropolitan Museum of Art Bulletin* (2016) 1, 17.

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Figure 6.9: Oswald Brierly, *Whalers of Twofold Bay, New South Wales*, 1867, watercolour. Source: Art Gallery of New South Wales

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Figure 6.10: '1910: Old Tom, swimming alongside a whaling boat that is being towed by a harpooned whale (out of frame to the right). A whale calf can be seen between Old Tom and the boat. Still from the documentary 'Whale chase in Twofold Bay' by C.E. Wellings & C.B. Jenkins, unfortunately now lost.' Source: Eden Community Site

Brierly's works depict a fervent heyday of whaling in Australian waters where '[l]ike gold-seeking, [whaling] gripped its men to the exclusion of all else.'<sup>122</sup> Danger and awe combined in the perfect subject for the Romantic painter. Brierly recalled: 'I shall never forget the new & sickening sensation of finding the whole boat suddenly lifted out of the water by the rising back of the whale, and the sliding gliding helplessly slipping motion of the boat as it shot down

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<sup>122</sup> Dakin (n110) 11.

the back of the monster under us.’<sup>123</sup> This whaler’s sentiment would persist in Australia’s endemic whale tales and imagery for decades to come. The infamous Old Tom, an orca whale that reputedly assisted the whalers in Twofold Bay by herding baleen whales within reach of the harpoons in exchange for the hunted whales’ lips and tongues. Old Tom was Australia’s own ghoulish twist on a whale myth celebrated in the 1910 documentary ‘Whalechase in Twofold Bay’ (fig 6.10).<sup>124</sup>

Yet the daring-do of the whale hunt seen in the 19<sup>th</sup> century Australian paintings of Brierly and others is notably absent from the graphic scenes depicted in the whale photographs submitted by Australia in the *Whaling in the Antarctic* proceedings (eg fig 6.2). Gone are the large-scale beasts against small-scale whalers in thrashing seas. Instead, in Australia’s images, the dying but not yet dead mammals are diminished against the enormous ships that tow them from the water. Blood does not gush or spray, it ekes in a slow and presumably painful death that is inhumane and unethical and wholly inconsistent with aesthetic representations of whales in Australia today. Australia’s photographs undo the legacy of whaling bravado in its aesthetic history with the close image of the gored whale (fig 6.2) and the bloody carcass dragged away for dissection (figs 6.8).

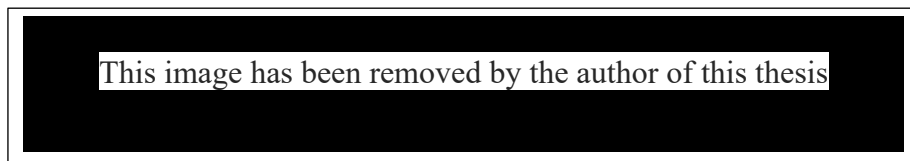


Figure 6.11: John Skinner Prout, *Old Whaling Station*, 1874, engraving done by Edward Paxman Brandard.  
Source: National Library of Australia

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<sup>123</sup> Oswald Brierly, 'The Cetacea or Reminiscences of the Sea' 1800s, manuscript cited by Australian Art Department, 'Sir Oswald Brierly: *Whalers of Twofold Bay, New South Wales*', (Art Gallery of New South Wales, 2004) <<https://www.artgallery.nsw.gov.au/collection/works/6294/>>.

<sup>124</sup> Dakin (n110) 155; see also Clode (n120) 8 and 64.





Figure 6.12: Rick Amor, *The Whale*, 1993, etching. Source: National Gallery of Australia

It was not all blood and courage in 19<sup>th</sup> century Australian representations of whaling. British artist John Skinner Prout portrayed a more desolate Australian whaling image in his 1874 print ‘Old Whaling Station’ (fig 6.11). Against the backdrop of a rugged Tasmanian skyline, the bleached whale skull abandoned in the shallows of calm water is far removed from the drama of skiffs on turbulent high seas, thrashing beasts and bloody spray of the whale hunt depicted by Brierly and others. Nor is this a stranded whale carcass, such a curiosity that whale skeletons would eventually become a staple of natural history museums.<sup>125</sup> This is the skull of a dismembered whale, the diminished and spent remains of the great creature that once was, abandoned on a remote shore. Skinner Prout’s serene yet sinister image is perhaps a portentous comment on the industry’s decline, a meditative musing on an exhausted resource, no longer flesh and blood, just bone, sharp and angular like the inanimate rocks and barren mountains around it.

The whale skull would reappear, over a century later, in contemporary Australian artist Rick Amor’s 1993 print ‘The Whale’ (fig 6.12). It was around this time, in 1992, that Australia had recognised a state of global environmental insecurity with its signing of two major international treaties addressing climate change and the protection of biodiversity.<sup>126</sup> With the foreboding clouds above and rising waters below, Amor’s whale skull could be seen to carry a significant message, the fate of the endangered mammal species a warning for humanity.

It is the futility and desolation of the works by Skinner Prout and Amor – over a century apart – that Australia captures in its photographs submitted to the ICJ.

<sup>125</sup> The ‘Ostend Whale’ is purportedly the first touring whale skeleton: Ellis (n4) 371-2.

<sup>126</sup> *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) (Australia signed 4 June 1992 and ratified 30 December 1992); *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) (Australia signed 5 June 1992 and ratified 18 June 1993).

#### 4.2 Japanese art on whales

Ironically, Japan's history of artistic representations of whales and whaling supports a claim of respect for whales in death (eg fig 6.13). In contrast to Australia's history of post-settlement whaling with harpoons, Japanese whalers practised artisanal whaling using nets over several centuries before expanding to modern whaling with mechanised harpoons in the early twentieth century.<sup>127</sup> Whales were predominantly hunted for their meat but modern whaling techniques saw them also processed for oil.<sup>128</sup> The Buddhist prohibition on the consumption of meat was avoided by naming whales 'brave fish' (isana) and, later, 'big fish' (kujira).<sup>129</sup> The sacrifice of a whale's life was nevertheless the subject of sacred rituals, with chants and dances an important feature of the whaling seasons.<sup>130</sup> Upon the death of a hunted whale, whalers would 'chant three times "May its soul rest in peace," and express their thanks to god and Buddha in a hymn for the capture of the most prized and great right whale.'<sup>131</sup>

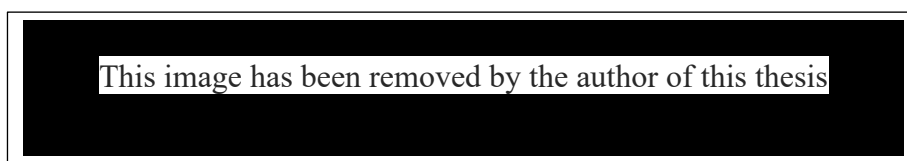


Figure 6.13: Katsushika Hokusai, *Whaling Scene on the Coast of Gotō*, ca 1830, woodblock print. Source: Visipix

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<sup>127</sup> Ellis (n4) 266-7. See also Arne Kalland and Brian Moeran, *Japanese Whaling: End of an Era?* (Curzon, 1992).

<sup>128</sup> Ellis, *ibid.*

<sup>129</sup> *Ibid* 82.

<sup>130</sup> *Ibid* 87. See also Kalland (n5) 155.

<sup>131</sup> Yomada Yosei, *Yogiotoru Eshi* [Pictures of Whaling] 1829, cited in Ellis (n4) 86; see also Vincent (n114) 124.

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Figure 6.14: Utagawa Kuniyoshi, *Whaling Scene at Goto, Hirado or Kishu*, ca 1840, woodblock print. Source: New Bedford Whaling Museum

Associated with religious beliefs, Japan's artistic depictions of whales through history are complex and varied. Buddhist-inspired understandings of whales prevalent in Japan honour and celebrate the life of whales. Shrines and monuments are dedicated to whales in Japan's coastal whaling communities.<sup>132</sup> Nineteenth-century Japanese art celebrates the whale hunt in much the same way as Brierly and other European artists of that era. The ingenuity and industry of whalers is depicted in the works of Hokusai (fig 6.13), Kuniyoshi (figs 6.14 and 6.15), Koson and other *ukiyo-e* masters exploring landscape and legend through painting and woodblock prints in the 1800s.<sup>133</sup> The other-worldly creatures are shown overcome at sea or dissected near to shore.

Whales are also a significant feature of Japanese folklore, with whale protagonists appearing in stories of courage and adversity. In Utagawa Kuniyoshi's woodblock print *Miyamoto Musashi Kills a Great Whale* (1847-48) (fig 6.15), a famed Japanese swordsman rides on the back of a whale performing the *ken kiri* or lancing of the whale. In real life, this would occur only after the whale had been weakened by hand-thrown harpoons. Described as a scene much anticipated by Japanese whalers, Yomada Yosei wrote in 1829 that this moment 'was terrible enough to make one break out in a cold sweat.'<sup>134</sup>

<sup>132</sup> See Kalland and Moeran (n127) 150-157. See also Vincent (n114) 109, 124-5.

<sup>133</sup> See eg The New Bedford Whaling Museum, 'Pacific Encounters: Yankee Whalers, Manjiro and the Opening of Japan', exhibition in 2004-5, includes Koson, *Hogeï sagakari no zu* [Attacking a Whale in Unison] Triptych woodblock print, undated circa 1880s, MIT Museum Cambridge Massachusetts, 10. On Ukiyoe art, see Richard Louis Edmonds, et al, 'Japan, §VI, 4: Late painting', in *Grove Art Online* (Oxford University Press, 2003).

<sup>134</sup> Yosei (n131).



Figure 6.15: Utagawa Kuniyoshi, *Miyamoto Musashi Kills a Great Whale*, 1847-48, triptych woodblock print.  
Source: Wikimedia Commons



Figure 6.16: 'Photo 3 A harpooned whale being hauled to the side of one of Japan's whale catcher boats, while a Japanese whaler aims a rifle at it', 'Memorial of Australia', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 9 May 2011) vol I, 98

Australia's photographs can be seen in dialogue with Japanese aesthetics, belittling Japan for its lack of respect or reverence seen in its art history. In Australia's third photograph (fig 6.16), instead of the famed Japanese swordsman Musashi astride the whale, a Japanese whaler – in Australia's counsel's words, 'the gentleman ... with the rifle'<sup>135</sup> – stands at the ready to deliver the *coup de grace*. A safe distance from the beast, rifle not sword in hand, the whaler is seen for Australia's purposes to be cowardly and merciless. Australia's eighth photograph (fig 6.8) exploits the juxtaposition between the visual image of the savaged whale carcass and the written inscription 'Legal Research under the ICRW' on the Japanese whaling vessels, the written word presented here as a baseless expression of Japan's preferred interpretation of the images of its whaling practices as legitimate in international law. The words would later be removed when the same ship set sail to hunt whales in Japan's territorial waters.<sup>136</sup>

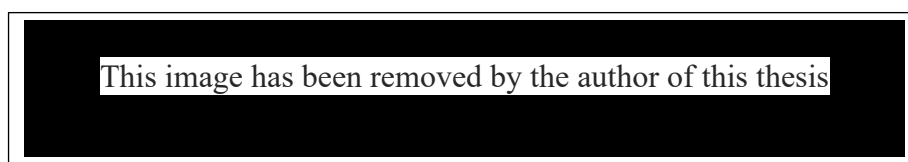


Figure 6.17: 'Photo 2: Analysis of mercury contained in muscle' (attributed to Institute of Cetacean Research) Counter-Memorial of Japan, *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 9 March 2012) vol I, 177

In contrast to Australia's images, the sanitised setting of the Japanese photographs – the laboratory emphasising the scientific purpose – de-animates the whale, creating an image that has no association with the visual history of whales in either Japan or Australia. Despite the glimpse of different whale species on a chart in one image (fig 6.17), the caption for the photographs of scientists at work might well read: 'This is not a whale'. To be effective as rhetoric, the photographs submitted by Japan would need to have no visual associations with the lives of mighty whales that have been celebrated in Japanese culture and grandly represented in the country's visual art. Yet even the method of combining two images, to make one composite photograph, employs Japanese artistic methods and aesthetic sensibility. Japan's photographic diptych recalls the segmented images of folding screens or double page illustrations common to books presenting Japanese *manga* 'sketches' in the 19<sup>th</sup> century.<sup>137</sup> The original photograph of the ear plug tissue has been manipulated for the submission (fig 6.3), stretched to complement the other image in the diptych, compromising the veracity of the photographs for the sake of aesthetic convention. The Japanese photographs reference aesthetic values despite themselves.

<sup>135</sup> Verbatim Record CR 2013/8 (n57) 60, [12] (Philippe Sands QC).

<sup>136</sup> See Alice Palmer, 'Absent Images of International Law' in Shane Chalmers and Sundhya Pahuja (eds), *Handbook on International Law and the Humanities* (Routledge, forthcoming 2020).

<sup>137</sup> Ellis Tinios, '2. Edo period (1600–1868) and after: books' in Richard Louis Edmonds, et al, 'Japan, 5X: Prints and books' *Grove Art Online* (Oxford University Press, 2003).



Figure 6.18: Shigeru Mizuki, *Bake-Kujira*, in *No Yōkai Jiten* [Encyclopedia of monsters] (Tōkyō, Shōwa 56, 1981)  
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Figure 6.19: Takashi Murakami, 727, 1996, acrylic on canvas mounted on board, three panels, 118x180in,  
©2014 Takashi Murakami/Kaikai Kiki Co, Ltd. Source: Blum & Poe Gallery

Japan's footnote references to photographs of incidents between activist Sea Shepherd vessels and Japanese whaling ships is also relevant to an analysis of the parties' use of photographic images.<sup>138</sup> The use of the word 'rammed' to describe the collisions, summons 19<sup>th</sup> century visual art – in Australia and Japan – where whalers' boats are tossed in the air on the back of a whale. Whale as menace has been a constant in Japanese artistic imagery. Depicted in 20<sup>th</sup> century artist Shigeru Mizuki manga style (fig 6.18), the legend of *Bake Kujira* tells the story

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<sup>138</sup> Counter-Memorial of Japan (n35) 263, notes 729 and 731.

of a skeleton whale that roamed the seas terrorising whalers, unperturbed by the swords thrown by fearful sailors. Contemporary artist Takashi Murakami might well have created his own take on this whale demon in his 2006 painting 727 (fig 6.19). Murakami's Mr DOB,<sup>139</sup> a formerly benevolent character recurring in his works, is transformed in this painting into a maniacal creature, all-seeing and all-knowing, riding waves painted in a style that recalls traditional Japanese artistic methods, its gaping mouth like that of a toothed whale species at the ready to swallow all in its path.

Looking at photographs on the website of the Japanese Institute of Cetacean Research,<sup>140</sup> however, a different image from the one provided by Japan in the text of its submission is revealed. The Sea Shepherd vessels hardly look set to overcome the Japanese whaling ships. In one photograph,<sup>141</sup> the dark shiny form of the activist ship flanks a Japanese vessel much like a whale rising up against assailant whalers. The bravado of the pirate symbol emerging from the sea spray, and the spectre of a 'ghost ship' tailing the Yushin Maru No 3 and the Bob Barker, casts Sea Shepherd at once as menacing – the skeletal *Bake Kujira* – and as fearless saviours of whales. Against the Japanese ships, however, Sea Shepherd remains the underdog, so that the photograph might well fail Japan's purpose of showing that it was a victim of interference that compromised its whale catch.

My analysis of the photographs submitted in the proceedings for *Whaling in the Antarctic* from aesthetic perspectives shows how the visual representations can be understood to support or undermine the parties' arguments as to the interpretation of the *Whaling Convention*. Next I consider the relevance of aesthetic method to these and other proceedings before the ICJ.

## 5. THE ART OF REPRESENTATION BEFORE THE ICJ

My analysis of the photographs in part 4 demonstrates the ways in which aesthetic methods for analysing images can illuminate the rhetorical function of photographs. In this way, my analysis using aesthetic methods serves as rhetorical analysis. I argue that aesthetic theory can produce conceptions of image for law, and aesthetic method can be employed in the articulation of argument arising from images, in circumstances where no such method has been identified by the ICJ.<sup>142</sup> In this part, I consider the aesthetic significance of photographs of whales to the parties' claims in *Whaling in the Antarctic*. I then examine the rhetorical function of aesthetic significance, and the conception of image for the purposes of rhetorical analysis as distinct from the conception of image for the evaluation of evidence. My findings from my analysis of the photographs in *Whaling in the Antarctic* from an aesthetic perspective are relevant, I suggest, to future uses of photographs in proceedings before the ICJ.

### 5.1 Aesthetic significance of photographs

Photographs have aesthetic significance – both outside and inside legal proceedings. Outside legal proceedings, anyone browsing the website photo gallery curated by the International

<sup>139</sup> See Morgan Falconer and Mary Chou, 'Murakami, Takashi' *Grove Art Online* (Oxford University Press, 2003).

<sup>140</sup> The URLs provided in the Counter-Memorial of Japan (n35) 263, notes 729 and 731 no longer function; images published by The Institute of Cetacean Research fit the description of those referenced in the submission, see Photo Library <<https://www.icrwhale.org/08-AENG.html>>.

<sup>141</sup> '2010.02.06 Bob Barker rams the Yushin Maru No.3 port stern', The Institute of Cetacean Research available at <<http://www.icrwhale.org/gpandsea-img216ENG.html>>.

<sup>142</sup> See eg Katherine Biber and Mehera San Roque, 'The Trouble with Pictures' (2006) 10 *Law Text Culture* 1. Cf Reichman (n95) 377.



Whaling Commission will find a collection of unlabelled images in a folder titled ‘dead/injured whales’.<sup>143</sup> Like the actors attending to Captain Boomer’s whale model (fig 6.1), people are seen in one photograph beside a giant and inert beast dislodged from its natural habitat (fig 6.20). Here, however, the whale is bound by ropes, mouth agape, as the people appear to make ready for flensing. Even in black and white – or possibly because it is drained of colour – the photograph can leave a viewer bereft. The purpose of these images on the website is unclear but it would be disingenuous to suggest that they do not speak to values and sentiment: even the webmaster warns that ‘viewer discretion is advised’.<sup>144</sup>



Figure 6.20: ‘Caught Blue Whale South Georgia 1930s’. Source: International Whaling Commission

Inside the legal proceedings, no such warning accompanied Australia’s use of images of dead or injured whales in *Whaling in the Antarctic*. Yet I have shown in part 4 of this Chapter how the photographs submitted by both parties speak to values and sentiment associated with whaling. Australia’s images confront the mythic legacy of whaling, seen in 19<sup>th</sup> century art in Australia and Japan, and show aesthetic sensibilities as they are for Australia today. They do not show an heroic fight to the death, but the slaughter of a sentient creature that is defenceless against Japan’s unforgiving industrial might. Australia’s choice of photographs substitutes the 19<sup>th</sup> century narrative of the courageous whaler with an invocation of moral values, if not in respect of the life of the whale itself, at least in respect of the manner of its killing, an inhumane method where death is not immediate and someone must stand at the ready with a rifle to kill the harpooned whale.<sup>145</sup> Meanwhile, Japan was compelled by the terms of the exception in article VIII of the *Whaling Convention* to present an image of scientific enterprise, deflecting

<sup>143</sup> International Whaling Commission, ‘Dead/Injured Whales’, Photo Gallery <<https://iwc.int/dead-injured-whales-gallery>>.

<sup>144</sup> Ibid.

<sup>145</sup> See further David Mence, ‘The Cetacean Right to Life Revisited’ (2015) 11(1) *International Journal of Law in Context* 17. See also Fitzmaurice, (n18) 153.

away from cultural aspects of its whaling practices. It impugned Australia for doing otherwise, railing against Australia's quest to impose a Delafield Cook style whale-sympathising sensibility on Japan. Japan's counsel referred, for example, to Australia's 'emotional anti-whaling moral crusade' and its attempt to impose 'the cultural preference of some at the expense of others'.<sup>146</sup>

As well as providing an account of how the photographs support the parties' arguments in *Whaling in the Antarctic*, my use of aesthetic method to analyse the images also warns of the ways in which they could pervert the advocate's script: how the images might fail as a persuasive device. I show how, for example, Japan's use of an image of a Sea Shepherd vessel during oral proceedings might not be seen to support its claim that it was interference from the anti-whaling pirate organisation, rather than falling demand for whale meat, that was responsible for Japan failing to reach its 'scientifically' determined catch quota.<sup>147</sup> Conversely, the claims of aesthetic and ethical values that can be constructed with aesthetic method from Australia's images of harpooned whales might have undermined Australia's claims as to the lack of merit of Japan's science if the ICJ determined that such considerations were irrelevant to the resolution of the dispute. Also problematic for Australia's arguments, the inscription 'Legal Research under the ICRW' on the Japanese whaling vessels shown in Australia's photographs (e.g. fig 6.8) confirm – in words – Japan's preferred interpretation of the images of its whaling practices as legitimate in international law.

I have used aesthetic method here to articulate the aesthetic significance of the photographs submitted by the parties in *Whaling in the Antarctic* in a rhetorical sense. However, neither the parties' arguments nor the Court's Judgment acknowledged the photographs for their aesthetic affect or significance.

## 5.2 Rhetorical function of photographs

My analysis of the aesthetic significance of the photographs articulates a rhetorical function of the images in the *Whaling in the Antarctic* proceedings. With aesthetic method, I examine the means of persuasive communication through visual representations. I show how the photographs can be seen to depict Australia's claim of a lack of merit, or for Japan's claim of merit, of lethal methods 'for purposes of scientific research' under article VIII of the *Whaling Convention*. I argue that the photographs bring to the interpretation of article VIII the values and sentiment that motivated the ban on commercial whaling to which article VIII provides an exemption.<sup>148</sup> Yet, unspoken and unacknowledged, the aesthetic significance of the photographs was, I maintain, left to roam free about the parties' arguments and, ultimately, the Judgment. This is, I argue, inconsistent with jurisprudential consideration for the proper conduct of law,<sup>149</sup> and the good administration of justice.<sup>150</sup> Not because aesthetic significance is not relevant to legal argument, interpretation and judgement, but because it is.

The majority of the members of the ICJ deciding *Whaling in the Antarctic* might have been unperturbed by the unbridled use of photographs in the proceedings. In the same way they

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<sup>146</sup> Verbatim Record CR 2013/12 (n68) 63 and 16 ('Australia cannot impose its will on other nations').

<sup>147</sup> Ibid 60.

<sup>148</sup> See Chapter 3, part 4.

<sup>149</sup> Cf for common law, Goodrich, 'Imago Decidendi' (n70).

<sup>150</sup> See Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; cf Bruno Simma, 'The International Court of Justice and Scientific Expertise' (2012) 106 *Proceedings of the ASIL Annual Meeting* 230.

claimed a capacity to isolate law from policy,<sup>151</sup> the majority might have invoked a Ulysses-inspired capacity to resist the aesthetic influence of the photographs. Dissenting Judge Benounna was openly wary of the aesthetic context of the dispute, acknowledging ‘that the issue of whaling is one that carries a heavy emotional and cultural charge, nourished over the centuries by literature, mythology and religious writings.’<sup>152</sup> Though perhaps implicitly concerned that aesthetics had influenced the majority, he was confident of his own capacity to ring-fence the law from emotion and culture, stating that, although ‘they cannot ignore’ the emotional and cultural background evoked in the parties’ submissions, judges of the ICJ ‘are bound, by virtue of their function, to ensure that it does not impinge in any way on their strictly legal analysis.’<sup>153</sup>

The manner in which the photographs were presented by both parties mirrors, in different ways, Judge Benounna’s expectation of impartial authority in the practice of international law. The Japanese images support, in their literal and metaphorical sterility, the neutral claims of legal method, a possible case for their probative weight as evidence. For Australia, the dead pan unemotional descriptions that accompany the photographs, in the written submissions and in the oral proceedings,<sup>154</sup> perform rationality. However I, like critical legal scholars,<sup>155</sup> am sceptical that judges can be armoured against aesthetic influence, including the aesthetic affect of photographs. This is not the same as aesthetic philosopher Emily Brady’s formulation of ‘disinterestedness’ in aesthetic judgement.<sup>156</sup> Brady’s disinterestedness puts distance between the judge and the thing judged; it does not remove that thing entirely from the realm of judgement.

I argue that, if it allows parties to submit photographs in proceedings, the ICJ should be capable of identifying the function of the photographs and addressing their aesthetic significance.<sup>157</sup> I maintain that jurisprudential consideration for the proper conduct of law, and the good administration of justice, demand such an account. If the ICJ evaluates the photographs as having no evidentiary weight, it should nevertheless consider other functions of the photographs, including as a persuasive device in the service of rhetoric with implications for its judgment. The judges might duly expect an explanation of the relevance of the images from the parties – as evidence, or as rhetoric – and then themselves reason the images into or, as the case may be, out of their judgment of the facts and law.

### 5.3 Aesthetic conceptions of image

An analysis of photographs for their rhetorical function requires a different conception of image from that which is implied in the evaluation of evidence. Aesthetic theory provides a basis for

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<sup>151</sup> *Whaling in the Antarctic* (n7) [69]; see also *ibid* (Judge Greenwood) 405.

<sup>152</sup> *Ibid* (Judge Bennouna) 341.

<sup>153</sup> *Ibid*.

<sup>154</sup> See above part 3.1.1.

<sup>155</sup> Related to the ‘indeterminacy’ thesis, see Andrea Bianchi, *International Law Theories* (Oxford University Press, 2016) 136; cf legal realism of Jerome Frank, *Law and the Modern Mind* (Anchor Books, 1930), cited in Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press, 2016), 91-92.

<sup>156</sup> Emily Brady, *Aesthetics of the Natural Environment* (Edinburgh University Press, 2003) 141; see further Chapter 2, part 2.2.3. Note that I use ‘judgement’ for the act of judging and ‘judgment’ to refer to a judicial decision. See generally Desmond Manderson, ‘Judgment in Law and the Humanities’ (2013) 1 *Revista Forumul Judecatorilor* 43.

<sup>157</sup> On US courts, see Goodrich, ‘Imago Decidendi’ (n70); The ICJ’s reliance on ‘written evidence’ has been attributed to the influence of civil law systems, Riddell and Plant (n74) 232. See also Quintana (n79) 426.

that distinction. To be considered as evidence in legal process, the photographs must be ‘documents’ – records of actual uncontrived events that serve to prove facts. From the perspective of aesthetic theory, this conceives of photographs as a ‘transparent’ medium to something imagined as ‘real’.<sup>158</sup> As already explained in Chapter 4 of the thesis, the realism of photographs suggests impartiality which, in turn, garners legitimacy.<sup>159</sup> It is this quality that I say makes photographs distinct from the informational graphics that were also presented by the parties.<sup>160</sup>

My aesthetic critique of the photographs submitted in *Whaling in the Antarctic* is founded, by contrast, on a conception of photographic images as ‘representations’.<sup>161</sup> As discussed in Chapter 4,<sup>162</sup> aesthetic analysis explains how representations in photographs are constructed and reconstructed, with images laid upon other images in the mind of each viewer. The representations are mediated by each observer – including legal counsel or a judge of the ICJ who uses or gazes upon the image. Once conceived as representation, photographic images can be offered by parties, and analysed by judges, for their persuasive effect in law. They can be aided in their analysis of the images by aesthetic methods. In the case of the photographs of whales, those methods could enlighten an understanding of the aesthetic value of whales in terms of the philosophy of environmental aesthetics which, I have argued, is relevant to an interpretation of the ban and exceptions to it.

The use of photographic images in international legal proceedings should not be dismissed in international proceedings as visual distractions. Describing the use of some forms of visual aid in court as a ‘needless distraction [that] can be extremely annoying’, former judge and President of the Court, Sir Robert Jennings, nevertheless recognised that graphic images could be of ‘great assistance’ in court.<sup>163</sup> It was ‘maps, charts and diagrams’ contemplated in this instance.<sup>164</sup> However, I maintain that photographic images used in the practice of international law should also be properly exploited by advocates for their rhetorical purchase and formally recognised by judges for their representational import to legal argument, interpretation and judgment.

## 6. CONCLUSION

Limited to an understanding of photographic images as ‘evidence’, international legal practice before the ICJ lacks the concepts and methods for all that aesthetic scholarship tells us that photographs can do and say. An aesthetic conception of photographs as depictions of a physical reality corresponds with the ICJ’s treatment of photographs as evidence.<sup>165</sup> Both rely on a

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<sup>158</sup> Kendall Walton, ‘Transparent Pictures: On the Nature of Photographic Realism’ (1984) 11(2) *Critical Inquiry* 246.

<sup>159</sup> See Chapter 4, part 2.4.1.

<sup>160</sup> Ibid.

<sup>161</sup> See Barbara Savedoff, *Transforming Images: How Photography Complicates the Picture* (Cornell University Press, 2000).

<sup>162</sup> See Chapter 4, part 2.4. Note especially Martin Drenthen, ‘Environmental Hermeneutics and the Meaning of Nature’ in Stephen M Gardiner and Allen Thompson (eds), *The Oxford Handbook of Environmental Ethics* (Oxford University Press, 2017) 162.

<sup>163</sup> Sir Robert Jennings, ‘The Work of the International Bar’ in Lal Chand Vohrah et al (eds), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International, 2003) 443. 456.

<sup>164</sup> Ibid. See also Quintana (n79) 355.

<sup>165</sup> Cf Mohamed Bennouna, ‘Experts before the International Court of Justice: What for?’ (2018) 9(3) *Journal of International Dispute Settlement* 345; Makane Moïse Mbengue, ‘Scientific Fact-finding at the International

photographic capacity for verisimilitude. But aesthetic theory also identifies photographic images as representations that have aesthetic significance. Conceived as representations, the photographs used in ICJ proceedings can be analysed for their aesthetic significance using aesthetic concepts and methods of interpretation.

My analysis of the photographs submitted in *Whaling in the Antarctic* uses the histories of visual art to lay bare putative meanings of the visual representations. My analysis also relies on insights from the philosophical field of environmental aesthetics which, I argue, are relevant to representations of environments – including fauna – for their aesthetic value. In this regard, my findings in this Chapter are peculiar to the use of environmental photographs in ICJ proceedings concerning international environmental agreements. My method of analysis could, however, serve international law more broadly by explaining the rhetorical function of any photograph which could, in turn, have a bearing on judicial interpretation and, ultimately, the ICJ's judgments.

With aesthetic methods at their disposal, judges could articulate and analyse a role for photographic images in circumstances where such images are currently presented to the Court, and tolerated in the proceedings, with no account of their aesthetic significance. To ignore or deny the aesthetic significance of photographs is, I say, to risk the consideration of matters admitted but not reasoned. I argue that a jurisprudential concern for the proper conduct of law, and the legal principle of good administration of justice, require an account of image for ICJ proceedings and judgments.

While my analysis of photographs in determinations of World Heritage in Chapter 5 considered the role of image as justifications for determinations of aesthetic value in the administration of a treaty, my analysis of images in this Chapter has considered the aesthetics of image as it relates to legal argument and judgment in the enforcement of a treaty. Chapter 5 was important to my thesis in revealing conceptions of image as verbal and graphic while this Chapter has been significant for its understanding of image as verisimilitude and as representation. In the next Chapter, I will examine the role of photographs in the documents that inform decisions on the implementation of the *Biodiversity Convention*, a treaty that protects the aesthetic value of biodiversity as one of several values expressed in the preamble.<sup>166</sup> There I examine the images as vehicles for plural representations of biodiversity's aesthetic value, showing how a range of meanings can be identified through aesthetic method.

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Court of Justice: An Appraisal in the Aftermath of the Whaling Case' (2016) 29(2) *Leiden Journal of International Law* 529.

<sup>166</sup> *Biodiversity Convention* (n126) preamble, 1<sup>st</sup> tiret. See Chapter 3, part 2.1.

## CHAPTER 7 FRAGMENTED AESTHETICS OF BIODIVERSITY

### EXHIBIT: EMILY KAME KNGWARREYE, *EARTH'S CREATION* (1994)



Figure 7.1: Emily Kame Kngwarreye, *Earth's Creation*, 1994, synthetic polymer paint on linen mounted on canvas, four panels. Photo: Haupt and Binder. Source: Universes in Universes

Emily Kame Kngwarreye *Earth's Creation* (1994) (fig 7.1) is both leaden and light, it falls and it rises. Held to a museum wall, its four conjoined panels make ready to tumble while its daubs effervesce. In European aesthetics, it is an insensible corruption of abstraction and figuration, formalism and expression.<sup>1</sup> But it is not clear that such aesthetic conceptions can be properly given to this work.<sup>2</sup> For its Anmatyerre elder creator, *Earth's Creation* is perhaps better understood in terms of space, time, land, story, law or life.<sup>3</sup> Lying flat in the red desert, it grew out of the earth, absorbing and reflecting everything about it. As the painting was disassembled, wrapped and flown to Europe in 2015, the Alhalkere Country of its making went too, its hot days and cool nights filling the temperature-controlled exhibition space in Venice with home.

When one-time 'Young British Artist' Damien Hirst claimed never to have heard of the Utopia art collective,<sup>4</sup> excusing his vacuous simulation of the oeuvre of Kngwarreye and other peoples from Country in the central Australian desert, he displayed the credible ignorance of an

<sup>1</sup> See Margo Neale, 'Emily Kame Kngwarreye: The Impossible Modernist' (2017) 37(2) *Artlink* 42.

<sup>2</sup> See eg David Garneau, 'Indigenous Art: From Appreciation to Art Criticism' in Ian McLean (ed), *Double Desire: Transculturation and Indigenous Contemporary Art* (Cambridge Scholars Publishing, 2014) 311.

<sup>3</sup> See Howard Morphy, *Ancestral Connections: Art and an Aboriginal System of Knowledge* (University of Chicago Press, 1991); Deborah Bird Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996).

<sup>4</sup> Calla Wahlquist, "'Uncanny Similarity': New Damien Hirst Works in Spot of Bother in Australia' *The Guardian* (online, 29 March 2018) <<https://www.theguardian.com/artanddesign/2018/mar/29/uncanny-similarity-new-damien-hirst-works-in-spot-of-bother-in-australia>>.

Englishman so absorbed in himself and his empire that he sees nothing of the world about him. Not least the Aboriginal women artists among those Indigenous Peoples so long unseen in the Australian *terra nullius*. Hirst surely profits from this would-be appropriation.<sup>5</sup> But his ignorance is his loss. Hirst's product pales against *Earth's Creation*. A work that inspires – in ways cultural and aesthetic, among many, but most certainly in ways that matter.

## 1. INTRODUCTION

The complex relationship between 'aesthetic' and 'cultural' values of the natural environment inherent in my description of Kngwarreye's *Earth's Creation* (fig 7.1) also arises in the implementation of the *Biodiversity Convention*.<sup>6</sup> Both values are in a suite of biodiversity values identified for protection in the preamble to the *Biodiversity Convention*,<sup>7</sup> and in the 'Aichi Targets' – goals set by the states parties to facilitate implementation of the treaty over a decade to 2020.<sup>8</sup> Aesthetic and cultural values are together distinguished by advisors to the states parties to the treaty from the 'material' economic value of biodiversity also listed for protection under the treaty.<sup>9</sup> Yet nowhere in the treaty are any of the values of biodiversity defined, and the states parties, working collectively as the Conference of the Parties, have not explained if or how one biodiversity value differs from another.

Many of the methods favoured by states parties to identify the values of biodiversity do little to differentiate them: aesthetic value is characterised as a cultural value which has economic value in the valuation of 'services' provided to humans by biodiverse ecosystems.<sup>10</sup> The Conference of the Parties has recognised emerging methods aimed at evaluating 'non-material' values of biodiversity, including aesthetic value.<sup>11</sup> However, more nuanced understandings of how each value might be defined, as contemplated for 'aesthetic' value in the philosophy of environmental aesthetics,<sup>12</sup> have not been articulated by the governing body. Decisions by the Conference of the Parties do not, for example, make sense of distinctions between the cultural value of biodiversity expressed in the arts of indigenous peoples, such as *Earth's Creation*, and aesthetic values of biodiversity conceived by the many cultures of the 196 nation states party to the treaty.<sup>13</sup>

<sup>5</sup> Fiona Foley, 'When the Circus Came to Town' (November, 2011) 245 *Art Monthly* 5; Lee Elsdon, 'Protecting the Intellectual and Cultural Property of Aboriginal Art' (April, 2019) *The Bulletin* 20. It might also be said that the inclusion of the work in the Venice Biennale was a form of appropriation.

<sup>6</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('*Biodiversity Convention*').

<sup>7</sup> Ibid, preamble 1<sup>st</sup> tiret.

<sup>8</sup> Conference of the Parties to the *Convention on Biological Diversity*, *The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets*, Decision X/2, 10<sup>th</sup> mtg, UN Doc UNEP/CBD/COP/DEC/X/2 (29 October 2010) annex ('*Aichi Targets*').

<sup>9</sup> Paul W Leadley et al, *Progress Towards the Aichi Biodiversity Targets: An Assessment of Biodiversity Trends, Policy Scenarios and Key Actions* (Technical Series 78) (Secretariat of the *Convention on Biological Diversity*, 2014) 12 ('*Aichi Assessment*').

<sup>10</sup> Gretchen C Daily, 'Introduction: What are Ecosystem Services?' in Gretchen C Daily (ed), *Nature's Services: Societal Dependence on Natural Ecosystems* (Island Press, 1997) 1, 3. See below part 3.1.2.

<sup>11</sup> On 'nature's contribution to people', see Conference of the Parties to the *Biodiversity Convention*, *Resource Manual for the Sixth National Report, including Annotated Reporting Templates*, Note by the Executive Secretary, 13<sup>th</sup> mtg, UN Doc UNEP/CBD/COP/13/21 (20 September 2016). See below part 4.2.

<sup>12</sup> See Nigel Cooper, Emily Brady, Helen Steen and Rosalind Bryce, 'Aesthetic and Spiritual Values of Ecosystems: Recognising the Ontological and Axiological Plurality of Cultural Ecosystem "Services"' (2016) 21 *Ecosystem Services* 218. See further Chapter 2, part 2.1.

<sup>13</sup> See generally John Woodliffe, 'Biodiversity and Indigenous Peoples' in Michael Bowman and Catherine Redgwell (eds), *International Law and the Conservation of Biological Diversity* (Kluwer Law International, 1996)



Building on my findings in Chapter 5 on the *World Heritage Convention* and Chapter 6 on the *Whaling Convention*, this Chapter considers how photographs used in the collective work of the states parties to the *Biodiversity Convention* can contribute to an understanding of aesthetic value and its relationship to other biodiversity values, particularly cultural value. For the reasons explained in Chapter 4,<sup>14</sup> I maintain that graphic images of the environment are relevant for the consideration of aesthetic value in terms of both the aesthetic philosophy of the arts and of environmental aesthetics. I argue that aesthetic insights into the meanings of biodiversity values represented in photographs could contribute to an understanding of those values among the states parties to the *Biodiversity Convention* and, in turn, of their relevance to commitments under the treaty.

This Chapter revisits in part 2 the doctrinal approaches to defining aesthetic value under the *Biodiversity Convention* before proceeding in part 3 with an aesthetic account of the photographs used in the fourth edition of the *Global Biodiversity Outlook* – a report prepared at the direction of the Conference of the Parties to the *Biodiversity Convention* to assess progress towards the Aichi Targets, including Targets that concern biodiversity values.<sup>15</sup> I close the Chapter in part 4 with a discussion of the relevance of the aesthetic analysis of photographic images to the implementation of the *Biodiversity Convention*.

## 2. DOCTRINAL MEANING OF BIODIVERSITY'S AESTHETIC VALUE

The *Biodiversity Convention* protects values of biodiversity. Specifically, the preamble to the treaty recognises the 'ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values' of biodiversity and its components, as well as the 'intrinsic' value of biodiversity.<sup>16</sup> In this part, I explain the relevance of biodiversity values, including aesthetic value, to the implementation of the *Biodiversity Convention* before briefly revisiting my findings from doctrinal treaty interpretation in Chapter 3. The lack of clarity as to the meaning of aesthetic value from orthodox sources of treaty interpretation leads me in part 3 to interrogate meanings of aesthetic value represented in photographs used in connection with the implementation of the *Biodiversity Convention*. It is there that I address critical perspectives on the issues raised by doctrinal interpretation, including those relevant to indigenous peoples.

### 2.1 The relevance of biodiversity values

Biodiversity values inform the implementation of the parties' commitments in the *Biodiversity Convention*. When, for example, parties act under the treaty to establish a system of national areas for protection of biodiversity,<sup>17</sup> they do so as a matter of doctrinal treaty interpretation to protect the values of biological diversity listed in the preamble.<sup>18</sup> Biodiversity values would also be implicated in treaty commitments concerning such matters as the protection of indigenous or traditional knowledge,<sup>19</sup> and in the creation of incentives for the private management of biodiversity.<sup>20</sup>

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69. Note that I use the term 'indigenous peoples' to refer to all indigenous peoples and capitalised 'Indigenous Peoples' when referring specifically to First Peoples of the territory known as Australia and the Torres Strait.

<sup>14</sup> See Chapter 4, part 2.4.1.

<sup>15</sup> Secretariat of the *Convention on Biological Diversity* (2014) *Global Biodiversity Outlook 4* ('GBO-4').

<sup>16</sup> *Biodiversity Convention* (n6) preamble 1<sup>st</sup> tiret.

<sup>17</sup> *Ibid* art 8(a).

<sup>18</sup> See Chapter 3, part 3.1.2.

<sup>19</sup> *Biodiversity Convention* (n6) art 8(j).

<sup>20</sup> *Ibid*, art 11.

In 2010, the Conference of the Parties to the *Biodiversity Convention* decided on a strategic plan for the implementation of the treaty over a decade to 2020.<sup>21</sup> Associated with the strategic plan are the ‘Aichi Targets’, a set of goals for the states parties in their implementation of the *Biodiversity Convention*.<sup>22</sup> Three of the Aichi Targets make express mention of the ‘values’ of biodiversity.<sup>23</sup> They concern: raising awareness of the values of biodiversity (Target 1); the integration of biodiversity values into planning and accounting for economic development (Target 2); and the development of knowledge and technologies relevant to biodiversity, including values of biodiversity (Target 19). The specific values of biodiversity contemplated by the parties are not identified. The list of biodiversity values identified in a technical report on progress towards the Aichi Targets corresponds with those in the preamble to the *Biodiversity Convention*.<sup>24</sup>

The fourth edition of the *Global Biodiversity Outlook* (‘GBO-4’) assessed the parties’ progress in achieving the Aichi Targets.<sup>25</sup> The *Global Biodiversity Outlook* is a periodic assessment of biodiversity approved by the Conference of the Parties to the *Biodiversity Convention*.<sup>26</sup> It is instigated by the states parties to gauge the achievement of the treaty objectives and to inform the implementation and development of treaty commitments.<sup>27</sup> Overall, GBO-4 found ‘that actions need to be stepped up and accelerated if the goals of the Strategic Plan are to be achieved.’<sup>28</sup> Regarding the three Aichi Targets 1, 2 and 19 specific to biodiversity values, parties were on track to achieve only part of Target 19. Progress towards the other part of Target 19, and Targets 1 and 2, was judged in the report as insufficient to meet the deadline of 2020.<sup>29</sup> The fifth edition of the *Global Biodiversity Outlook* anticipated in 2020 will assess the extent to which the Aichi Targets have been achieved.<sup>30</sup>

## 2.2 Doctrinal meanings of biodiversity’s aesthetic value

None of the values of biodiversity is defined in the *Biodiversity Convention*. In Chapter 3, I employed doctrinal methods of treaty interpretation, largely codified in the *Vienna Convention on the Law of Treaties*,<sup>31</sup> to develop a legal meaning for ‘aesthetic’ value expressed in the preamble to the *Biodiversity Convention*. As explained again briefly here, my doctrinal interpretation of aesthetic value in the *Biodiversity Convention* pointed to possible associations with ‘natural beauty’, but it did not clarify the relationship between aesthetic value and other biodiversity values, including cultural and economic value.

<sup>21</sup> Conference of the Parties to the *Convention on Biological Diversity*, *The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets*, Decision X/2, 10<sup>th</sup> mtg, UN Doc UNEP/CBD/COP/DEC/X/2 (29 October 2010).

<sup>22</sup> *Aichi Targets* (n8).

<sup>23</sup> *Ibid* 1, 2 and 19.

<sup>24</sup> *Aichi Assessment* (n9) 11.

<sup>25</sup> GBO-4 (n15).

<sup>26</sup> Conference of the Parties to the *Convention on Biological Diversity*, Decision II/1 *Report of the First Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice*, 2<sup>nd</sup> mtg, UN Doc UNEP/CBD/COP/2/19 (30 November 1995) (‘GBO Decision’).

<sup>27</sup> *Subsidiary Body on Scientific, Technical and Technological Advice*, Recommendation I/6 ‘Global Biodiversity Outlook’, 1<sup>st</sup> mtg UN Doc UNEP/CBD/COP/2/5 (21 September 1995) 32; see also GBO-4 (n15) 27.

<sup>28</sup> GBO-4 (n15) 130.

<sup>29</sup> *Ibid* 18, 22.

<sup>30</sup> Conference of the Parties to the *Convention on Biological Diversity*, ‘Global Biodiversity Outlook’, Decision 14/35, 14<sup>th</sup> mtg, UN Doc CBD/COP/DEC/14/35 (30 November 2018).

<sup>31</sup> *Vienna Convention on the Law of Treaties*, concluded 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (‘*Vienna Convention*’) arts 31 and 32.

Looking first at the ordinary meaning of ‘aesthetic’ value, I identified in Chapter 3 dictionary definitions that referred to aesthetic value in terms of ‘beauty’ or ‘perception by the senses’. I noted that the interpretative principle of effectiveness requires a meaning of ‘aesthetic’ value of biodiversity that can be distinguished from other values of biodiversity expressly identified in the treaty’s preamble, including ‘cultural’ value. The distinction in aesthetic philosophy between environmental aesthetics, and the aesthetic philosophy of the arts could assist to distinguish the aesthetic value of biodiversity from aesthetic elements of the ‘cultural’ values of biodiversity associated with the arts. I also explained that the ‘aesthetic’ value of biodiversity could be informed by the term ‘wilderness’ expressed in annex I to the *Biodiversity Convention*.

The object valued – biological diversity or, in short form, biodiversity – is also part of the context that would be relevant to defining aesthetic value using doctrinal techniques. Biological diversity is defined in the treaty as ‘the variability among living organisms’.<sup>32</sup> However, complexities around the concept of biodiversity, and the attribution of values to it, have been raised by scholars of international environmental law and philosophers of environmental aesthetics.<sup>33</sup> Reference to biodiversity as the object of aesthetic value might be further complicated by my finding in Chapter 3 as to the historical provenance of the values listed in the *Biodiversity Convention*.<sup>34</sup> The *Convention on the Conservation of Migratory Species of Wild Animals* (‘*Bonn Convention*’) contains a list of values that is the likely precedent for the values listed in the preamble to the *Biodiversity Convention*.<sup>35</sup> It is not apparent from the negotiating materials for the *Biodiversity Convention* what, if any, consideration was given to whether values applied to wild animals might differ when applied to biodiversity.

In Chapter 3, I also considered as an orthodox source for treaty interpretation the ‘subsequent practice’ of the parties. Under article 31(3) of the *Vienna Convention*, interpreters of treaties can look to sources such as ‘[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’<sup>36</sup> I argued that the disparate understandings of aesthetic value apparent from a select number of national reports submitted by individual states parties under article 26 of the *Biodiversity Convention* were not likely to establish the agreement of the parties for the purposes of treaty interpretation.<sup>37</sup>

I also considered as possible evidence of subsequent practice such things as decisions of the Conference of the Parties to the *Biodiversity Convention* (COP decisions) and related reports. I noted that few COP decisions mention the ‘aesthetic’ value of biodiversity and, where they do, it is mentioned only as one in the suite of biodiversity values contained in the treaty preamble.<sup>38</sup> Other decisions refer to biodiversity values in general. The Aichi Targets, for example, refer to ‘biodiversity values’ or ‘values of biodiversity’ without specifying what they are. COP decisions have also endorsed methodologies for valuing biodiversity in terms of

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<sup>32</sup> *Biodiversity Convention* (n6) art 2.

<sup>33</sup> See Chapter 3, part 3.1.2.

<sup>34</sup> See Chapter 3, part 3.3.2.

<sup>35</sup> *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983) (‘*Bonn Convention*’) preamble 3<sup>rd</sup> tiret (does not list intrinsic value).

<sup>36</sup> *Vienna Convention* (n31) art 31(3)(b).

<sup>37</sup> Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2015) 254.

<sup>38</sup> See Chapter 3, part 3.2.2.

‘ecosystem services’ where aesthetic, cultural and economic values of biodiversity appear to have been combined. However, I concluded in Chapter 3 that none of the COP decisions I identified appears likely to ‘establish the agreement of the parties’ as to the meaning of aesthetic value for the purposes of the *Vienna Convention* rules of interpretation.<sup>39</sup>

My examination of sources of treaty interpretation in Chapter 3 did not extend to the *Global Biodiversity Outlook*. Prepared by experts working in consultation with the Secretariat to the *Biodiversity Convention*, the *Global Biodiversity Outlook* is one of many resources that informs the parties in their collective oversight of treaty implementation. It synthesises information from other reports, including the national reports on treaty implementation noted above.<sup>40</sup> Commissioned by the Secretariat at the direction of the Conference of the Parties,<sup>41</sup> the *Global Biodiversity Outlook* arguably documents practice that is descriptive or indicative of the parties’ understandings of treaty terms. Assessing the implementation of the Aichi Targets, including those specifically related to biodiversity values, *GBO-4* could be suggestive of meanings of those values. However, it provides only a broad overview of progress towards the Targets concerning biodiversity values, with no specific analysis of aesthetic value.<sup>42</sup> Moreover, *GBO-4* could inform COP decisions but it would not necessarily determine their outcome. As such, it is not clear that it has any interpretative relevance for the purposes of the rules under the *Vienna Convention*.

In addition to the written text, *GBO-4* contains many visual representations of biodiversity in the form of photographs. In the ways explained in Chapter 4, and elaborated in Chapters 5 and 6 of this thesis, I maintain that photographs used in the *Global Biodiversity Outlook* and other documents generated under the treaty can be analysed, from an aesthetic perspective, to develop understandings of biodiversity’s aesthetic value. In the next part 3, I consider the extent to which photographs included in *GBO-4* can be analysed to provide an account of aesthetic and other values of biodiversity.

### 3. AESTHETIC VALUES OF BIODIVERSITY IN PHOTOGRAPHS

Photographs contained in *GBO-4* show lush forests, coral reefs of varied colours and charismatic fauna as well as people relying on the environment for their food, water and livelihoods.<sup>43</sup> The photographs also show damage done to the environment – by large-scale agriculture, industrial manufacturers and power generators.<sup>44</sup> In this part, I examine from an aesthetic perspective the six photographs in *GBO-4* that accompany the assessment of the three Aichi Targets concerning biodiversity values: Targets 1, 2 and 19.<sup>45</sup> I examine representations of aesthetic value in the photographs first in terms of ‘natural beauty’ and secondly in terms of ‘cultural’ value. I refer to the aesthetic value of the ‘natural environment’ and, in some instances, I identify specific issues arising from the philosophical literature for the aesthetic value of ‘biodiversity’. Few philosophers of environmental aesthetics address questions specific to the aesthetic appreciation of ‘biodiversity’.<sup>46</sup>

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<sup>39</sup> Ibid.

<sup>40</sup> See eg *GBO-4* (n15) 3.

<sup>41</sup> GBO Decision (n26).

<sup>42</sup> See eg *GBO-4* (n15) 32-39.

<sup>43</sup> See eg below figs 7.2, 7.3, 7.8, 7.9, 7.12, 7.13.

<sup>44</sup> See eg *GBO-4* (n15) 41, 43, 66.

<sup>45</sup> *Aichi Targets* (n8) 1, 2 and 19. See above (n23) and accompanying text.

<sup>46</sup> Cf Emily Brady, ‘Aesthetics in Practice: Valuing the Natural World’ (2006) 13(3) *Environmental Values* 277 (‘Aesthetics in Practice’) 285. Note the significance of attributing values to biodiversity as distinct from the

### 3.1 Aesthetic value of biodiversity as natural beauty

Doctrinal treaty interpretation suggests that the aesthetic value contemplated for the *Biodiversity Convention* could be synonymous with ‘natural beauty’.<sup>47</sup> As discussed in Chapter 2,<sup>48</sup> ‘natural beauty’ is variously conceived in aesthetic philosophy. It can be understood, for example, in terms of ‘scenic’ qualities exploited in landscape painting. Natural beauty is also associated in aesthetic philosophy with the notion of ‘wilderness’. Below I consider the relevance of these two conceptions of natural beauty to photographs in *GBO-4*.

#### 3.1.1. Scenic Landscapes

The relationship between the aesthetic value of the environment and ‘scenic’ qualities stems from developments in Western European landscape painting.<sup>49</sup> Art historian Simon Schama identifies a 17<sup>th</sup> century emblem, ‘Rura Mihi et Silentium’, as the quintessential bucolic scene in the Western landscape tradition, depicting the countryside as ‘the moral corrective to the ills of court and city’.<sup>50</sup> By the 18<sup>th</sup> century, a portable tinted convex mirror known as a ‘Claude glass’ was being used by artists to create a sense of a greater distance between the viewer and a feature in the landscape, such as a lake or hillside. Natural spaces were framed by the mirror’s edge and viewed in their entirety from a vantage point. An 18<sup>th</sup> century guide book to the Lake District of England encouraged use of the Claude glass by visitors to the area to give ‘the finished picture, in highest colouring, and just perspective.’<sup>51</sup> People were encouraged to visit natural spaces for leisure and to view those places as if they were a landscape painting, conscious of formal ‘scenic’ qualities in the environment – contrasts in shapes, colours and lines – and perspective.<sup>52</sup>

Two photographs that appear with the discussion of biodiversity values in *GBO-4* can be readily analysed from an aesthetic perspective in terms of ‘scenic’ landscapes. One of the photographs, included with the discussion of Aichi Target 1 on raising awareness of biodiversity values, shows SCUBA divers ascending from a coral reef (fig 7.2). The other photograph, featured in the section of *GBO-4* assessing Aichi Target 19 on the development of knowledge of biodiversity values, shows an expansive view of rice paddy terraces (fig 7.3).

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natural environment is not specifically addressed in Bryan G Norton (ed), *The Preservation of Species: The Value of Biological Diversity* (Princeton University Press, 1986).

<sup>47</sup> See above part 2.2; see also Chapter 3 part 3.5.

<sup>48</sup> See Chapter 2, part 3.2.1.

<sup>49</sup> See generally Arnold Berleant, ‘Scenic Beauty in a Global Context’ in Arnold Berleant, *Aesthetics Beyond the Arts: New and Recent Essays* (Ashgate, 2012) (‘Scenic Beauty’) 79.

<sup>50</sup> Simon Schama, *Landscape and Memory* (Harper Collins, 1995) 10.

<sup>51</sup> ‘A Guide to the Lakes . . . , By the author of The Antiquities of Furness [Thomas West] (London, 1778), 15, 131’ quoted by John T Odgen, ‘From Spatial to Aesthetic Distance in the Eighteenth Century’ (1974) 35(1) *Journal of the History of Ideas* 63, 67.

<sup>52</sup> See Emily Brady, *Aesthetics of the Natural Environment* (Edinburgh University Press, 2003) (‘Aesthetics of Environment’) 20–21, 43. See also Allen Carlson, *Aesthetics and the Environment: The Appreciation of Nature, Art and Architecture* (Routledge, 2000) 45 (‘Aesthetics and Environment’) 32.



Figure 7.2: *Global Biodiversity Outlook 4*, 32

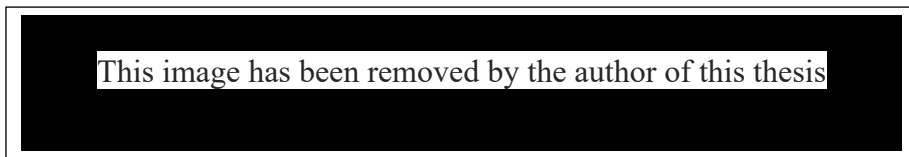


Figure 7.3: *Global Biodiversity Outlook 4*, 118

Both photographs suggest a scenic aesthetic. The photograph of the coral reef depicts a picturesque scene, highlighting the irregular shapes and colours of the reef. The dark foregrounding of coral formations and schools of fish, with the divers in the background ascending upwards towards the light, provides a scenic vantage. The divers look on – through them we see ourselves seeing the reef. The elevated view in the photograph of the rice paddy terraces accentuates the patterns and contrasts in the scene – the pastel colours, organic lines and concertina shapes have visual appeal. It has the semblance of pastoral tranquillity: the huts, modest versions of von Guérard’s station estate (fig 7.4), suggest a peaceful country life.

Both images depict diversity as it has been conceived for the arts – a concept which has been appropriated by Western science in the conception of biological diversity.<sup>53</sup>

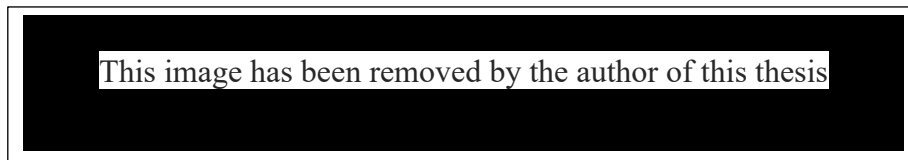


Figure 7.4: Eugene von Guérard, *Mr Clark's Station, Deep Creek, near Keilor*, 1867, oil on canvas 68.4 x 122.0cm. Source: National Gallery of Victoria

However, aesthetic conceptions of scenic environments have been criticised in aesthetic philosophy for their limited characterisation of the aesthetic experience of nature.<sup>54</sup> Aesthetic philosopher Emily Brady observes that: 'Scenic value is used all the time in conservation literature, yet it designates an outmoded way of understanding the environment which ignores the special *environing* qualities of environments.'<sup>55</sup> As discussed in Chapter 2,<sup>56</sup> this is one of the grounds on which environmental aestheticians reject models for appreciating art as an analogy for the aesthetic appreciation of nature.

Yet I have argued that visual art can inform critical understandings of scenic representations of the environment.<sup>57</sup> Contemporary painter Mandy Martin embraces the genres of 18<sup>th</sup> and 19<sup>th</sup> century scenic landscapes but she manipulates them to draw attention to the fragility of the natural environment.<sup>58</sup> In her painting *O-B-L-I-V-I-O-N* (fig 7.5), for example, Martin depicts a sublime tempest while letters mark the textured surface with a word – a mark of human intervention – that is both a literal description and a portent of environmental collapse.

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<sup>53</sup> Brady, 'Aesthetics in Practice' (n46) 285; see below (n68) (ecological impacts of rice cultivation) and (n71) (concept of biodiversity).

<sup>54</sup> See Chapter 2, part 2.2.2. See also Berleant, 'Scenic Beauty' (n49).

<sup>55</sup> Brady, *Aesthetics of Environment* (n52) 21, emphasis in original.

<sup>56</sup> See Chapter 2, part 2.3.

<sup>57</sup> Chapter 4, part 2.4.1.

<sup>58</sup> See Zsuzsanna Soboslay, 'Mandy Martin: Eco-worrying' (2010) 226 *Art Monthly Australia* 30, 32.



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copyright reasons

Figure 7.5: Mandy Martin, *O-B-L-I-V-I-O-N*, 1993, oil on canvas, 152x274cm. Photography: Robert Colvin.  
Source: Ian Potter Museum of Art, University of Melbourne

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Figure 7.6: René Magritte, *La condition humaine*, 1933, oil on canvas, 100x81x1.6cm. Source: National Gallery of Australia

Similar themes can be understood from Janet Laurence's artwork *Deep Breathing Resuscitation for the Reef* (fig 4.6) discussed earlier in Chapter 4 of this thesis.<sup>59</sup> These contemporary landscapes are possibly examples of what Simon Schama calls the 'anti-landscape' – a reaction, he said, to 'the annexation of nature by culture'.<sup>60</sup> He offers René Magritte's painting *The Human Condition* (fig 7.6) as an example of that annexation rejected by contemporary landscapists.<sup>61</sup> It is, however, also possible that Magritte lamented the constraints of artistic convention in Western European landscape tradition. The artist said of his work in 1938 '[w]e see [the world] as being outside ourselves even though it is only a mental representation of what we experience on the inside.'<sup>62</sup>

I maintain that visual art, and ways of understanding visual art, can be used to examine issues for biodiversity values that arise from scenic landscapes in light of the philosophy of environmental aesthetics. The SCUBA divers in the *GBO-4* photograph of the coral reef (fig 7.2), literally immersed in the aquatic environment, suggest the kind of sensory and imaginative engagement with the environment theorised by many philosophers of environmental aesthetics such as Emily Brady.<sup>63</sup> But the image also combines aesthetic value with another environmental value – recreational value.

The association of aesthetic and recreational values is problematic for the implementation of the *Biodiversity Convention*. Both values are listed separately as values of biodiversity in the preamble to the treaty and, as such, they should be conceived as distinct values for the purposes of effective treaty interpretation.<sup>64</sup> Yet problems arising from any conflation of those values are also philosophical. As Emily Brady and other philosophers of environmental aesthetics observe,<sup>65</sup> the association with recreational value ends by trivialising and tainting aesthetic value. Recreational value has a complex history, evolving from the hunting of animals in game reserves to hiking in natural environments protected for their biodiversity.<sup>66</sup> This is a biodiversity value associated with leisure, an hedonistic luxury for the few, readily transposed into economic value borne of income from tourism.

It is the harmful aspects of recreational value that Marie Voignier explores in her video artwork, *Les Immobiles* (2013) (fig 7.7).<sup>67</sup> In it, the recollections of a safari guide narrate still photographs of trophy hunters, highlighting the dissociative capacity of people insensitive to the impacts of their recreational sport. The artwork reveals the ways in which recreational value is different from the aesthetic appreciation of the environment conceived by philosophers of environmental aesthetics and – possibly – by parties to the *Biodiversity Convention*.

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<sup>59</sup> See Chapter 4, part 2.2.2.

<sup>60</sup> Schama (n50) 12.

<sup>61</sup> Ibid.

<sup>62</sup> René Magritte quoted in Schama, *ibid.* Cf characterisation of this work by Nicole Graham, 'This is Not a Thing: Land, Sustainability and Legal Education' (2014) 26 *Journal of Environmental Law* 395, 396.

<sup>63</sup> Cf imagination from above the water's surface, Brady, *Aesthetics of Environment* (n52) 57.

<sup>64</sup> See Chapter 3, part 3.1.2.

<sup>65</sup> Brady, *Aesthetics of Environment* (n52) 129. See generally Chapter 2, part 2.2.5.

<sup>66</sup> Alexander Gillespie, *International Environmental Law, Policy and Ethics* (Oxford University Press, 2<sup>nd</sup> ed, 2014) 18. Note more extensive examination of 'recreational value' in relation to wilderness and aesthetic value in first edition: Alexander Gillespie, *International Environmental Law, Policy and Ethics* (Oxford University Press, 1<sup>st</sup> ed, 1997), 102-106.

<sup>67</sup> Christine Macel, Luz Gyalui and Flavia Fossa Margutti (eds), *La Biennale di Venezia: 57 Esposizione Internazionale d'Arte: Viva Arte Viva* (SIAE, 2017) 264-267 (fig 7.7 at 265).



Figure 7.7: Marie Voignier, 'Les Immobiles', 2013, still photo from film, collection FRAC Poitou Charentes, courtesy Marcelle Alix, Paris. Source: Festival Images Vevey

The photograph of the rice paddy terraces (fig 7.3) can also be examined from critical perspectives debated among philosophers of environmental aesthetics. By framing the environment as a scene, placing it at a distance from the human viewer, the image of the rice paddies fails to convey the spatial, immersive quality of being in and part of environmental spaces as understood in contemporary environmental aesthetics.

The rice paddy photograph is also notable for its depiction of a cultivated environment. Vegetation has been cleared from the foothills and the terraces have been constructed and flooded, presumably with water diverted from a natural watercourse.<sup>68</sup> For some environmental aestheticians, the human intervention in that environment would disqualify it from aesthetic appreciation altogether. The converse of the 'positive' aesthetic developed by philosopher Allen Carlson and others, for example, is that an unnatural, cultivated or otherwise altered environment is not capable of being understood in terms of environmental aesthetics.<sup>69</sup> The cultivated nature of the rice paddies exposes underlying tensions in the conception of 'biodiversity' appreciated for its aesthetic value under the *Biodiversity Convention*. The forms of variability apparent in the image of the rice paddies – the colours and contours produced by the human manipulation of the land – might not be the forms of variability contemplated for the treaty, which conceives of biodiversity 'within species, between species and of ecosystems'.<sup>70</sup> The aesthetic elements of the image attest to human intervention that could be at odds with the treaty's own definition of biodiversity. Through an aesthetic examination of

<sup>68</sup> See Channa N. B. Bambaradeniya, Felix P. Amerasinghe 'Biodiversity Associated with the Rice Field Agroecosystem in Asian Countries: A Brief Review', Working Paper 63 (International Water Management Institute, 2003). Cf cultural elements in rice cultivation: Philippe Descola, *Beyond Nature and Culture* [tr Janet Lloyd] (The University of Chicago Press, 2013) 44; Andrew J. Chapeskie 'Culture, Landscape and Diversity' in Darrell Addison Posey (ed), *Cultural and Spiritual Values of Biodiversity: A Complementary Contribution to the Global Biodiversity Assessment* (United Nations Environment Programme and Intermediate Technology Publications, 1999) 76.

<sup>69</sup> Carlson, *Aesthetics and Environment* (n52) 73. See Chapter 2, part 2.3.

<sup>70</sup> *Biodiversity Convention* (n6) art 2.

the image, it becomes apparent that the object valued under the *Biodiversity Convention* – biodiversity – must also be understood in the task of defining the values protected under the treaty.<sup>71</sup>

Enriched by critical insights from art and the philosophy of environmental aesthetics, the photographs of the coral reef and the rice paddies suggest a disjuncture between the aesthetic qualities in the images and the aesthetic value or values of biodiversity protected under the *Biodiversity Convention*. In the next section, I consider photographs in *GBO-4* from the perspective of another aesthetic concept related to natural beauty: ‘wilderness’.

### 3.1.2 Wilderness Untouched

As discussed in Chapter 2, the concept of ‘wilderness’ is an environmental aesthetic that in the 20<sup>th</sup> century was adopted into law in the United States and other countries around the world.<sup>72</sup> It imagines the environment in terms of wild spaces and species untouched by humans, valued for its capacity to transport people to an existential realm. Associated with American Transcendentalism,<sup>73</sup> the idea of wilderness reimagines notions of Arcadia, as well as Romantic understandings of the sublime and picturesque, for the 20<sup>th</sup> century.<sup>74</sup> It is also related to the philosophical theory of positive aesthetics,<sup>75</sup> limiting the aesthetic appreciation of natural environments to those places undisturbed by humans. Wilderness is a conception of the natural environment from which humans are absent save the person who is immersed in the appreciation of it. It is also related to the recreational value discussed above in relation to scenic landscapes, with ‘wilderness’ valued by people for physical and psychological benefits.<sup>76</sup>

The two photographs in *GBO-4* that accompany the discussion of the integration of biodiversity values into planning and accounting for economic development (Aichi Target 2) can be analysed from an aesthetic perspective in terms of ‘wilderness’. They depict, respectively, a mangrove forest (fig 7.8) and an elephant herd grazing on a savannah plain (fig 7.9). The ancient and pristine mangrove forest, with twisted buttress roots wending their way into clear water reflecting the trunks and leafy mass above, appears as a wilderness untouched by humans. Cool shaded interiors contrast with the stark light that pierces the tree canopy. It is a wild space to inspire and to be conserved. The photograph of the elephants invites the viewer to marvel at the size, strength and resilience of the wandering pachyderms. The rising horizon in the background suggests the fertile legacy of a volcano crater, a bountiful wilderness.

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<sup>71</sup> See eg Michael Bowman, ‘The Nature, Development and Philosophical Foundations of the Biodiversity Concept in International Law’ in Bowman and Redgwell (n13) (‘Foundations’) 5; David Takacs, *The Idea of Biodiversity: Philosophies of Paradise* (Johns Hopkins University Press, 1996); Werner Scholtz, ‘Animal Culling: A Sustainable Approach or Anthropocentric Atrocity: Issues of Biodiversity and Custodial Sovereignty’ (2005) 2(2) *Macquarie Journal of International and Comparative Environmental Law* 9, 11.

<sup>72</sup> See Mark Woods, ‘Federal Wilderness Preservation in the United States: The Preservation of Wilderness?’ in J Baird Callicott and Michael P Nelson (eds), *The Great New Wilderness Debate* (University of Georgia Press, 1998); Eugene C Hargrove, ‘The Historical Foundations of American Environmental Attitudes’ in Allen Carlson and Sheila Lintott (eds), *Nature, Aesthetics, and Environmentalism: From Beauty to Duty* (Columbia University Press, 2008) 29; Gillespie 2014 (n66) 18–19. On the global construction of environmental laws, see Lee Godden, Jacqueline Peel and Jan McDonald, *Environmental Law* (Oxford University Press, 2<sup>nd</sup> ed, 2019) 26.

<sup>73</sup> Brady, *Aesthetics of Environment* (n52) 46. See Chapter 4, part 2.1.1.

<sup>74</sup> Cf Tim Stephens, ‘What is the Point of International Environmental Law Scholarship in the Anthropocene?’ in Ole W Pedersen (ed), *Perspectives on Environmental Law Scholarship: Essays on Purpose, Shape and Direction* (Cambridge University Press, 2018) 129.

<sup>75</sup> Carlson, *Aesthetics and Environment* (n52) 73.

<sup>76</sup> See Gillespie 1997 (n66) 104.

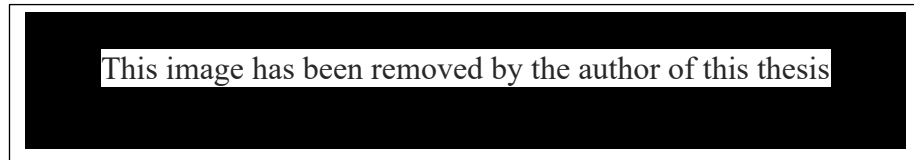


Figure 7.8: *Global Biodiversity Outlook 4*, 37

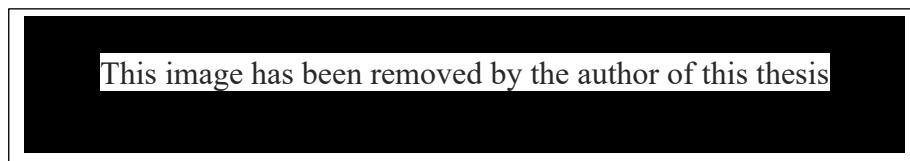


Figure 7.9: *Global Biodiversity Outlook 4*, 38

These wilderness photographs in *GBO-4* conjure the Romantic landscape imagery of 19<sup>th</sup> century European and British painters discussed in Chapter 4,<sup>77</sup> as well as the landscape aesthetic of many contemporary artists around the world today. The idea of wilderness and the

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<sup>77</sup> See Chapter 4, part 2.1.1. Cf Michael Bowman, 'Law, Legal Scholarship and the Conservation of Biological Diversity: 2020 Vision and Beyond' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Elgar Online, 2016) 3, 13.

Romantic rejection of industrial ‘progression’ as an aesthetic value of the environment persists, for example, in the contemporary art of Raymond Arnold. His composite etching *Mt Lyell (Expanded Field)* (fig 7.10) zooms out from meticulous studies of gnarled tree trunks, and jewelled rock faces, to reveal a vast and rugged landscape damaged by mining but ‘returned to nature’. Finding resonance in a poem by Seamus Heaney – ‘An elsewhere world, beyond Maps and atlases’ – Arnold’s work is a nostalgic invocation of a reclaimed wilderness.<sup>78</sup> It is a reassurance that nature will prevail.

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Figure 7.10: Raymond Arnold, *Mt Lyell (Expanded Field)*, 2017, 5 panel etching on 300 gsm Velin Arches including 90 individual fragments, dimensions variable edition 1/4, 80x500cm. Source: Australian Galleries

The wilderness aesthetic is, however, the subject of significant critique among aesthetic scholars, environmental aestheticians and art critics alike.<sup>79</sup> For philosophers of environmental aesthetics such as Emily Brady, an environment absent humans is not an environment appreciated for its aesthetic value.<sup>80</sup> Aesthetic value is necessarily an anthropocentric value of the environment, perceived by humans in and part of the environment that is valued.<sup>81</sup> Brady’s characterisation of the natural environment capable of aesthetic appreciation is consistent with the concept of biological diversity developed for Western science. It is a concept founded in biology on connections between all elements of the environment, from habitats to species and their genes – *including* human beings.<sup>82</sup> As such, wilderness photographs of environments, devoid of humans, can be understood as anachronistic and antagonistic to the very concept of biodiversity.

It is perhaps instead intrinsic value that is represented in the wilderness apparent in the *GBO-4* photographs for Aichi Target 2. Intrinsic value is a value of biodiversity that is distinguished from other values – including aesthetic value – in the *Biodiversity Convention*.<sup>83</sup> It is generally understood to be a value that serves no instrumental application for humans: it is the value of the environment in its own right.<sup>84</sup> But scholars have pointed out that it is conceptually difficult to apply the notion of intrinsic value to biodiversity – the ‘diversity’ of genes, species and ecosystems is not necessarily a subject of ‘intrinsic’ worth in and of itself. Freya Dawson, for example, questions the extent to which scientific knowledge is relevant to conceptions of

<sup>78</sup> Raymond Arnold, *Elsewhere World*, Exhibition Essay (Australian Galleries, 2017).

<sup>79</sup> See generally Mark Woods, *Rethinking Wilderness* (Broadview Press, 2017). See also William Cronon, ‘The Trouble with Wilderness or Getting Back to the Wrong Nature’ in Callicott and Nelson (n72) 471; Michael P Nelson and J Baird Callicott (eds), *The Wilderness Debate Rages On: Continuing the Great New Wilderness Debate* (University of Georgia Press, 2008); David Delaney, *Law and Nature* (Cambridge University Press, 2003) 178-9.

<sup>80</sup> Brady, *Aesthetics of Environment* (n52) 53.

<sup>81</sup> Gillespie 2014 (n66) 13.

<sup>82</sup> See Sahotra Sarkar, ‘Approaches to Biodiversity’ in Justin Garson, Anya Plutynski, and Sahotra Sarkar (eds), *The Routledge Handbook of Philosophy of Biodiversity* (Routledge, 2017) 43.

<sup>83</sup> *Biodiversity Convention* (n6) preamble, 1<sup>st</sup> tiret.

<sup>84</sup> See Mattia Foschi and Tom West, ‘In Whose Interest? Instrumental and Intrinsic Value in Biodiversity Law’ in Bowman, Davies and Goodwin (n77) 55. See further Chapter 2, part 3.2.2.

intrinsic value.<sup>85</sup> She maintains that science ‘does not recognize the intrinsic value of biodiversity. We must always look to cultural factors to identify value.’<sup>86</sup>

Analysing the photographs from an eco-critical perspective,<sup>87</sup> situating them for example in socio-political discourse, can help to develop an aesthetic account of concepts and values relevant to the implementation of the *Biodiversity Convention*. For example, one of the elephants in the *GBO-4* photo has extended ears, a defensive gesture asserting authority and claiming territory. Likely an African elephant,<sup>88</sup> it stands on soil over which wars have been waged, with or between colonial pretenders, with or between the first human inhabitants of planet Earth. Claims and counter-claims to land are indifferent to biodiversity, though not to biological resources. As sovereign, states decide for themselves how to use the resources of the realm. Again, an understanding of the object of value under the treaty is significant to an understanding of the values – both biological diversity and ‘its components’ are named as objects of aesthetic value in the preamble to the *Biodiversity Convention*.<sup>89</sup>

The relationship between the aesthetic and economic value of biodiversity is also apparent in the photographs. Economic value attributed to the ecosystem services provided by a pristine mangrove, for example, might be different, in terms of biodiversity protection, from the economic value to be gained from hunting elephants – whether permitted or illegal. Yet such distinctions are not obvious from the general call in Aichi Target 2 for the integration of the values of biodiversity into planning for economic development.<sup>90</sup> Fiona Hall’s artwork *Tender* (2003-2005) (fig 7.11) takes aim at economies of the environment in ways that can illuminate understandings of biodiversity’s value. Adopting a title ambiguously referencing both love and money, the artist has woven birds’ nests from shredded US dollar bills in a blatant critique of the monetary values promoted over aesthetics and, possibly, at nature’s expense. The delicate shape she gives to the nests, a symbol of a fragile natural habitat, is undermined by the hard currency that constitutes them.



Figure 7.11: Fiona Hall, *Tender*, 2003-2005, US Dollars, Dimensions variable, Collection: Artist. Courtesy Roslyn Oxley9 Gallery, Sydney. Source: ABC Radio National

<sup>85</sup> Freya Dawson, ‘What is the Value of Biodiversity? Scientific and Philosophical Perspectives’ in Nicole Rogers (ed), *Green Paradigms and the Law* (Southern Cross University Press, 1998) 93.

<sup>86</sup> Ibid 107.

<sup>87</sup> See Chapter 4, part 2.3.2.

<sup>88</sup> Sylvia K. Sikes, *The Natural History of the African Elephant* (Weidenfeld & Nicolson, 1971).

<sup>89</sup> *Biodiversity Convention* (n6) preamble, 1<sup>st</sup> tiret.

<sup>90</sup> *Aichi Targets* (n8).



The impacts of commerce are acknowledged in the written text of the *GBO-4* – agricultural subsidies are, for example, identified as one of the significant causes of harm to biodiversity.<sup>91</sup> However such impacts are largely absent from the photographic imagery of nature’s aesthetic ideal.<sup>92</sup> Recreational hunts for the rich, and poaching by the poor, will see elephant populations decimated for trophies and ivory.<sup>93</sup> But through the photographs, we are not meant to see the elephants for their ivory tusks, a valuable commodity that sees them poached to near extinction. Nor are we to see in the mangrove image biodiversity as either vulnerable to rising sea levels or as protective of the land. Instead, the photographs speak to biodiversity as wilderness, cherished by those who have created it as an escape from modernity.

States parties might contest the extent to which the ‘wilderness’ projected by the photographs correlates with the aesthetic value protected under the *Biodiversity Convention*. The inclusion of photographs representing biodiversity as wilderness in reports on biodiversity could be a departure from the decisions of the Conference of the Parties of the *Biodiversity Convention* to conserve biodiversity in a way that respects the human communities that live with it. For example, the reconceptualization of nature inhabited by humans was central to work under the *Biodiversity Convention* to produce the *Akwé: Kon Guidelines*.<sup>94</sup> These voluntary guidelines were agreed by the Conference of the Parties in 2004 to better integrate the concerns of those people living in biodiverse places – indigenous and local communities – in assessments of development impacts on biodiversity. The acknowledgement by the parties of these human concerns is, possibly, consistent with the social value of biodiversity recognised in the treaty’s preamble but not suited to an idea of aesthetic value as wilderness.

Ultimately, my aesthetic analysis of the mangrove and elephant images in *GBO-4* (figs 7.8 and 7.9) serves to identify aesthetic legacies and contradictions embedded in visual representations of biodiversity in the work of the *Biodiversity Convention*. With no humans in view, the photographic images are not a comprehensive representation of the concept of biological diversity that is the foundation of the treaty. The images facilitate critical understandings of aesthetic value showing how ideas of natural beauty portrayed in the photographs are culturally situated as scenic beauty and wilderness. The photographs can also be analysed from an aesthetic perspective to highlight differences between biodiversity’s aesthetic value and other values – intrinsic, or economic. Aesthetic analysis also illuminates understanding of the object of value – biodiversity. In the next section, I will reflect on aesthetic perspectives of another environmental value – cultural value – revealed in photographs in *GBO-4* as one that can be distinguished from the aesthetic value of biodiversity.

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<sup>91</sup> *GBO-4* (n15) 41.

<sup>92</sup> Cf *GBO-4* (n15) 40 (tractor), 43 (silos), 59 (fish nets), 65 (aquaculture), 66 (chimneys) 122 (erosion).

<sup>93</sup> See *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), ‘African Elephant Poaching Down, Ivory Seizures Up and Hit Record High’ (Press Release 24 October 2017) <[https://cites.org/eng/news/pr/African\\_elephant\\_poaching\\_down\\_ivory\\_seizures\\_up\\_and\\_hit\\_record\\_high\\_24102017](https://cites.org/eng/news/pr/African_elephant_poaching_down_ivory_seizures_up_and_hit_record_high_24102017)>; Edward B. Barbier, Joanne C. Burgess, Timothy M. Swanson, and David W. Pearce, *Elephants, Economics and Ivory* (Earthscan, 2009).

<sup>94</sup> Conference of the Parties to the *Convention on Biological Diversity*, Decision VII/16 F *Akwé: Kon Guidelines*, 7<sup>th</sup> mtg, UN Doc UNEP/CBD/COP/DEC/VII/16 (13 April 2004); see also *Convention on Biological Diversity*, Subsidiary Body on Scientific, Technical and Technological Advice, *Note by the Executive Secretary*, ‘Managing Biodiversity is About People’ 7<sup>th</sup> mtg UN Doc UNEP/CBD/SBSTTA/17/INF/1 (4 September 2013).

### 3.2 Aesthetic value of biodiversity as culture

The ‘aesthetic’ value of biodiversity is listed separately from ‘cultural’ value in the preamble to the *Biodiversity Convention*.<sup>95</sup> I have, however, noted links between aesthetic and cultural value that have been made by the parties to the *Biodiversity Convention*.<sup>96</sup> Methods for the valuation of biodiversity on the basis of ‘ecosystem services’, for example, include various environmental functions described as ‘aesthetic’ in the category of ‘cultural’ services.<sup>97</sup> In this section, I analyse the aesthetic value of the environment understood from the photographs in terms of culture. Specifically, I examine cultural elements of biodiversity’s aesthetic value and aesthetic elements of biodiversity’s cultural value.

#### 3.2.1 Cultural elements of biodiversity’s aesthetic value

Philosophers of environmental aesthetics distinguish between the aesthetic appreciation of, on the one hand, the natural environment and, on the other, of artefacts.<sup>98</sup> In this sense, the natural environment to be appreciated is not considered a product of human craft, so enabling a distinction between the aesthetic appreciation of the natural environment and aesthetic assessments of built environments and cultivated landscapes in terms of architecture and design. Similarly, an aesthetic appreciation of art depicting the natural environment, or made from materials sourced from the natural environment – what I called in Chapter 4 ‘art of the environment’ – is not contemplated for the aesthetic appreciation of the environment conceived by philosophers of environmental aesthetics.<sup>99</sup>

Several philosophers of environmental aesthetics argue, however, that a person’s aesthetic appreciation of the environment is a function of culture shared among a community of people, whether defined by language, ethnicity or nationality.<sup>100</sup> For this purpose, it remains the case that the object of appreciation – the natural environment – is not a cultural object in the way that art or architecture is a cultural object. Instead, the person appreciating the natural environment is a cultural subject. *Earth’s Creation* (fig 7.1), the artwork discussed at the outset of this Chapter, can be seen as a cultural object but it could also be characterised for the philosophy of environmental aesthetics as a manifestation of the artist’s aesthetic appreciation of the environment, as informed by her culture.<sup>101</sup> Western science could also be characterised as a form of cultural knowledge that informs a human subject’s aesthetic appreciation of the environment.<sup>102</sup> As discussed earlier in this Chapter,<sup>103</sup> the appreciation of the natural environment in terms of natural beauty defined by scenic and wilderness qualities is understood with reference to culture – Western European and Anglo-American culture – depicted in cultural objects in the form of scenic beauty in landscape art and concepts of wilderness.

In this part I analyse two photographs in *GBO-4* to explain philosophical aspects of the relationship between aesthetic and cultural values of biodiversity protected by the treaty. One

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<sup>95</sup> *Biodiversity Convention* (n6) preamble, 1<sup>st</sup> tiret.

<sup>96</sup> See above part 2.2, in the context of ecosystem services.

<sup>97</sup> See Cooper et al (n12).

<sup>98</sup> See Jonathan Maskit, ‘On Universalism and Cultural Historicism in Environmental Aesthetics’ in Martin Drenthen and Jozef Keulartz (eds), *Environmental Aesthetics: Crossing Divides and Breaking Ground* (Fordham University Press, 2014) 41. See further Chapter 2, part 2.3.

<sup>99</sup> See Chapter 4, part 2.2.3.

<sup>100</sup> Maskit (n98).

<sup>101</sup> For discussion of indigenous perspectives, see discussion of Julie Gough, *Observance* (2012), fig 8.1 in Chapter 8.

<sup>102</sup> See eg Brady, *Aesthetics of Environment* (n52) 77.

<sup>103</sup> See above part 3.1.

of the photographs (fig 7.12), included with the discussion of Aichi Target 1 on raising awareness of biodiversity values, shows a man with a wooden rod over his shoulders, tin cans strung from each end – a possible water-carrier.<sup>104</sup> Another photograph (fig 7.13), featured in the section of *GBO-4* assessing Aichi Target 19 on the development of knowledge of biodiversity values, shows a man in a natural environment who appears to be fishing. No title or caption describes where the men are or what they are doing.



Figure 7.12: *Global Biodiversity Outlook 4*, 35



Figure 7.13: *Global Biodiversity Outlook 4*, 120

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<sup>104</sup> *GBO-4* (n15) 35.

The *GBO-4* photographs of the water-carrier and the fisherman can be analysed together to develop a particular understanding of cultural value for the aesthetic appreciation of the environment that is theorised in the philosophy of environmental aesthetics.<sup>105</sup> Both photographs are portraits of men standing in what might be seen as a rural environment. The water-carrier looks up and out at the world. He is alone, contemplating the environment around him, an environment that extends outside the frame of the image. In the other image, the fisherman is introspective, focussed on a detail of a fishing line that renders all around it irrelevant. He has a sarong tied around his waist, a naked torso and a turban on his head. There are other people behind him. Like them, the main figure appears to be balanced on stilts, a method of fishing common in Sri Lanka.<sup>106</sup>

From the two images, it could be said that the human subjects see their environments differently, from their own vantage points, with their own aesthetic sensibility. The water-carrier could be characterised for the purposes of the philosophy of environmental aesthetics as an archetype of a subjectivist aesthetic experience. But the fisherman, from his clothing and his method of fishing, appears as a product of his culture. He could be seen as appreciating the natural environment around him from a specific cultural vantage.<sup>107</sup> He has a like-minded community of people about him who share that cultural perspective and the elements of the aesthetic experience that come with it. In this way, the fisherman is perhaps closer to the objectivists in the philosophy of environmental aesthetics,<sup>108</sup> where traditional knowledge as opposed to Western science, could be seen to lend an objective frame of reference to his aesthetic experience of the environment. This is not to say that the aesthetic experience of the environment is necessarily all or only cultural. Some philosophers of aesthetics maintain that it is.<sup>109</sup> However, for others such as Emily Brady, cultural value is one element that joins others, such as emotion and imagination, to shape the aesthetic value of the environment.<sup>110</sup>

An aesthetic analysis of the *GBO-4* photographs can be instructive in explaining cultural elements of the aesthetic appreciation of the environment for the philosophy of environmental aesthetics. But the photographs can also inspire eco-critical reflections on the vision of ‘undeveloped’ landscapes embedded in the cultural legacy of Western art. The contemplative gaze of the water-carrier, and the balletic poise of the fisherman, both men of colour, could be seen as suggestive of the hunters and gatherers of societies that were so frequently depicted as primitive in British and European art from colonial encounters.<sup>111</sup> Portrayals of ‘native’ communities and the ‘noble savage’ – such as those apparent in paintings depicting an Australian ‘Aboriginal Arcadia’ – have long been critiqued for the oppression they engender.<sup>112</sup> Nineteenth-century British painter John Glover imagined Indigenous peoples into his paintings of the Tasmanian landscape (fig 7.14) long after they had been killed or exiled from their

<sup>105</sup> See eg Brady, *Aesthetics of Environment* (n52) 52.

<sup>106</sup> Paul Alexander, *Sri Lankan Fishermen: Rural Capitalism and Peasant Society* (Australian National University, 1982).

<sup>107</sup> See below, however, my discussion of ‘subsistence’ value, part 3.2.3.

<sup>108</sup> Eg Carlson, *Aesthetics and Environment* (n52); see also Brady, *Aesthetics of Environment* (n52) 191.

<sup>109</sup> See Maskit (n98).

<sup>110</sup> Brady, *Aesthetics of Environment* (n52) 146.

<sup>111</sup> Cathy Leahy and Judith Ryan (eds), *Colony: Australia 1770-1861/Frontier Wars* (National Gallery of Victoria, 2018) 190. On ‘noble savage’, see Gillespie 2014 (n66) 84.

<sup>112</sup> See Rebecca Edwards, ‘A Delightful and Difficult Art’ in Leahy and Ryan (n111) 176, 178; Jean-François Staszak, ‘Primitivism and the Other: History of Art and Cultural Geography’ (2004) 60 *GeoJournal* 353; Norma Broude (ed), *Gauguin’s Challenge: New Perspectives After Postmodernism* (Bloomsbury Academic, 2018).

country by the colonial settlers.<sup>113</sup> Glover and other artists of the time show Australian Aborigines as naïve peoples so enmeshed with their natural environments that they are not seen – not recognised apart from the exotic environment – by the European invaders of the territory.<sup>114</sup>

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Figure 7.14: John Glover, *The River Nile, Van Diemen's Land, from Mr Glover's farm*, 1837, oil on canvas 76.4×114.6cm. Source: National Gallery of Victoria

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copyright reasons

Figure 7.15: Danie Mellor, *Et in arcadia ego (of landscape and memory)*, 2011, pastel, pencil, glitter, Swarovski crystal and wash on Saunders Waterford paper, 152x226cm, private collection. Source: Jan Murphy Gallery

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<sup>113</sup> David Hansen and Peter Timms (eds), *John Glover and the Colonial Picturesque* (Tasmanian Museum and Art Gallery, 2003).

<sup>114</sup> Cf Julie Gough with James Boyce, Brigita Ozolins, Khadija von Zinnenburg Carroll, *Fugitive History: The Art of Julie Gough* (UWA Publishing, 2018).

Visual artists have highlighted such critical elements through their works.<sup>115</sup> Artist Danie Mellor, for example, critiques depictions of pre-contact Aboriginal Australia as a savage nirvana: Aborigines ‘at play’, living with and on the continent’s fauna and flora.<sup>116</sup> His drawing, *Et in arcadia ego (of landscape and memory)* (fig 7.15),<sup>117</sup> shows an Aboriginal man, poised on a fallen tree trunk, returning from a hunt with marsupials draped around his shoulders. A white man, also standing on a fallen tree in the rainforest but dressed for the city, aims a rifle at the tangled tree canopy. Fauna endemic to Australia – though not all from a rainforest habitat – are off-scale icons in a post-settlement imaginary, pasted on an alien blue forest in this conjured Eden and memorialised within a gilded floral frame. Both humans are visible, distinct from the landscape. But only one knows the value of place. Only one belongs. If anyone is naïve in this image, it is the hapless European – not the Aborigine who knows the place and is sure to survive.

Casting the fisherman in the *GBO-4* photograph (fig 7.13) in similar terms, the man is no longer the culturally embedded appreciator of a natural environment. Nor is he primitive. He and the water-carrier (fig 7.12) could instead be seen as symbols of resilience, wise and well-practised stewards of a fragile environment. Rather than seeing the *GBO-4* photographs as perpetuating disingenuous tropes, aesthetic analysis can be used to redeem the images as a depiction of cultural knowledge of biodiversity protected under the *Biodiversity Convention*. In the next section, I address the cultural value of biodiversity expressed in the aesthetic practices of indigenous peoples that can – and I argue should – be distinguished from cultural elements that inform aesthetic appreciation of biodiversity.

### 3.2.2 Aesthetic elements of biodiversity’s cultural values

Like aesthetic value, the ‘cultural’ value of biodiversity and its components acknowledged in the preamble to the *Biodiversity Convention* is not defined. It might include the value of traditional knowledge of indigenous and local communities, relevant to the conservation of biodiversity, which are protected under the treaty.<sup>118</sup> It is these forms of knowledge that give rise to ‘biocultural rights’.<sup>119</sup> *Cultural and Spiritual Values of Biodiversity* is an edited compendium of essays produced for the United Nations Environment Programme which has been cited in work of the Secretariat to the *Biodiversity Convention*.<sup>120</sup> The editor of the compendium associates ‘cultural value’ with, among other things, ‘the beliefs and practices of indigenous and traditional peoples in relation to their use and conservation of biodiversity’.<sup>121</sup> The cultural value of biodiversity is also described by other contributors to the compendium with reference to aesthetic values associated with the arts.<sup>122</sup> Particular mention is made of the

<sup>115</sup> See Kate McMillan, *Contemporary Art and Unforgetting in Colonial Landscapes: Islands of Empire* (Palgrave Macmillan, 2019).

<sup>116</sup> Maudie Palmer, ‘Introduction’ in Maudie Palmer and Samantha Littlely, *Danie Mellor: Exotic Lies Sacred Ties* (University of Queensland Art Museum, 2014) 17.

<sup>117</sup> Ibid 52-3.

<sup>118</sup> *Biodiversity Convention* (n6) art 8(j) (traditional knowledge) and art 10(c) (customary use).

<sup>119</sup> Kabir Sanjay Bavikatte and Tom Bennett, ‘Community Stewardship: The Foundation of Biocultural Rights’ (2015) 6(1) *Journal of Human Rights and the Environment* 7.

<sup>120</sup> See eg Conference of the Parties to the *Convention on Biological Diversity*, Decision VI/10 Article 8(j) and Related Provisions, 6<sup>th</sup> mtg, UN Doc UNEP/CBD/COP/6/20 (27 May 2002) annex 1.

<sup>121</sup> Darrell Addison Posey, ‘Introduction: Culture and Nature – The Inextricable Link’ in Posey (n68). See also Gillespie 2014 (n66) 86.

<sup>122</sup> See Margot McLean, ‘Art and Environment, or Look Here’, Box 11.1, in Posey (n68) 439; Janet M. Chernela ‘Indigenous knowledge and Amazonian Blackwaters of Hunger’ in Posey (n68) 423 (colour plates 22-24, after 284); James Hillman, ‘Where is the Environment?’ in Posey (n68) 486, 487.

creative arts of indigenous and traditional communities, including stories, dances and songs.<sup>123</sup> Photographs used in the publication depict scenes of indigenous lands at risk from human pollution embroidered on fabric, as well as ‘bark-cloth’ paintings representing animals and hunting methods.<sup>124</sup>

Characterisations in *Cultural and Spiritual Values of Biodiversity* of the cultural value of biodiversity as ‘aesthetic’ suggests a Western European and Anglo-American conception of aesthetics related to the arts. But it is not clear from that compendium how artistic expressions of cultural value might also relate to the aesthetic value of biodiversity in terms conceived by philosophers of environmental aesthetics. Nor is it clear if the conception of aesthetic value in Western European and Anglo-American philosophy – as it relates to either the arts or to the natural environment – is appropriately extended to cultural or other appreciations of the environment among indigenous communities. The use of non-indigenous aesthetic concepts to describe indigenous art, and indigenous relationships to the natural environment apparent in art, is contested and would require explanation and qualification.<sup>125</sup>

In contrast to *Cultural and Spiritual Values of Biodiversity*, there are no images in *GBO-4* of creative arts as an expression of the cultural value of biodiversity, indigenous or otherwise. The image of the fisherman (fig 7.13) is, arguably, an image of artisanal fishing practice which might be borne of traditional knowledge that is protective of biodiversity. But in the photographic images included in *GBO-4*, no one is seen painting with ochre hues on bark, no one fashions twigs and leaves into artefact, no one dons decorative feathers for a hunt or ceremonial dance. With the absence of such images, *GBO-4* has avoided tropes that can stereotype and oppress. Earlier I explained, for example, artistic traditions that portray indigenous peoples as primitive. Yet *GBO-4* might have also missed an opportunity to address connections made by the parties themselves between biodiversity’s aesthetic value and culture<sup>126</sup> – and to reconceive the dominant aesthetic of Britain and Western Europe from an indigenous perspective.

Some examples of art by indigenous peoples can be seen to express the cultural knowledge of biodiversity, and the value of that knowledge, through aesthetic practices familiar to a Western European and Anglo-American conception of aesthetics related to the arts. In ways explained below, these works can be seen as aesthetic translations of indigenous values of biodiversity aimed at educating non-indigenous communities so that they might also value and protect biodiversity on that basis.

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<sup>123</sup> See eg Laurie Anne Whitt, ‘Indigenous peoples, their Environments and Territories: Metaphor and Power in Indigenous and Western Knowledge Systems’ in Posey (n68) 69; Francisco Montes, ‘Spirit, Story and Medicine: Sachamama – an Example of The Ancient Beings of the Amazon Rainforest’ Box 6.4 [tr Kathleen Harrison] in Posey (n68) 276.

<sup>124</sup> See Posey (n68) colour plates, after 284.

<sup>125</sup> See Garneau (n2).

<sup>126</sup> See above part 2.2.



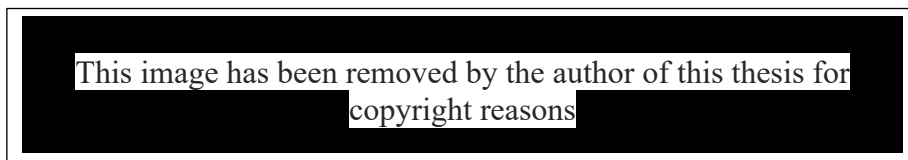


Figure 7.16: Abel Rodríguez, from series *Ciclo anual del bosque de la vega* (Seasonal changes in the flooded rain forest), ink and watercolour. Source: Tropenbos International



Figure 7.17: Abel Rodríguez from series *Ciclo anual del bosque de la vega* (Seasonal changes in the flooded rain forest), ink and watercolour. Source: Tropenbos International

The meticulous ink, graphite and watercolour drawings of Nonuya elder, Abel Rodríguez, are an example of traditional knowledge communicated across indigenous and European imaginaries of biodiversity. They are an artistic representation of indigenous knowledge of the natural environment in ways that can be understood in terms of biodiversity. Select drawings from the series “Annual Cycle of the Flooded Rainforest” (2009) (figs 7.16 and 7.17) show trees, and details of leaves, as well as fauna, from the Cahuinari region in Colombia. Notations in Nonuya and Spanish languages explain the structures or properties of plants. With written

annotations reminiscent of the botanical records of the naturalists that would accompany colonial explorers,<sup>127</sup> Rodríguez' delicate portrayals of flora and fauna display an intimate knowledge of both the parts and processes that make habitats whole. He has an expertise apart from Western natural science that is highly sensitive to the variability and interdependence of life's elements and peculiar to his community's land. Rodríguez' willingness to provide open access to Nonuya knowledge of nature's instrumental qualities is unnerving for those viewers concerned about any piratic dispositions of pharmaceutical companies.<sup>128</sup> That a Dutch charitable organisation, Tropenbos, appears to 'own' the works also raises concerns about the potential appropriation of Nonuya knowledge.<sup>129</sup> For Rodríguez, however, this may well facilitate an elder's task in the preservation of nature for future generations.<sup>130</sup>



Figure 7.18: Mulkun Wirrpanda and John Wolseley, works from *Midawarr Harvest*, 2017. Source: National Museum of Australia

The artistic collaboration of Mulkun Wirrpanda and John Wolseley (fig 7.18) provides further reflection on the relationship between aesthetics and indigenous culture in connection with biodiversity. The artists' contrapuntal visions of the environment's aesthetics facilitate a dual conception of culture as, on the one hand, traditional knowledge of biodiversity and, on the

<sup>127</sup> See Paul Brunton (ed), *The Endeavour Journal of Joseph Banks: The Australian Journey* (HarperCollins, 1998); Jean Fornasiero, Peter Monteath and John West-Sooby, *Encountering Terra Australis: The Australian Voyages of Nicolas Baudin and Matthew Flinders* (Wakefield Press, 2004).

<sup>128</sup> Alexander Gillespie, *Conservation, Biodiversity and International Law* (Edward Elgar, 2011) ('Biodiversity') 501.

<sup>129</sup> See eg Lars Eckstein and Anja Schwarz (eds), *Postcolonial Piracy: Media Distribution and Cultural Production in the Global South* (Bloomsbury Academic, 2014); Elsdon (n5).

<sup>130</sup> See José Roca, 'Abel Rodríguez' in Quinn Latimer and Adam Szymczyk (eds), *documenta 14: Daybook* (Prestel, 2017); Abel Rodríguez, *The Plants Cultivated by the People from the Center in the Colombian Amazon* (Programa Trinacional, 2013).

other, as aesthetic convention for representations of the environment.<sup>131</sup> Wirrpanda communicates her Indigenous knowledge of biodiversity to Wolseley through art and he ‘repeats’ the catechism through an European aesthetic tradition. The resulting hybridised environmental aesthetic has the concerning potential to ‘assimilate’ Aboriginal imaginaries and images.<sup>132</sup> However, it can also serve to communicate knowledge vital to the protection of biodiversity. The collaboration sees a British and Western European aesthetic value of biodiversity led by Indigenous knowledge.

My aesthetic examination of artworks representing traditional knowledge of the natural environment shows how images can contribute to a conceptualisation of the cultural value of biodiversity for the *Biodiversity Convention*. The use of such images in *GBO-4* could have served the states parties to the treaty in their understanding of aesthetic elements of biodiversity’s cultural value as distinct from the cultural elements of the aesthetic value of biodiversity. Distinctions between cultural and aesthetic value in these terms could have implications for the implementation of the treaty – for what is protected, and how it is protected, in ways informed and protective of indigenous values.

While I have for the purposes of this analysis identified values in *images* absent from *GBO-4*, I now turn to consider how the *GBO-4* images present a *value* absent from the express terms of the treaty: subsistence value.

### 3.2.3 Subsistence value of biodiversity through aesthetics

Missing from the list of biodiversity values in the preamble to the *Biodiversity Convention* is an environmental value essential to the very concept of biological diversity – the subsistence value of biodiversity. Described in a technical report used as a basis for *GBO-4* as a non-monetary value,<sup>133</sup> subsistence is eerily absent from the intrinsic, ecological, genetic, social, economic, scientific, educational, cultural, recreational or aesthetic biodiversity values expressly protected under the treaty.<sup>134</sup> Some of the values could perhaps be interpreted to include subsistence. The mention of ‘intrinsic’ value might stretch to a right of survival of all species and ‘ecological’ value rests on an awareness of the interdependence of all life.<sup>135</sup> But none quite speaks to the value of biodiversity for human survival.<sup>136</sup>

The subsistence value of biodiversity is one particularly relevant to developing country states, sometimes contrasted with and elevated above biodiversity’s aesthetic value.<sup>137</sup> In his contribution to *Cultural and Spiritual Values of Biodiversity*, for example, Clark Peteru observed that ‘[d]espite the turmoil [in Western Samoa], people still survive from their own

<sup>131</sup> See Will Stubbs and John Wolseley (eds), *Midawarr Harvest: The Art of Mulkun Wirrpanda and John Wolseley* (National Museum of Australia, 2018). See also Mandy Martin’s ‘extensive immersion projects’, Peter Haynes, *Mandy Martin: Painting 1981-2009* (Canberra Museum and Gallery, 2008) 10 and Fiona Hall’s collaboration with Tjanpi Desert Weavers for Fiona Hall, *Wrong Way Time* Australian Pavillion, Biennale Arte 2015, 56th International Art Exhibition, Venice.

<sup>132</sup> See eg Donna Leslie, *Aboriginal Art: Creativity and Assimilation* (Macmillan Art Publishing, 2008) 43.

<sup>133</sup> *Aichi Assessment* (n9) 17. See also *ibid* 23. See generally Petra Maass, *The Cultural Context of Biodiversity Conservation* in Michael Markussen et al (eds), *Valuation and Conservation of Biodiversity: Interdisciplinary Perspectives on the Convention on Biological Diversity* (Springer, 2005) 315.

<sup>134</sup> *Biodiversity Convention* (n6) preamble 1<sup>st</sup> tiret. There is no reference to subsistence value in the treaty.

<sup>135</sup> See Fosci and West (n84) 75.

<sup>136</sup> See Bradley J Cardinale et al, ‘Biodiversity Loss and its Impact on Humanity’ (2012) 486 *Nature* 59.

<sup>137</sup> See generally Dilys Roe, Joanna Elliott, Chris Sandbrook (eds), *Biodiversity Conservation and Poverty Alleviation: Exploring the Evidence for a Link* (John Wiley & Sons, 2012).

plot of land rather than the supermarket shelf.’<sup>138</sup> He described ‘Western Samoan views of the environment’ in terms of subsistence as opposed to aesthetic value:

Survival requires pragmatism not aestheticism, and for that reason Samoans have a utilitarian view of nature. Nature exists to feed, to house, then to satisfy cultural obligations. Usually it is only at the end of the day that one can relax and enjoy one’s surroundings and the coolness of the approaching evening. To my knowledge the environment is neither revered nor protected for its own sake.<sup>139</sup>

Artist Amar Kanwar’s video artwork *The Scene of Crime* (2011) (fig 7.19) speaks to the relationship between the subsistence value of the natural environment and environmental conservation in developing countries. Various scenes and sounds are combined in the work to portray the resistance of people displaced from subsistence farming lands earmarked for industrial development in the Indian state of Odisha. The video is part of a larger multimedia installation called *The Sovereign Forest* (2011), comprising books, documents, soundscapes, a collection of seeds and various artefacts which, the artist says, are evidence of crimes against people and the environments that sustain them.<sup>140</sup>



Figure 7.19: Amar Kanwar, *The Scene of Crime*, 2011, HD video installation (colour, sound), 42 min, part of the *Sovereign Forest* multimedia installation, courtesy Marian Goodman Gallery. Source: Carnegie Museum of Art

The absence of subsistence value from the biodiversity values listed for protection under the *Biodiversity Convention* is difficult to reconcile with the account often given of the treaty as having marked a shift in international environmental law in favour of the ‘developing’ Global

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<sup>138</sup> Clark Peteru, ‘Western Samoan Views of the Environment’ in Posey (n68) 421, 422.

<sup>139</sup> Ibid 421.

<sup>140</sup> See TarraWarra Museum of Art, *TarraWarra International 2013: Animate/Inanimate* (TarraWarra Museum of Art, 2013).

South.<sup>141</sup> The equitable sharing of ‘benefits’ flowing from the exploitation of genetic resources, recognised in the objectives and expressed through articles 15 and 19 of the *Biodiversity Convention*, had been a demand of developing countries.<sup>142</sup> With developing countries constituting many of the centres of diversity for genetic resources that are desired for pharmaceutical and other development by countries of the ‘developed’ North,<sup>143</sup> the Global South succeeded in asserting a claim to the benefits associated with the exploitation of this natural resource within their jurisdictions. The adoption of the treaty was, ultimately, an assertion of sovereign equality in name and in practice. It was a move away from the international administration of environmental protections under, for example, the *World Heritage Convention*, to nationalised processes of biodiversity conservation.

Despite there being no express reference to subsistence value in the *Biodiversity Convention*, the photographs of the water-carrier and fisherman in *GBO-4* (figs 7.12 and 7.13) can both be analysed in such terms. Both men are engaged in tasks of subsistence, one (I have assumed) collecting fresh water, the other hoping to catch a fish for an evening meal. These photographic images of people living from the natural environment, highlight the subsistence value of biodiversity in ways vital for people of the Global South. As such, they evoke an ‘environmentalism of the poor’ to describe values of the environment common to the majority of people living in developing countries.<sup>144</sup> This articulation of environmentalism rejects a conception of the Global South as favouring economic development over environmental protection. It recognises instead the value of clean environments to poor communities for sustenance. Rob Nixon says the North’s focus on the conservation of ‘charismatic megafauna’ in a ‘masculinist tradition’ is at odds with the environmental values of the South.<sup>145</sup>

The photographs of the water-carrier and the fisherman (figs 7.12 and 7.13), understood in terms of the subsistence value of biodiversity, is a repost to the photographs in *GBO-4* of natural beauty.<sup>146</sup> My aesthetic analysis of the images serves to highlight subsistence as a value of biodiversity that is additional to those expressly contemplated by the states parties in the treaty. It understands the images from a position of the Global South, addressing Nixon’s concern that eco-criticism as a scholarly endeavour has focussed on North American culture.<sup>147</sup> In doing so, however, my analysis risks perpetuating stereotypes about attitudes towards the environment in developing countries. It also underplays the relevance of the images to all parties to the *Biodiversity Convention*, as biodiversity’s subsistence value must also pertain to people in cities and in the industrialised countries of the North. It shows that the selection and analyses of images for their portrayal of biodiversity values must be mindful of different perspectives and the many meanings arising from images using aesthetic methods.

<sup>141</sup> See Andreas Kotsakis, ‘The Historical Roots of the North-South Dynamic in Biodiversity Conservation and its Imprint on the Convention on Biological Diversity’ in Jona Razzaque and Elisa Morgera (eds), *Biodiversity and Nature Protection Law* (Edward Elgar, vol 3, 2017) 44. I variously refer to ‘developing countries’ and the ‘Global South’ to refer to countries with low and middle income economies or that otherwise identify as ‘developing countries’ in the work of the *Biodiversity Convention* (n6). I distinguish them from so-called ‘developed’ countries of the ‘North’ that have high-income economies. See further Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004).

<sup>142</sup> See further *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, opened for signature 29 October 2010, 2226 UNTS 208 (entered into force 12 October 2014).

<sup>143</sup> See Gillespie, *Biodiversity* (n128) 501.

<sup>144</sup> See Ramachandra Guha, *Environmentalism: A Global History* (Longman, 2000). See Chapter 2, part 4.3.

<sup>145</sup> Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press, 2011) 139.

<sup>146</sup> See above part 3.1.

<sup>147</sup> Nixon (n145) 234.

### 3.3 Fragmented aesthetics of biodiversity

My doctrinal interpretation of aesthetic value for the *Biodiversity Convention* from orthodox written sources concluded that aesthetic value might be synonymous with ‘natural beauty’ and that it is in the practice of the states parties conflated with cultural values of biodiversity.<sup>148</sup> Turning instead to the photographic images used in *GBO-4*, I have used aesthetic methods to examine meanings of biodiversity’s aesthetic value from the perspective of aesthetic philosophy – both as it concerns the arts and the natural environment. My aesthetic analysis of the images has revealed critical perspectives on ‘natural beauty’ as scenic landscapes and wilderness. It also provided an account of the relationship between biodiversity’s aesthetic value and culture which, I argue, identifies distinctions important to the protection of each value of biodiversity in its own right.

For the meaning of aesthetic value, the photographs in *GBO-4* support an understanding of natural beauty as scenic landscape or wilderness. But they also facilitate a critique of aesthetic value as natural beauty, associating the value with cultural values of Britain, Western Europe and North America. Aesthetic analysis, whether from the perspective of environmental aesthetics or art theory, can reveal the ways in which the concepts and values evoked in the photographs in *GBO-4* might ultimately undermine the objectives of the *Biodiversity Convention*. How, for example, the aesthetic appeal of a rice paddy scene (fig 7.13) is not necessarily indicative of the aesthetic value of biodiversity.

My aesthetic analysis also raises the prospect that the ‘aesthetic’ value of biodiversity contemplated in the *Biodiversity Convention* is separate from the ‘cultural’ value inherent in, or manifested by, the traditional knowledge and cultural practices of indigenous peoples and local communities protected under the treaty. An understanding of the cultural elements of aesthetic values applied to biodiversity allows for pluralised definitions of aesthetic value appropriate for a treaty, with states parties representing a wide range of cultural perspectives. An understanding of the aesthetic elements of cultural value applied to biodiversity in terms of the arts can take proper account of indigenous values.

Ultimately, my analysis of the photographic images in *GBO-4* reveals fragmented understandings of biodiversity’s aesthetic value. It highlights complex intersections with other values named in the treaty, such as recreational, cultural and economic values, and values not named, such as subsistence value. It points to issues arising from the application of values to biodiversity as distinct from the natural environment. It does not resolve the ambiguity of meaning left by doctrinal interpretation but it could inform a critical understanding of aesthetic value for the collective oversight by the Conference of the Parties of the implementation of the *Biodiversity Convention*.

## 4. USING AESTHETIC ANALYSIS OF IMAGES FOR THE BIODIVERSITY CONVENTION

I have shown in this and previous chapters how photographs of the natural environment can be analysed from an aesthetic perspective to develop understandings of terms relevant to the implementation of international environmental treaties. Specifically, I have used images to understand the meaning of the environment’s aesthetic value to such treaties. I have argued that meanings derived from aesthetic analysis of images could in the future inform interpretation in the administration of the *World Heritage Convention* and the enforcement of

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<sup>148</sup> See Chapter 3, part 3.5.

the *Whaling Convention*.<sup>149</sup> In this part, I argue that meanings from photographic images could also be identified and used to inform decisions of the Conference of the Parties to the *Biodiversity Convention* and the implementation of the treaty by states parties. Below I propose guidance on the use of photographic images in reports prepared under the *Biodiversity Convention* and I argue for the use of aesthetic methods in the institutional processes for the valuation of biodiversity.

#### 4.1 Guidance on images in reports under the *Biodiversity Convention*

Editions of the *Global Biodiversity Outlook* have, over time, made increasing use of photographic images.<sup>150</sup> Other reports to the Conference of the Parties to the *Biodiversity Convention*, such as national reports prepared under the treaty by individual states parties,<sup>151</sup> also contain photographic images. The Maldives Fifth National Report, for example, is replete with photographs, most depicting attractive scenes associated with the archipelago's biodiversity.<sup>152</sup> As I noted in Chapter 5 on the *World Heritage Convention*,<sup>153</sup> photographs that represent the natural environment serve as records for international environmental treaty regimes that must assess the state of the environment in their administration of the treaty. There is, however, no guidance from the Conference of the Parties to the *Biodiversity Convention* on the use and purpose of photographs in reports prepared under the treaty.<sup>154</sup> Existing guidance issued by the Secretariat to the *Biodiversity Convention* on the preparation of national reports has encouraged parties 'to include illustrative tables, figures and images',<sup>155</sup> but no reason or requirements are provided for photographs.

Recognising the capacity for photographs to convey meanings, the Conference of the Parties could in the future endorse and facilitate the use of photographic images for their substantive relevance to the implementation of the *Biodiversity Convention*. It could, for example, produce guidance to states parties and the Secretariat on the presentation of photographic images in reports prepared under the *Biodiversity Convention*. Formal guidance could ensure that images consistent with the parties' understanding of the terms of the treaty – including biodiversity's 'aesthetic' value – are used to portray or explain the meaning of such terms in those reports. Guidance could in turn facilitate a discussion among the parties as to the meaning of aesthetic and other biodiversity values.

Guidance would need to address such matters as the quality of images used and the nature of any written commentary accompanying the image. As discussed in Chapter 5 on the *World Heritage Convention*,<sup>156</sup> the capacity of an image to activate an imaginative or emotional response to the environment it represents could be compromised by its small size or low resolution. I maintain that the content and quality of the written text accompanying images,

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<sup>149</sup> See respectively Chapters 5 and 6.

<sup>150</sup> See Secretariat of the *Convention on Biological Diversity*, *Global Biodiversity Outlook* <<https://www.cbd.int/gbo/>>.

<sup>151</sup> *Biodiversity Convention* (n6) art 26.

<sup>152</sup> Maldives Fifth National Report under the *Biodiversity Convention* (2015). Cf photographs in Uganda Fifth National Report under the *Biodiversity Convention* (2014).

<sup>153</sup> See Chapter 5, part 3.3.

<sup>154</sup> *Convention on Biological Diversity, Use of Cameras and Audio/Video Recording Devices by Participants at Meetings of the Convention on Biological Diversity* (15 August 2012).

<sup>155</sup> Conference of the Parties to the *Biodiversity Convention*, Decision X/10 *National Reporting: Review of Experience and Proposals for the Fifth National Report*, 10<sup>th</sup> mtg UN doc UNEP/CBD/COP/DEC/X/10 (29 October 2010) [1]; see also *Convention on Biological Diversity Guidelines for the Fourth National Report*, <<https://www.cbd.int/reports/guidelines/default.shtml>>.

<sup>156</sup> See Chapter 5, part 5.2.



such as descriptions of properties in files nominating sites for World Heritage status and Statements of Outstanding Universal Value, could also steer aesthetic analysis of the images for the *Biodiversity Convention*. In the case of *GBO-4* studied for this Chapter, large format and high-resolution photographs appeared with the written text. No captions or written text described the content of the photographs or explained their relevance to the findings in the report.<sup>157</sup> The high quality of the images facilitated my aesthetic analysis of them but the absence of any written explanation might have meant that assumptions I made for the purposes of aesthetic analysis were not accurate.

It would also be appropriate for guidance on the use of photographs in reports prepared under the *Biodiversity Convention* to explain the purpose of using images. Guidance could, for example, address the relevance of the images to interpretations of the parties' commitments under the treaty. Considerations that determine whether written documents are appropriate sources for doctrinal treaty interpretation, such as evidence of subsequent practice,<sup>158</sup> could also be used by interpreters to determine whether images qualify as an interpretative source. I argued in Chapter 5 that photographs used in documents nominating properties for World Heritage status were an appropriate source of interpretation and,<sup>159</sup> in Chapter 6, I argued that photographs included in the submissions of parties to the International Court of Justice could also be understood for their meaning in a legal judgment.<sup>160</sup> For the purposes of interpreting the *Biodiversity Convention*, my finding that *GBO-4* does not 'establish the agreement of the parties' as to the meaning of aesthetic value might also disqualify images contained in *GBO-4* from formal consideration in interpretation. However, formal guidance developed by the states parties to the *Biodiversity Convention* could clarify the circumstances in which such images would inform the states parties in their implementation of the treaty.

As an alternative to guidance, the Conference of the Parties to the *Biodiversity Convention* could opt to exclude images from substantive considerations in its work. The *Intergovernmental Platform on Biodiversity and Ecosystem Services* (IPBES), to which the Secretariat to the *Biodiversity Convention* is an observer,<sup>161</sup> has on occasion expressly excluded photographic images from substantive conclusions in its assessments of biodiversity.<sup>162</sup> This would not, however, prevent substantive conclusions being drawn from images as a matter of practice. As I explained in Chapter 4,<sup>163</sup> relegating images to a decorative function does not mean that they cannot be seen for their aesthetic significance. It would serve only to dismiss the critical insights that might come from an overt analysis of the images in light of biodiversity values and other matters relevant to the implementation of commitments under the *Biodiversity Convention*.

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<sup>157</sup> See Secretariat of the *Convention on Biological Diversity*, *Global Biodiversity Outlook* <<https://www.cbd.int/gbo/>>. GBO-2 included captions while GBO-3 provided explanatory text or captions for only some photographs.

<sup>158</sup> Gardiner (n37) 255.

<sup>159</sup> See Chapter 5, part 5.3.

<sup>160</sup> See Chapter 6, part 5.3.

<sup>161</sup> See IPBES Members and Observers, <<https://ipbes.net/members-observers>>.

<sup>162</sup> Cf Disclaimer accompanying photographs provided with Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), 'Biodiversity and Nature's Contributions Continue Dangerous Decline, Scientists Warn' (Media Release, undated, released 28 March 2018) <<https://goo.gl/oJ4DRq>>.

<sup>163</sup> See Chapter 4, part 2.4.2.

## 4.2 Methods for the valuation of biodiversity values

As previously explained, methods of biodiversity valuation have been endorsed in decisions of the Conference of the Parties to the *Biodiversity Convention* and adopted by parties in their national jurisdictions.<sup>164</sup> These methods typically ascribe economic value to ‘ecosystem services’, including a category of ‘cultural’ ecosystem services serving aesthetic functions.<sup>165</sup> It is, however, recognised by advisors to the Conference of the Parties – and explained in the technical report that supports *GBO-4* – that prevalent methodologies for the economic valuation of biodiversity neglect the non-material values of biodiversity, including aesthetic value.<sup>166</sup> Economic valuation is criticised by experts for its potential to give greater emphasis to material values in assessments of the protection of biodiversity values under the treaty.<sup>167</sup>

Through its adoption of a resource manual in 2016,<sup>168</sup> the Conference of the Parties to the *Biodiversity Convention* encouraged states parties to use methodologies for assessing biodiversity in their national reports similar to those of IPBES. Created by over 100 states in 2012,<sup>169</sup> IPBES is adopting methodologies aimed at understandings of biodiversity values that are additional to economic value.<sup>170</sup> Specifically, IPBES assessments rely on a framework of valuation based on ‘nature’s contribution to people’ which is intended to take account of perspectives on cultural value developed in social science.<sup>171</sup> However, no mention is made in the categories prescribed for this methodology of concepts relevant to aesthetic philosophy.<sup>172</sup> There is no explanation of aesthetic value in terms, for example, of the philosophy of environmental aesthetics or in terms of the arts. Nor does the methodology appear to contemplate the use of photographs in the assessment of nature’s contribution to people.

I argue that the interdisciplinary premise for the assessment of ‘nature’s contribution to people’ should be extended to take account of the philosophy of environmental aesthetics and aesthetic methods for developing meanings from photographs, including meanings of aesthetic value.<sup>173</sup>

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<sup>164</sup> See Chapter 3, part 3.2.2.

<sup>165</sup> See Pavan Sukhdev et al, *The Economics of Ecosystems and Biodiversity: Mainstreaming the Economics of Nature: A Synthesis of the Approach, Conclusions and Recommendations of TEEB* (Progress Press, 2010) (‘TEEB Synthesis’) annex, 34. See generally Colin T. Reid and Walters Nsoh, *The Privatisation of Biodiversity?: New Approaches to Conservation Law* (Edward Elgar Publishing, 2016).

<sup>166</sup> See *Aichi Assessment* (n9) 12. See also Secretariat of the *Convention on Biological Diversity, An Exploration of Tools and Methodologies for Valuation of Biodiversity and Biodiversity Resources and Functions* (Technical Series No 28, 2007) 16.

<sup>167</sup> See eg Cooper et al (n12). Note: N Small, M Munday and I Durance, ‘The Challenge of Valuing Ecosystem Services that Have No Material Benefits’ (2017) 44 *Global Environmental Change* 57-67; RK Turner et al, ‘Valuing Nature: Lessons Learned and Future Research Directions’ (2003) 46 *Ecological Economics* 493; Michael Prior, ‘Economic Valuation and Environmental Values’ (1998) 7(4) *Environmental Values* 423.

<sup>168</sup> The COP has encouraged states parties to adopt the IPBES approach to valuation in their 6<sup>th</sup> national reports on their implementation of the *Convention* due at the end of 2018: *Resource Manual for the Sixth National Report* (n11).

<sup>169</sup> See IPBES ‘About’ <<https://ipbes.net/history-establishment>>.

<sup>170</sup> See M Fischer et al (eds), *Summary for Policymakers of the Regional Assessment Report on Biodiversity and Ecosystem Services for Europe and Central Asia of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES Secretariat, 2018) (‘IPBES Summary for Policymakers’) 7.

<sup>171</sup> See eg *ibid*, appendix 2.

<sup>172</sup> Category 16, Table S1, ‘Reporting Categories of Nature’s Contributions to People (NCP) used in IPBES Assessments According to the Generalizing Perspective’ in S Díaz et al, ‘Assessing Nature’s Contributions to People’ (2018) 359 *Science* (Supplementary Material) 270–272.

<sup>173</sup> See eg UK National Ecosystem Assessment Follow-on Phase, ‘Cultural ecosystem services and indicators’ in Peter Coates et al, ‘Arts & Humanities Perspectives on Cultural Ecosystem Services’, Arts & Humanities Working Group (AHWG): Final Report (April 2014), annex 1.

Where the Conference of the Parties endorses IPBES and other valuation methodologies, it should also propose the use of aesthetic methods of assessment. As I argued in Chapter 2,<sup>174</sup> understandings of the aesthetic value of the natural environment developed in the philosophy of environmental aesthetics have a role in the valuation of the natural environment in public policy settings and, by extension, in law.<sup>175</sup> Understandings of the environment's aesthetic value in terms of a sensorial experience, as developed by philosophers such as Emily Brady,<sup>176</sup> could be employed to articulate a meaning for the aesthetic under the *Biodiversity Convention* that is important for consideration and distinct from other biodiversity values that must also be protected under the treaty. I maintain that the aesthetic analysis of images of the natural environment could also be employed in the valuation of biodiversity to enlighten conceptions of biodiversity values, particularly non-material values such as aesthetic value, in the implementation and development of the *Biodiversity Convention*.

## 5. CONCLUSION

By many accounts, a failure to achieve the objectives of the *Biodiversity Convention* will have devastating impacts on all life on earth.<sup>177</sup> But a lack of visibility of species and habitat diversity in the daily lives of many people is thought to contribute to complacency in its protection. Executive Secretary for the *Biodiversity Convention*, Cristiana Paşca Palmer, has for example referred to biodiversity loss as a 'silent killer', different from climate change 'where people feel the impact in everyday life.'<sup>178</sup> Indeed, it is the imperceptibility of the significance of biodiversity to people that prompted the Conference of the Parties to the *Biodiversity Convention* to use the first of their Aichi Targets to call on states to raise the awareness of biodiversity values.<sup>179</sup>

Images of biodiversity could be used in institutional publications such as the *Global Biodiversity Outlook* and other materials produced under the *Biodiversity Convention* to explain and foster the protection of biodiversity values in a manner that is openly acknowledged and properly explained in aesthetic terms. Campaigns of environmental organisations, such as *Love Not Loss*, deliberately use images to raise awareness of the value of biodiversity to people.<sup>180</sup> However, the Conference of the Parties has produced no formal guidance that identifies the purpose of images, or articulates meanings for images, to its decisions under the *Biodiversity Convention*. My aesthetic analysis of the photographs in *GBO-4* in this Chapter shows why and how this could be done.

<sup>174</sup> See Chapter 2, part 4.

<sup>175</sup> See eg Brady, *Aesthetics of Environment* (n52); see also See also Yrjö Sepänmaa, 'From Theoretical to Applied Environmental Aesthetics: Academic Aesthetics Meets Real-World Demands' in Martin Drenthen and Jozef Keulartz (eds), *Environmental Aesthetics: Crossing Divides and Breaking Ground* (Fordham University Press, 2014) 87.

<sup>176</sup> Brady, *Aesthetics of Environment* (n52) 237-8.

<sup>177</sup> See eg IPBES *Summary for Policymakers* (n170).

<sup>178</sup> Cristiana Paşca Palmer quoted in Jonathan Watts, 'Stop Biodiversity Loss or We Could Face Our Own Extinction, Warns UN' *The Guardian* (online, 7 November 2018) <<https://www.theguardian.com/environment/2018/nov/03/stop-biodiversity-loss-or-we-could-face-our-own-extinction-warns-un>>. See also Opening statement by Ms Cristiana Paşca Palmer, Executive Secretary of the *Convention on Biological Diversity*, Conference of the Parties to the *Convention on Biological Diversity*, *Report of the Conference of the Parties to the Convention on Biological Diversity on its Fourteenth Meeting*, 14<sup>th</sup> mtg (2018), UN doc CBD/COP/14/14 (20 March 2019) annex II, 292.

<sup>179</sup> *GBO-4* (n15).

<sup>180</sup> See International Union for Conservation of Nature, 'Love not Loss' <<https://www.iucn.org/commissions/commission-education-and-communication/resources/love-not-loss>>.

Aesthetic insights from photographic images of biodiversity can be used to develop understandings of biodiversity values that are deemed so important to the implementation of the *Biodiversity Convention*. I have shown how aesthetic analysis is particularly useful to an understanding of aesthetic value as important for protection and distinct from other values of biodiversity, including cultural value. My analysis has also shown that critical perspectives applied to images through aesthetic methods such as eco-criticism can be used to identify and exclude images that undermine or are otherwise inconsistent with the objectives of the treaty.

In the next and final Chapter, I will address my conclusions in this Chapter with reference to my findings throughout the thesis.

## CHAPTER 8 BEYOND THE FRAME: A CONCLUSION

International law is made with words and it has methods for understanding their meanings.<sup>1</sup> I have shown how international law is also made with graphic images – including photographs – in decision-making processes under treaties that protect the environment’s aesthetic value.<sup>2</sup> My focus has been a particular source of international law: the international environmental treaties that account for much of what is called international environmental law.<sup>3</sup> I found that international rules and practices concerning the use of photographs in decision-making processes under those treaties conceive of photographs as records of fact.<sup>4</sup> Aesthetic philosophy, by contrast, recognises images in photographs as representations, and aesthetic theory for the arts has developed methods for articulating meanings from those representations.<sup>5</sup> I have demonstrated that photographs of the environment have particular meanings concerning the environment’s aesthetic value, a value debated in the aesthetic philosophy of environmental aesthetics.<sup>6</sup> Ultimately, I argue that concepts and methods from aesthetic philosophy can be employed to identify and analyse photographic images of the natural environment to make aesthetic value meaningful in international environmental law. It is my contention that aesthetic method must be repurposed to give significance to representations from photographs for international environmental treaties and, by extension, to other international laws.

In the thesis, I have developed a jurisprudence of aesthetics for the practice of international environmental law. I have engaged aesthetic methods for the arts to relate concepts from environmental aesthetics to the meaning of ‘aesthetic’ value as a term for international environmental treaties. Specifically, I have used aesthetic methods to analyse photographs used by states in decision-making processes of three international environmental treaties: the *World Heritage Convention*,<sup>7</sup> the *Whaling Convention*,<sup>8</sup> and the *Biodiversity Convention*.<sup>9</sup> My aesthetic methods were adapted from aesthetic philosophy in the Western European and Anglo-American traditions that address the arts.<sup>10</sup> This included using visual art in my interrogation of the photographs. However, the meanings of the environment’s aesthetic value produced through my analysis were informed by the philosophy of ‘environmental aesthetics’,<sup>11</sup> an

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<sup>1</sup> See Chapter 3. See generally Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press, 2015).

<sup>2</sup> See Chapters 5 to 7.

<sup>3</sup> See generally Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press, 4<sup>th</sup> ed, 2018).

<sup>4</sup> See Chapters 5 to 7.

<sup>5</sup> See Chapter 4. See generally Stephen Davies and Philip Alperson, *The Philosophy of Art* (Wiley Blackwell, 2016).

<sup>6</sup> See Chapter 2. Emily Brady, *Aesthetics of the Natural Environment* (Edinburgh University Press, 2003) (‘*Aesthetics of Environment*’).

<sup>7</sup> *Convention for the Protection of the World Cultural and Natural Heritage*, adopted 16 November 1972, 1037 UNTS 151 (1977) (entered into force 17 December 1975) (‘*World Heritage Convention*’).

<sup>8</sup> *International Convention on the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) (‘*Whaling Convention*’).

<sup>9</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) (‘*Biodiversity Convention*’).

<sup>10</sup> See Jerrold Levinson, ‘Philosophical Aesthetics: An Overview’ in Jerrold Levinson (ed), *The Oxford Handbook of Aesthetics* (Oxford University Press, 2003) 3.

<sup>11</sup> See Chapter 2. See generally John A Fisher, ‘Environmental Aesthetics’ in Jerrold Levinson (ed), *The Oxford Handbook of Aesthetics* (Oxford University Press, 2003) 667; Allen Carlson, ‘Ten Steps in the Development of

orientation in aesthetic philosophy that is concerned with the aesthetic appreciation of the natural environment as distinct from the arts. My eco-critical analysis of the photographs produced an understanding of how aesthetic value is associated in those images with Western European and British landscape art.<sup>12</sup> This aesthetic tradition is apparent in the photographs used in the treaty processes despite the potential for different aesthetic preferences among the many states parties to the treaties.<sup>13</sup> In addition to producing critical insights, I proposed pluralised meanings for the environment's aesthetic value associated with such things as sensation, imagination, emotion and knowledge from different cultures, consistent with understandings among philosophers of environmental aesthetics such as Emily Brady.<sup>14</sup>

In this final Chapter, I look beyond the frame of the thesis to consider wider implications of my research. I explain my conclusions in terms of interpretative 'method' and interpreted 'meanings'. My proposed methods are described in part 1 of this Chapter as aesthetic ways of knowing graphic images in international law. Aesthetic methods for the arts are 'interpretative' in a dual sense. They define images as representations of meaning as well as defining the meanings that arise from the images. In part 2, I explain how I have used aesthetic method to interpret the meanings of the environment's aesthetic value through the photographs of the environment used in decision-making processes under the three international environmental treaties studied for the thesis. The findings as to aesthetic method and meanings make a new contribution to the theory and practice of international environmental law. The relevance of aesthetic philosophy to environmental law is an emerging field.<sup>15</sup> My research introduces the philosophy of environmental aesthetics to the interdisciplinary study of law and image, expanding the role of images in international law. In part 3, I address the relevance of my thesis and findings to international legal practice. I propose that decision-makers could accommodate aesthetic methods in rules of treaty interpretation, procedural practices and methods of judgement. I end the Chapter as preceding chapters have begun, with an aesthetic analysis of an artwork that demonstrates the methods and meanings I propose for photographs of the environment's aesthetic value in international environmental law.

## 1. KNOWING PHOTOGRAPHS IN INTERNATIONAL LAW

Techniques of interpretation in international law do not rely on graphic images as representations from which meanings can be constructed and critically analysed. But aesthetic methods for the arts do. In the thesis, I employed orthodox written sources for a doctrinal legal interpretation of aesthetic value under the three treaties examined in the thesis: two making express mention of aesthetic value, the *World Heritage Convention* and the *Biodiversity Convention*, and one that I argue is informed by aesthetic value, the *Whaling Convention*.<sup>16</sup> Having applied techniques of treaty interpretation using orthodox sources – written reference

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Western Environmental Aesthetics' in Martin Drenthen and Jozef Keulartz (eds), *Environmental Aesthetics: Crossing Divides and Breaking Ground* (Fordham University Press, 2014) 13.

<sup>12</sup> See Chapter 4. See generally Alan C Braddock and Christoph Irmscher (eds), *A Keener Perception: Ecocritical Studies in American Art History* (University of Alabama Press, 2009).

<sup>13</sup> See Chapter 3. See generally Jonathan Maskit, 'On Universalism and Cultural Historicism in Environmental Aesthetics' in Drenthen and Keulartz (n11) 41.

<sup>14</sup> See Chapters 5 and 7. See generally Emily Brady, 'Aesthetic Value, Nature, and Environment' in Stephen M Gardiner and Allen Thompson (eds), *Oxford Handbook of Environmental Ethics* (Oxford University Press, 2017) 186 ('*Ethics Handbook*').

<sup>15</sup> See Chapter 4, part 3.3. See eg Benjamin J Richardson, *The Art of Environmental Law: Governing with Aesthetics* (Hart Publishing, forthcoming).

<sup>16</sup> See Chapter 3.



materials and documentation generated under treaties – I then turned to photographs used in decision-making processes under each of those treaties to identify and interrogate meanings of the environment’s aesthetic value.<sup>17</sup>

### 1.1 Aesthetic value in treaty practice

In the thesis, my application of the international rules of treaty interpretation generated a variable account, from a doctrinal perspective, of the meaning of the environment’s ‘aesthetic’ value protected under the studied treaties.<sup>18</sup> In the course of developing that account, I found that the international bodies established to administer the treaties have characterised ‘aesthetic’ value in ways that give the term only limited, if any, significance in the implementation of those treaties.

One way in which the significance of aesthetic value has been given limited significance is through the conflation of aesthetic value with other environmental values. In the case of the *World Heritage Convention*, the parties and the World Heritage Committee appear to treat aesthetic value as being synonymous with ‘natural beauty’.<sup>19</sup> Understandings of aesthetic value in the administration of the *Biodiversity Convention* are associated with ‘cultural’ value.<sup>20</sup> The treaties respectively express natural beauty and cultural value as environmental values in addition to aesthetic value but distinctions between the values are not explained. The conflation of aesthetic value with other environmental values also expressed in the treaty might constitute a misinterpretation of the term ‘aesthetic’: the international principle of effective treaty interpretation requires that each term in a treaty be distinguished from other terms.<sup>21</sup> However, as discussed further below, the conflated meanings might also amount to the ‘subsequent agreement’ of the parties as to the meaning of ‘aesthetic’ value under the *Vienna Convention*.<sup>22</sup>

My analysis of ‘aesthetic’ value in relation to the *Whaling Convention* took me to debates before the International Whaling Commission which suggest that aesthetic value is among several environmental values that inform the maintenance of the ban on commercial whaling under the treaty.<sup>23</sup> However, the states parties variously present the aesthetic value of whales as a cultural or ethical concern. There is no stated understanding of aesthetic value independent of those values, and no explanation of how aesthetic value might relate to the ethical, scientific and economic values expressly protected under the *Whaling Convention*.<sup>24</sup>

Another way in which aesthetic value appears to have no significance in treaty practice is through its displacement by other environmental values. These other values are quantified in purportedly objective terms, such as scientific and economic values, while aesthetic value is characterised as a subjective value.<sup>25</sup> For the *World Heritage Convention*, scientific values are articulated in decisions of the World Heritage Committee to inscribe natural properties in the

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<sup>17</sup> See Chapters 5-7.

<sup>18</sup> See Chapter 3.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> See Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2<sup>nd</sup> ed, 2015), 168 and 179ff. See Chapter 3.

<sup>22</sup> *Vienna Convention on the Law of Treaties*, concluded 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*‘Vienna Convention’*).

<sup>23</sup> *Whaling Convention* (n8) schedule, clause 10(e) (commercial whaling ban).

<sup>24</sup> See Chapter 3. See discussion below part 3.1.

<sup>25</sup> See Emily Brady, *Aesthetics of Environment* (n6) 100.



World Heritage List on the basis of ‘aesthetic’ or ‘natural beauty’ points of view.<sup>26</sup> The scientific matters relevant to the express provisions of the *Whaling Convention* at issue in *Whaling in the Antarctic* saw the parties to the dispute, and the International Court of Justice (ICJ), adhere to science over any other values that might have also expressly informed the ICJ’s reasoning of the law.<sup>27</sup> In valuation methods employed by the states parties to the *Biodiversity Convention*, aesthetic value is conceived in terms of its economic value.<sup>28</sup>

## 1.2 Photographs as representations and records

International law’s contemplation of meaning is limited to words: the principal sources of international law are grounded in written and verbal language,<sup>29</sup> and international law’s methods for interpreting that language is constructed with words in written texts.<sup>30</sup> I argued in the thesis, however, that representations of the natural environment in images, particularly photographs, used by the parties in the decision-making processes of the three treaties can also inform meanings. A construction of those meanings from the photographs would be necessary, I contend, for certain purposes in the decision-making processes.<sup>31</sup> I maintained, for example, that meanings developed from photographs could substantiate a claim by a state party, or justify a decision of the World Heritage Committee, as to the outstanding universal value of natural heritage from an ‘aesthetic’ point of view under *World Heritage Convention*.<sup>32</sup> I also argued that meanings from photographs presented by states in their submissions to the ICJ – such as those used in the *Whaling in the Antarctic* dispute under the *Whaling Convention* – could be acknowledged for their role in legal argument as rhetoric and inform judges in their legal interpretations and judgments.<sup>33</sup> Meanings from photographs employed in the practices of the parties to the *Biodiversity Convention* could, I contended, explain the significance of the ‘aesthetic’ value of biodiversity for a decision of the Conference of the Parties.<sup>34</sup>

However, I found that photographs are not formally recognised in the practices of international bodies under the treaties as images that represent meanings. In the thesis, I examined the rules and practice of the international bodies that are empowered to make decisions under the three treaties, finding that the photographs are conceived instead as records of fact.<sup>35</sup> The rules of procedure and practices on the use of photographs in submissions to the World Heritage Committee, and to the ICJ, as well as the practices of using photographs in material requested by the Conference of the Parties to the *Biodiversity Convention*, appear to treat photographs as a proxy for what would have been seen in a place, at a time, by the naked eye.<sup>36</sup>

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<sup>26</sup> See Chapter 5.

<sup>27</sup> *Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Judgment)* [2014] ICJ Rep 226 (*‘Whaling in the Antarctic’*). See Chapter 6.

<sup>28</sup> See Chapter 7. See discussion below in part 3.2.

<sup>29</sup> See Chapter 3, part 5. On the written sources of international law generally, see Samantha Besson, ‘Theorizing the Sources of International Law’ in Samantha Besson and John Tasioulas (eds), *Philosophy of International Law* (Oxford University Press, 2010) 163; Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law: A Modern Introduction* (Cambridge University Press, 2<sup>nd</sup> ed, 2018) 38. Cf Peter G. Staubach, *The Rule of Unwritten International Law: Customary Law, General Principles, and World Order* (Taylor and Francis, 2018).

<sup>30</sup> *Vienna Convention* (n22) art 31. See ‘Interpretative Material Generated in Making Treaties’ in Gardiner (n21) 81. On documentation of ‘subsequent practice’, see Gardiner (n20) 255. See Chapter 3.

<sup>31</sup> See Chapter 5-7.

<sup>32</sup> See Chapter 5.

<sup>33</sup> See Chapter 6.

<sup>34</sup> See Chapter 7.

<sup>35</sup> See Chapters 5-7.

<sup>36</sup> See Chapters 5-7.

### 1.3 Aesthetic values from photographs

In contrast to the formal rules and practices of the international bodies that judge the environment's aesthetic value for the treaties, aesthetic philosophers conceive of photographs as representations and they develop meanings from those representations using a range of interpretative methods.<sup>37</sup> I conceive 'image' variously for this purpose. For example, there is 'graphic' image – the photograph printed on paper or projected on screen; there is also 'representational' image – images constitutive of meanings constructed by viewers of the graphic image;<sup>38</sup> and there is the factual or recorded image – the image perceived in physical terms as light to the eye of a viewer at a given time and place. Art historian WJT Mitchell describes this last type of image as an 'optical' image, distinguishing it from graphic, verbal, mental and perceptual images.<sup>39</sup>

In the thesis, I engaged different aesthetic methods to construct and interrogate meanings of aesthetic value from the images represented in the photographs used in the decision-making processes under the three treaties – the *World Heritage Convention*, the *Whaling Convention* and the *Biodiversity Convention*. These included methods that reference precedents in art history.<sup>40</sup> My aesthetic methods also developed critical reflections that drew on socio-political, economic, scientific and cultural contexts.<sup>41</sup> These methods are associated with 'eco-criticism', which has been extended from literature to visual art,<sup>42</sup> and from North American contexts to the arts of cultures around the world.<sup>43</sup>

My aesthetic analysis of the photographs was premised on an understanding that concepts and methods developed for the arts can be employed in the study of graphic images in legal process regardless of whether those images could be characterised as 'art'.<sup>44</sup> Graphic images as aesthetic subjects in law have been theorised for common and civil law traditions by jurisprudents of image, in the study of visual jurisprudence or 'imaginal law'.<sup>45</sup> In the thesis, I extended that visual jurisprudence to the practice of international environmental law. However, as explained in the next part of this Chapter, my aesthetic analysis of photographs to develop meanings of the environment's aesthetic value might be problematic for philosophy of 'environmental aesthetics'.<sup>46</sup>

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<sup>37</sup> See generally Barbara Savedoff, *Transforming Images: How Photography Complicates the Picture* (Cornell University Press, 2000). Note discussion of environmental hermeneutics in Chapter 4.

<sup>38</sup> See further Chapter 4. See generally Stephen Davies, *The Philosophy of Art* (John Wiley & Sons, 2<sup>nd</sup> ed, 2016) 159.

<sup>39</sup> WJT Mitchell, *Iconology: Image, Text, Ideology* (University of Chicago Press, 1986) 10; for concepts of 'image' by visual jurisprudents, see Chapter 4, part 3.1.2.

<sup>40</sup> See Chapter 4.

<sup>41</sup> Ibid.

<sup>42</sup> See Braddock and Irmscher (n12).

<sup>43</sup> See Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Harvard University Press, 2011).

<sup>44</sup> See Robert Stecker, 'What is Art?' in *Aesthetics and the Philosophy of Art: An Introduction* (Rowman & Littlefield, 2<sup>nd</sup> ed, 2010) 95.

<sup>45</sup> Desmond Manderson 'Introduction: Imaginal Law' in Desmond Manderson (ed), *Law and the Visual: Representations, Technologies and Critique* (University of Toronto Press, 2018) 3, 4 citing Chiara Bottici, *Imaginal Politics* (Columbia University Press, 2014). See further Chapter 4.

<sup>46</sup> See Fisher (n11).

## 2. MEANINGS OF AESTHETIC VALUE IN PHOTOGRAPHS

I argued in the thesis that two orientations in Western European and Anglo-American aesthetic philosophy are relevant to an aesthetic analysis of the photographs used in decision-making processes under the three treaties. As well as employing theories in aesthetic philosophy for the visual arts described above in part 1, my analysis of the photographs also engaged philosophical theories from ‘environmental aesthetics’, a field in aesthetic philosophy that concerns the aesthetic appreciation of the natural environment.<sup>47</sup>

### 2.1 Environmental aesthetics

My articulation of the environment’s aesthetic value for the thesis relied principally on the model of environmental aesthetics developed by philosopher Emily Brady, the proponent of an integrated aesthetic model developed for application in environmental policy.<sup>48</sup> Brady understands that the aesthetic value of the natural environment is necessarily pluralised, derived from sensorial experience and shaped by imagination, emotion and knowledge from different cultures.<sup>49</sup> She acknowledges, however, that within communities that share certain knowledge, there are common elements to aesthetic value that are capable of being communicated to others.<sup>50</sup> For Brady and other philosophers of environmental aesthetics, this aesthetic appreciation of the natural environment is an engaged or profound value that is important to people – not trivial, superficial, hedonistic or indulgent – producing what I name for the thesis an ‘exquisite’ affect.<sup>51</sup>

I explained in the thesis that, for many philosophers of environmental aesthetics, the aesthetic appreciation of the environment is different from an aesthetic evaluation of visual art.<sup>52</sup> Those philosophers maintain that an appreciation of the environment requires a physical immersion in the environment as distinct from the observation of an art object.<sup>53</sup> I argue for an adaptation of this position, however, for the purposes of working with aesthetic method in international law. First, the decision-making processes described in this thesis are institutional processes. It is not necessarily feasible or desirable for the decision-makers to undertake site visits for a physical experience of the environment to judge its aesthetic value.<sup>54</sup> In addition, the decision-making processes addressed in my thesis are governed by international law and produce international law. Graphic representations of the environment judged as having aesthetic value are necessary in legal processes that document reasons for decisions in order to communicate, evaluate and, in some cases, replicate those reasons.<sup>55</sup> Finally, I maintain that visual art can in any event communicate the kinds of aesthetic values of the natural environment contemplated

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<sup>47</sup> See Chapter 2.

<sup>48</sup> Brady, *Aesthetics of Environment* (n6) 3.

<sup>49</sup> Ibid 237-8.

<sup>50</sup> See Chapter 2.

<sup>51</sup> Brady, *Aesthetics of Environment* (n6) 142, 170, 185. See also Ronald Hepburn, ‘Trivial and Serious in Aesthetic Appreciation of Nature’ in Salim Kemal and Ivan Gaskell (eds), *Landscape, Natural Beauty and the Arts* (Cambridge University Press, 1993) 65.

<sup>52</sup> See Chapter 2, part 2.3.

<sup>53</sup> Brady, *Aesthetics of Environment* (n6) 237; Arnold Berleant, ‘Art, Environment and the Shaping of Experience’ in Arnold Berleant (ed), *Environment and the Arts: Perspectives on Environmental Aesthetics* (Ashgate, 2002) 1, 7-8.

<sup>54</sup> See eg Michael A Becker and Cecily Rose, ‘Investigating the Value of Site Visits in Inter-State Arbitration and Adjudication’ (2017) 8(2) *Journal of International Dispute Settlement* 219.

<sup>55</sup> On ‘settled jurisprudence’, see Gardiner (n21) 285-7. I argue that photographs could have precedential import for World Heritage inscriptions, see Chapter 5, part 3.3.1.

in environmental aesthetics.<sup>56</sup> My analyses of select photographs in terms of sensorial perception demonstrate, I suggest, how graphic images conceived as representation can be understood in terms beyond visual perception. To be sure, aesthetic value imagined from a photograph is necessarily different from a physical experience of place. I argue, however, that aesthetic analysis of the photograph provides an approximation of aesthetic experience adapted for the institutional nature of legal process.

## 2.2 Critical and normative accounts of aesthetic value

My analysis of the environmental images in photographs that I identified as having been used in decision-making processes under the three treaties, provided accounts of the environment's aesthetic value that were either critical or normative.

Through a critical lens, I identified the aesthetic values evident in some of the photographs used under the three treaties as those associated with landscape art. In what I described as conventional conceptions of Western European and British landscape, the environment's aesthetic value is limited to 'scenes' that are visually apparent and objectified by reference to formal qualities associated with the appreciation of art.<sup>57</sup> This conventional aesthetic connotes smooth and delicate qualities with 'natural beauty', immense features and vast horizons with the 'sublime', and irregular and vibrant environments with the 'picturesque'.<sup>58</sup> These aesthetic conventions were developed in 19<sup>th</sup> century Western European and British landscape, derived from Chinese and Japanese landscapes, and adapted by landscape artists in European and British colonies in Africa, Australia and North and South America.<sup>59</sup> Prevalence of the aesthetic convention is, however, not necessarily an indication of a preference shared globally across cultures.<sup>60</sup> I critiqued the landscape aesthetic, through the photographs, as insensitive to pluralised conceptions of the environment's aesthetic value likely held by the many states parties to the multilateral treaties.<sup>61</sup>

Separate from my critical analysis, I also analysed the photographs to develop normative renderings of the environment's aesthetic value. Those accounts understood the environment's aesthetic value in terms of multisensory and multicultural perception, as contemplated by environmental aestheticians such as Emily Brady.<sup>62</sup> As explained at the outset to this Chapter, Brady describes the environment's aesthetic value in terms of sensation, imagination, emotion and knowledge. This normative construction is what I name for the thesis a 'now-world' aesthetic value of the environment. It can evolve with changing environments, and be adapted for different places and for different people. Distinguishable from other environmental values, the now-world aesthetic eschews the limited and singular representation of the environment's aesthetic value in 19<sup>th</sup> century Western European and British landscape art.

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<sup>56</sup> Note Berleant (n53).

<sup>57</sup> See below as to the cultural context for these landscape conventions.

<sup>58</sup> Brady, *Aesthetics of Environment* (n6) 32.

<sup>59</sup> See Chapter 4. See also Arthur C Danto, 'Can It Be the "Most Wanted Painting" Even if Nobody Wants It?' in JoAnn Wypijewski (ed), *Painting by Numbers: Komar and Melamid's Scientific Guide to Art* (Farrar Straus Giroux, 1997); cf Denis Dutton, *The Art Instinct: Beauty, Pleasure and Human Evolution* (Oxford University Press, 2009).

<sup>60</sup> See Chapter 4, part 2.1.2. Cf Arnold Berleant, 'Scenic Beauty in a Global Context' in Arnold Berleant, *Aesthetics Beyond the Arts: New and Recent Essays* (Ashgate, 2012).

<sup>61</sup> See Chapters 5 and 7.

<sup>62</sup> Brady, *Aesthetics of Environment* (n6); see further Chapter 2.

I observed in the thesis that my critical account of the environment's aesthetic value suggests an aesthetic imperialism that resonates with observations made in post-colonial critiques of international environmental law.<sup>63</sup> I suggested that aesthetic value understood in terms of an Anglo-European conventional landscape aesthetic is not necessarily representative of the aesthetic values of developing countries of the Global South that make up the majority of the states parties to the *World Heritage Convention* and the *Biodiversity Convention*.<sup>64</sup> Charges of aesthetic imperialism do not stop, however, at North-South relationships. In the *Whaling in the Antarctic* dispute, Japan's submissions to the ICJ criticised Australia for using the *Whaling Convention* to impose its cultural views of whales on Japan – cultural views that I show in Chapter 6 of the thesis to have an aesthetic dimension for both parties to the dispute.<sup>65</sup>

I maintain that my normative construction of a now-world aesthetic from photographs in the decision-making processes of the three treaties addresses some of the concerns arising from critical accounts of the images. Specifically, my analysis of photographs used in the contexts of the *World Heritage Convention* and the *Biodiversity Convention* identified aesthetic appreciation of the natural environment as culturally relative. I pointed out that the subjective nature of this account is, however, antithetical to constructions of aesthetic value ripe for comparison with other environmental values, as required in the administration of international environmental law. I discussed the extent to which the Kantian concept of 'disinterestedness', as imagined by Brady for her theory of integrated aesthetics of the environment,<sup>66</sup> could be adopted to avoid idiosyncratic or arbitrary formulations of the environment's aesthetic value in decision-making processes of international law.<sup>67</sup> Critical perspectives could be a function of disinterestedness but it is not clear that such disinterestedness could be achieved in an institutional process for making aesthetic judgements. The concept might not be something that can be commonly adopted by the people responsible for making decisions based on judgements of aesthetic value under the treaties.

I acknowledge that the theories of environmental aesthetics are themselves culturally situated in Anglo-American – and to a degree Western European – philosophical discourse.<sup>68</sup> However, to the extent that they advance cultural pluralism, philosophical theories of environmental aesthetics contemplate and embrace diverse ontological understandings of the environment and its aesthetic value.<sup>69</sup>

### 2.3 Taking aesthetics to the practice of international law

There are both similarities and differences in the meanings of the environment's aesthetic value arising from, on the one hand, my doctrinal interpretation from orthodox written materials in Chapter 3 of the thesis and, on the other hand, my aesthetic accounts constructed and analysed from photographs in Chapters 5 to 7. I argued that 'aesthetic' value can be understood from both orthodox and graphic sources in terms of natural beauty portrayed in conventional landscape art from 19<sup>th</sup> century Western Europe and Britain. Yet I maintained that such an

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<sup>63</sup> See generally Usha Natarajan and Kishan Khoday, 'Locating Nature: Making and Unmaking International Law' (2014) 27 *Leiden Journal of International Law* 573; Karin Mickelson, 'South, North, International Environmental Law, and International Environmental Lawyers' (2000) 11(1) *Yearbook of International Environmental Law* 52.

<sup>64</sup> See Maskit (n13). See also Brady, *Ethics Handbook* (n14).

<sup>65</sup> See Chapter 6.

<sup>66</sup> Brady, *Aesthetics of Environment* (n6) 140.

<sup>67</sup> See Chapter 2, part 2.2.3.

<sup>68</sup> See Maskit (n13).

<sup>69</sup> Cf *ibid* 50. See Chapter 2.

understanding of the environment's aesthetic value risks protecting the aesthetic values of only some of the states parties in the implementation of international environmental treaties that otherwise purport to protect aesthetic value for all parties.<sup>70</sup> This is at odds with dogmatic law: the legal principle *pacta sunt servanda*, for example, requires that all parties abide by their treaty commitments.<sup>71</sup> I argued that it is also problematic for jurists: the reasoned and responsible practice of law demands an understanding and explanation of the role of graphic images in the formulation of meanings for treaty terms.<sup>72</sup>

With my identification of the photographs, and the meanings they convey, I was not claiming that the images were in fact understood as such in the practice of international environmental law.<sup>73</sup> I consider that the images in photographs are used by advocates for their meanings, and that such intended and other meanings would register in the minds of the decision-makers that view them.<sup>74</sup> But the work in my thesis did not extend to demonstrating which meanings were intended by the states using them, or which meanings decision-makers took from photographs, or how they were reflected in the decisions of international bodies on aesthetic value. Instead, my findings showed that decision-makers have not been attentive to graphic images. As jurist, I argue that the capacity for photographs to be understood for their representations demands an account of such images in the practice of international law.

In the next part of this Chapter, I consider how photographs and aesthetic method might be properly acknowledged in future practices of international law. These proposals are premised on a knowledge of aesthetic concepts and method. However, I note that aesthetic philosophy, like international law, is an academic and professional discipline.<sup>75</sup> As such, expertise or expert advice in aesthetic philosophy would be necessary for decision-makers to work with aesthetic concepts and method in the practice of international law. This is not a remarkable claim. Extra-disciplinary analysis is typical in international law,<sup>76</sup> particularly international environmental law. The complex nature of environmental issues requires decision-makers to engage in such matters as science and economics.<sup>77</sup> The World Heritage Committee is, for example, advised on ecology and anthropology by advisory bodies, including by the International Union for Conservation of Nature (IUCN).<sup>78</sup> Judges of the ICJ acquired an understanding of scientific principles, and relied on scientific experts, for their decision in *Whaling in the Antarctic*.<sup>79</sup> The

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<sup>70</sup> See Chapter 3.

<sup>71</sup> See Malcolm Shaw, *International Law* (Cambridge University Press, 8<sup>th</sup> ed, 2017) 685.

<sup>72</sup> On concepts of 'modern' and 'postmodern' jurisprudence, see Costas Douzinas and Ronnie Warrington with Shaun McVeigh, *Postmodern Jurisprudence: The Law of the Text in the Texts of the Law* (Routledge, 1991) 25-28.

<sup>73</sup> On literature, see generally Ed Morgan, *The Aesthetics of International Law* (University of Toronto Press, 2007).

<sup>74</sup> Cf legal realism of Jerome Frank, *Law and the Modern Mind* (Anchor Books, 1930), cited in Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (Oxford University Press, 2016), 91-92.

<sup>75</sup> See eg Trevor Pateman, *Key Concepts: A Guide to Aesthetics, Criticism and the Arts in Education* (Taylor and Francis, 2016); cf Jean d'Aspremont et al (eds), *International Law as a Profession* (Cambridge University Press, 2017).

<sup>76</sup> Mohamed Bennouna, 'Experts before the International Court of Justice: What for?' (2018) 9(3) *Journal of International Dispute Settlement* 345.

<sup>77</sup> See Sands and Peel (n3) 6.

<sup>78</sup> *World Heritage Convention* (n7) art 14.

<sup>79</sup> *Whaling in the Antarctic* (n27). See Makane Moïse Mbengue, 'Scientific Fact-finding at the International Court of Justice: An Appraisal in the Aftermath of the Whaling Case' (2016) 29(2) *Leiden Journal of International Law* 529.



*Global Biodiversity Outlook*, discussed in Chapter 7, is prepared by experts in ecology,<sup>80</sup> including scientific experts, whose findings guide the Conference of the Parties to the *Biodiversity Convention*.<sup>81</sup> In the same way that these decision-makers are currently advised and instructed by scientists and other experts, I argue that they can also rely on the advice of experts in aesthetic philosophy to understand graphic images, and acquire an appreciation of the relevance of graphic image to decisions made under international law.

### 3. WORKING WITH AESTHETIC METHOD FOR IMAGES IN INTERNATIONAL LAW

Together, my aesthetic *methods*, and the *meanings* of aesthetic value constructed with those methods, constitute a jurisprudence of aesthetics for the practice of international law. My thesis has explained ways to conceive of graphic images as representations – rather than as records of fact – and how to develop meanings from them relevant to a particular source of international law: international environmental treaties. The respective case studies demonstrated how determinations of aesthetic value can be required for different juridical purposes: the administration of a treaty, in the case of the World Heritage Committee, the enforcement of a treaty in the case of the ICJ, and the implementation of the treaty, in the case of the Conference of the Parties to the *Biodiversity Convention*.

Photographs of the environment were the specific focus of my thesis but aesthetic methods could be applied to photographs depicting any subject, to construct meanings relevant to international laws.<sup>82</sup> In this part of the Chapter, I consider ways of working with aesthetic method and photographs in respect of:

1. International rules of interpretation for treaties;
2. Procedures governing the use of photographs in international decision-making processes; and
3. Methods by which the environment's aesthetic value is identified and judged by states parties and decision-makers for, and in accordance with, international law.

The context for my proposals is the three international environmental treaties studied for the thesis but, where explained below, they could have analogous relevance to other international laws. My proposals for the practice of international law are, I argue, necessary for the proper conduct of law in jurisprudential terms and for the good administration of justice.<sup>83</sup>

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<sup>80</sup> Secretariat of the *Convention on Biological Diversity* (2014) *Global Biodiversity Outlook 4* ('GBO-4').

<sup>81</sup> Conference of the Parties to the *Convention on Biological Diversity*, Decision II/1 *Report of the First Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice*, 2<sup>nd</sup> mtg, UN Doc UNEP/CBD/COP/2/19 (30 November 1995).

<sup>82</sup> For other treaties protecting the environment's aesthetic value, eg *Protocol on Environmental Protection to the Antarctic Treaty*, opened for signature 4 October 1991, 402 UNTS 71 (entered into force 14 January 1998) ('*Antarctic Protocol*') art 3. For other international laws, see generally: Peter D Rush and Maria Elander, 'Working Through the Cinematography of International Criminal Justice: Procedures of Law and Images of Atrocity' (2018) 6(1) *London Review of International Law* 17; Desmond Manderson, 'Not Drowning, Waving: Images, History, and the Representation of Asylum Seekers' in Marianne Dickie, Dorota Gozdecka and Sudrishti Reich (eds), *Unintended Consequences: The Impact of Migration Law and Policy* (ANU Press, 2016) 159.

<sup>83</sup> See Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353; cf Bruno Simma, 'The International Court of Justice and Scientific Expertise' (2012) 106 *Proceedings of the ASIL Annual Meeting* 230.



### 3.1 Interpretation of 'aesthetic' value for treaties

My aesthetic analysis of the photographs of the environment highlights meanings relevant to 'aesthetic' value as an express term of two of the treaties examined in the thesis, the *World Heritage Convention* and the *Biodiversity Convention*. I argue however that aesthetic methods could be employed to analyse photographs as sources of treaty interpretation in the practice of international law more broadly.

#### 3.1.1 Photographs as sources for legal interpretation

Photographs could be accommodated in what are described as 'evolutive', 'dynamic' or 'sociological' interpretation techniques which take account of meanings that develop after the adoption of a treaty among the states parties or the international community more generally.<sup>84</sup> I will, however, focus here on how the photographs could be conceived for the purposes of the *Vienna Convention on the Law of Treaties* as indications of the 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.<sup>85</sup>

'Subsequent practice' has been variously understood for doctrinal treaty interpretation but only in connection with written texts.<sup>86</sup> Several factors might determine whether states parties would be willing to accept photographs as constitutive of subsequent practice. In the case of decisions on aesthetic value under international environmental treaties, photographs used to justify or explain a finding of aesthetic value could, I argue, qualify as subsequent practice. By way of contrast, photographs used to decorate a document, in the sense that no substantive link between them and the meaning of aesthetic value is expressed in the document, might not. Another factor relevant to the status of photographs as subsequent practice might be the juridical nature of a judgement of aesthetic value that has relied on photographs.<sup>87</sup> A photograph used to justify a decision of the World Heritage Committee might amount to an 'agreement' of the parties. A photograph in a report produced by expert advisors, such as the *Global Biodiversity Outlook*, informing only a hortatory decision of the Conference of the Parties to the *Biodiversity Convention* such as the decision agreeing the Aichi Targets,<sup>88</sup> might not amount to an agreement. It could, however, be relevant more broadly to the development of meanings for the treaty over time.

#### 3.1.2 Adapting legal methods of interpretation

My thesis showed examples of interpretation in the course of treaties being administered by experts implemented by states and enforced by judges. However, all manner of state representatives, bureaucrats and experts having responsibilities to make or implement international law must interpret the terms of international law.<sup>89</sup> I maintain that decision-makers tasked with treaty interpretation for these purposes could engage aesthetic methods to articulate meanings from photographs used in their decision-making processes.

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<sup>84</sup> See Chapter 3.

<sup>85</sup> *Vienna Convention* (n22) art 31(3)(b).

<sup>86</sup> Gardiner describes 'subsequent practice' as 'what can be shown to have been done systematically or repeatedly in implementation and application of a treaty', Gardiner (n21) 254. On written texts, see *ibid*, 255.

<sup>87</sup> On 'establishing' agreement, see *ibid* 269.

<sup>88</sup> Conference of the Parties to the *Convention on Biological Diversity*, *The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets*, Decision X/2, 10<sup>th</sup> mtg, UN Doc UNEP/CBD/COP/DEC/X/2 (29 October 2010) annex ('*Aichi Targets*') [13].

<sup>89</sup> Gardiner (n21) 123; see also Jan Klabbers, 'Virtuous Interpretation' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, 2010) 17, 37.

As explained in Chapter 3 of the thesis, aesthetic methods and graphic images have not been formally used in the customary international legal practices of treaty interpretation codified in the *Vienna Convention on the Law of Treaties*.<sup>90</sup> Yet because graphic images can represent meanings as demonstrated in my Chapters 5 to 7, I argue that those practices should be adapted for the many graphic images that populate the decision-making processes of international laws. The interpretation of treaties is described as an art not a science.<sup>91</sup> As such, it could be readily adapted to accommodate new sources for interpretation, such as photographs and other graphic images.

Critical understandings of terms, developed from photographs through aesthetic method, will inevitably lead to different interpretations. But, as they do with words, treaty interpreters could articulate those different meanings, and explain why one is justified over another, with reference to legal principles and rules of treaty interpretation adapted for graphic images as sources of interpretation. Treaty interpreters already navigate the many meanings that can arise from a term in a treaty: photographic images can be seen as another source, and aesthetic method seen as another technique, to provide a reasoned basis for the interpretation of international law.

### 3.2 Procedures for decisions on aesthetic value

Procedural rules and practices are developed by international bodies to ensure orderly and transparent decision-making processes that administer, and are themselves consistent with, international law.<sup>92</sup> Each of the international bodies making decisions under the respective treaties studied in the thesis have rules of procedure and documented practices of their decision-making procedures. Below, I discuss the implications of my thesis findings for the procedures of the World Heritage Committee, the ICJ, and the Conference of the Parties to the *Biodiversity Convention*. However, I maintain that my findings could also be applied to the procedures of other international bodies using graphic images in their decision-making processes.

#### 3.2.1 World Heritage Committee procedures

The *Operational Guidelines* for the World Heritage Committee currently contemplate the use of photographs in documents made by states to nominate properties to the World Heritage List.<sup>93</sup> Specifically, states are encouraged to ‘provide a sufficient number of recent images (prints, slides and, where possible, electronic formats, videos and aerial photographs) to give a good general picture of the property.’<sup>94</sup> In addition, states are advised to provide ‘documentation necessary to substantiate the nomination’, including ‘images of a quality

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<sup>90</sup> See eg Gardiner (n21) section 8.1.

<sup>91</sup> See Sir Humphrey Waldcock, Special Rapporteur of the International Law Commission on the Law of Treaties, ‘Third Report on the Law of Treaties’ (1964) II *Yearbook of the International Law Commission* 54. See also Jan Klabbers, *International Law* (Cambridge University Press, 2<sup>nd</sup> ed, 2017) 58.

<sup>92</sup> Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2015); Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell, 2009) 297.

<sup>93</sup> World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention*, UN Doc WHC.19/01 (10 July 2019 (‘WHC Operational Guidelines’)) [77].

<sup>94</sup> Ibid, annex 5 (‘Properties for inscription on the World Heritage List’ Nomination Format) [7a]; see also World Heritage Centre, ‘Preparing World Heritage Nominations’ *World Heritage Resource Manual* (UNESCO, 2<sup>nd</sup> ed, 2011) (‘Resource Manual’), 121.

suitable for printing'.<sup>95</sup> However, the *Operational Guidelines* do not properly explain the purpose of the photographs or the methods used for analysing them.

Given the findings of my thesis on the range of meanings for aesthetic value that can arise from photographs, I argue that the *Operational Guidelines* should be amended to explain how photographs relate to determinations of a property's aesthetic value by the World Heritage Committee. This would apply to both natural and cultural properties but I have argued that photographs have particular relevance to understandings of the environment's aesthetic value. The *Operational Guidelines* are regularly revised by the World Heritage Committee and my thesis findings could be considered in the context of future reviews.<sup>96</sup> Any consideration given to the use of photographs, and aesthetic expertise, by states parties in the process of nominating properties for World Heritage, should take account of necessary resources, corresponding costs and likely impacts on developing country parties.<sup>97</sup>

### 3.2.2 International Court of Justice procedures

Like the World Heritage Committee, the ICJ has also developed formal rules of procedure, but those rules do not address the submission of photographs in legal proceedings. As I explained in Chapter 6 of the thesis, the ICJ has, as a matter of practice, allowed photographs in written submissions as evidence and it has made formal mention of photographs in its *Practice Direction IXquater*.<sup>98</sup> My aesthetic analysis of the photographs in *Whaling in the Antarctic* nevertheless demonstrates for states, and the ICJ, that photographs and other graphic images can be understood for their 'representations' of meaning.

I maintain that parties to legal proceedings properly conducted should be required to account for their use of graphic images in their submissions to the ICJ. My findings are based on an analysis of photographs of whales in the *Whaling in the Antarctic* dispute. However, the potential for photographs to have what I describe as legitimate rhetorical import – with implications for legal interpretation and judgment – warrants procedures that acknowledge the aesthetic relevance of graphic images to legal reasoning for all proceedings. The use of photographs and other visual material for purposes other than evidence could be addressed by the ICJ, for example in future proceedings on a case-by-case basis, or through a future practice direction.<sup>99</sup> Similar considerations would apply to other international courts and tribunals allowing photographs in submissions.<sup>100</sup>

### 3.2.3 Procedures of the Conference of the Parties to the Biodiversity Convention

Rules of procedure govern the decision-making of the Conference of the Parties to the *Biodiversity Convention*. However, my research did not identify any publicly available guidance on the use of photographs in material generated in connection with decisions of the

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<sup>95</sup> WHC *Operational Guidelines* (n93) para 132. See also *Resource Manual* (n94) 60 ('providing attractive photographs is inadequate'), 98 ('[p]oor quality images are of no use').

<sup>96</sup> See World Heritage Policy Compendium <<https://whc.unesco.org/en/compendium/>>.

<sup>97</sup> Eg through the 'Upstream Process': World Heritage Committee, 'Item 9 of the Provisional Agenda: Global Strategy for a Representative, Balanced and Credible World Heritage List: 9A. Upstream Process', Report on the Implementation of the Upstream Process, 43<sup>rd</sup> sess (2019) UN Doc WHC/19/43.COM/9A.Rev (19 June 2019).

<sup>98</sup> International Court of Justice, *Practice Direction IXquater* (11 April 2013).

<sup>99</sup> On the role of image in rhetoric, see Chapter 6.

<sup>100</sup> On images in evidence for other international courts and tribunals, see eg Chittharanjan F Amerasinghe, *Evidence in International Litigation* (Brill, 2005) 394.

Conference of the Parties.<sup>101</sup> Other international bodies might have rules governing the use of photographs in their reports but it is not clear that they would have any relevance to decisions of the Conference of the Parties to the *Biodiversity Convention* that rely on those reports.<sup>102</sup>

I propose on at least two grounds that the Conference of the Parties to the *Biodiversity Convention* should develop rules or guidance on the use of photographs for its decision-making processes. First, to explain the role and relevance of photographs currently used in documentation. Secondly, to strengthen understandings of biodiversity values in general, and aesthetic value in particular, in circumstances where a lack of understanding of those values has been identified as an impediment to the implementation of the *Biodiversity Convention*.<sup>103</sup> With the extensive and rapid loss of biodiversity acknowledged by the Conference of the Parties and other bodies,<sup>104</sup> initiatives that might assist implementation of the treaty should be explored.

### 3.3 Judgements of the environment's aesthetic value

An understanding of the 'judgement' of environmental values in a legal context – in a decision-making process under international law and governed by international law – can be distinguished from 'judgment' as the outcome of a judicial process.<sup>105</sup> I maintain that each of the international bodies making decisions under the three treaties studied in the thesis, including the ICJ, undertake a process of judgement in their assessment, evaluation or determination of environmental values invoked by states under the treaties which is relevant to their legal or juridical judgments. In this thesis, I described the World Heritage Committee and the Conference of the Parties to the *Biodiversity Convention* as undertaking judgements in their administrative assessments or evaluations of aesthetic value while I characterised the ICJ as exercising judgement of aesthetic value for the interpretation of international law. Below I argue that the relevance of photographs used in the decision-making processes of these bodies should be expressly addressed for, and in, decisions made under treaties.

#### 3.3.1 Administrative determinations

Criterion (vii) for assessing the outstanding universal value of natural heritage, set out in the *Operational Guidelines* of the World Heritage Committee,<sup>106</sup> is based on the 'natural beauty' and 'aesthetic' points of view protected under the *World Heritage Convention*.<sup>107</sup> A study commissioned by IUCN anticipated that experts in environmental aesthetics could be consulted on 'clear evidence' of natural beauty and aesthetic importance in the course of the World Heritage Committee's evaluation of natural properties for inscription on the World Heritage

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<sup>101</sup> Cf *Rules of Procedure for the Conference of the Parties*, Decision I/1 adopted by the Conference of the Parties to the *Convention on Biological Diversity*, 1<sup>st</sup> mtg, UNEP/CBD/COP/DEC/I/1 (28 February 1995), annex (amended by Decision V/20).

<sup>102</sup> Note disclaimer accompanying photographs provided with Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) 'Biodiversity and Nature's Contributions Continue Dangerous Decline, Scientists Warn' (Media Release, undated, released 28 March 2018) <<https://goo.gl/oJ4DRq>>.

<sup>103</sup> *GBO-4* (n80).

<sup>104</sup> Eg *GBO-4* (n80); ES Brondizio et al (eds), *Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES Secretariat, 2019).

<sup>105</sup> Desmond Manderson, 'Judgment in Law and the Humanities' (2013) 1 *Revista Forumul Judecatorilor* 43-62; cf Allen Carlson, 'Nature, Aesthetic Judgment, and Objectivity' in *Aesthetics and the Environment: The Appreciation of Nature, Art and Architecture* (Routledge, 2000) 54; Brady, *Aesthetics of Environment* (n6) 191.

<sup>106</sup> *WHC Operational Guidelines* (n93) para 77. See Chapter 5.

<sup>107</sup> *World Heritage Convention* (n7) art 2.

List.<sup>108</sup> The study also suggested that experts in aesthetics be consulted on the development of a landscape typology.<sup>109</sup> There is, however, no mention in the study of the role of photographs of the environment in such assessments of aesthetic value. The findings of my thesis indicate that the relevance of photographs to determinations of outstanding universal value should be addressed in any future work of the World Heritage Committee on the application of criterion (vii). My findings in Chapters 3 and 5 on the conflation of the aesthetic and natural beauty points of view in the practices of the World Heritage Committee should also be considered in the context of any reforms to the *Operational Guidelines*.

Models of evaluation that assign monetary values to ‘ecosystem services’ are commonly used by states in their characterisation of biodiversity values for the implementation of the *Biodiversity Convention*.<sup>110</sup> The governing body of the *Biodiversity Convention*, the Conference of the Parties, has encouraged states parties to use methods of valuation for biodiversity based on ‘nature’s contribution to people’ alongside their fiscal evaluations of ecosystem services.<sup>111</sup> This approach recognises that valuation models for biodiversity commonly employed by the parties do not properly account for non-material values such as aesthetic value.<sup>112</sup> However, concepts and methods from aesthetic philosophy are not currently expressed in the prescribed categories of ‘nature’s contribution to people’.<sup>113</sup> I argue that the interdisciplinary premise for this emerging approach to valuation should be extended to take account of aesthetic methods for developing meanings of aesthetic value from photographs.<sup>114</sup>

### 3.3.2 Judicial judgment

As explained above, my aesthetic analysis of the photographs used in the *Whaling in the Antarctic* proceedings demonstrates that photographs and other graphic images can be understood for their ‘representations’ of meaning. If as suggested above, ICJ procedures were adapted for graphic images used for their representations in parties’ submissions, an understanding of the relevance of those images to judgments would also need to be developed.<sup>115</sup> I argue from the position of jurispudent that understandings of the ways in which those representations are taken into account in judgments should be articulated for the

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<sup>108</sup> Nora Mitchell, *IUCN Study on the Application of Criterion (vii): Considering Superlative Natural Phenomena and Exceptional Natural Beauty within the World Heritage Convention* (Report for the International Union for the Conservation of Nature, World Heritage Study N° 10, 2013) 57-8.

<sup>109</sup> Ibid.

<sup>110</sup> See Chapter 7. See eg *The Economics of Ecosystems and Biodiversity* (TEEB) <<http://www.teebweb.org>> or the *UN System of Economic and Environmental Accounting* (SEEA) <<https://seea.un.org>>.

<sup>111</sup> Eg states parties were encouraged to adopt the IPBES approach in their 6<sup>th</sup> national reports on the implementation of the *Biodiversity Convention*, see further Conference of the Parties to the *Biodiversity Convention*, *Resource Manual for the Sixth National Report, including Annotated Reporting Templates*, Note by the Executive Secretary, 13<sup>th</sup> mtg, UN Doc UNEP/CBD/COP/13/21 (20 September 2016).

<sup>112</sup> M Fischer et al (eds), *Summary for Policymakers of the Regional Assessment Report on Biodiversity and Ecosystem Services for Europe and Central Asia of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES Secretariat, 2018) 7.

<sup>113</sup> Category 16, Table S1, ‘Reporting Categories of Nature’s Contributions to People (NCP) Used in IPBES Assessments According to the Generalizing Perspective’ in S Díaz et al, ‘Assessing Nature’s Contributions to People’ (2018) 359 *Science* (Supplementary Material) 270.

<sup>114</sup> See eg UK National Ecosystem Assessment Follow-on Phase, ‘Cultural ecosystem services and indicators’ in Peter Coates et al, ‘Arts & Humanities Perspectives on Cultural Ecosystem Services’, Arts & Humanities Working Group (AHWG): Final Report (April 2014), annex 1.

<sup>115</sup> Iain Scobbie, ‘Rhetoric, Persuasion, and Interpretation in International Law’ in Bianchi, Peat and Windsor (n1) 61.



proper conduct of law and the good administration of justice.<sup>116</sup> Where graphic images are reproduced in judgments, the ICJ should be capable of explaining the significance of the image to its decision – with the possibility of the Court making a distinction between graphic images seen as representations in an aesthetic sense, and those seen for their presentation of facts as evidence.

EXHIBIT: JULIE GOUGH, *OBSERVANCE* (2012)



Figure 8.1: Julie Gough, *Observance*, 2012, still from video projection HDMI, H264, 16:9 (colour, sound), 17:09 mins. Source: Artist

Panneebothi, temtoryer, teeburricar, lillerclapperlar, noermernar... flour, sheep, soldier, whale boat, white man. These are the names of things introduced to Tasmania with the arrival of Europeans that are written over coastal scenes in artist Julie Gough's video *Observance* (2012) (fig 8.1). From a distance – among trees, behind boulders, atop a hill – Gough's camera surveys the land as it meets Australia's southern seas. Wombats graze on a verge. Wallabies swat flies. Plovers dart over sand. And all the while eco-tourists decked in hiking gear and saddled with backpacks come in and out of view, picking their way over the sand and rocks. They stumble, stop, stare out to sea. They take photographs or reach for curios in the flotsam. Some of the intrepid travellers appear delighted, others weary, as they live the promise of an adventure in this remote and wild place.

Yet from Gough's vantage, these people are objects, not subjects in their own experience of nature. They are avatars for the white colonisers who invaded this place, each step they take an encroachment on Aboriginal territory.<sup>117</sup> The artist turns the sounds of nature on and off,

<sup>116</sup> Note Peter Goodrich, 'Imago Decidendi: On the Common Law of Images' 1(1) *Art and Law* (2017) 1; on international environmental law in domestic courts, see Alice Palmer and Cairo Robb (eds), *International Environmental Reports, Volume 4: International Environmental Law in National Courts* (Cambridge University Press, 2004).

<sup>117</sup> Julie Gough 'Observance' in Cathy Leahy and Judith Ryan (eds), *Colony: Australia 1770-1861/Frontier Wars* (National Gallery of Victoria, 2018) 268-9; see also Judith Ryan, 'Disquiet and Resistance in the Art of Julie Gough' (June 2013) 33(2) *Artlink* 72.

the interval between marking a moment's silence for her fallen people. Layering text on the picture, Gough lists the first words for new things to this old place, translating them into English, the foreign language of their provenance, to reveal them as agents of destruction in a 'parallel world'.<sup>118</sup> An excerpt from British lay preacher George Augustus Robinson's journal of 1830 is featured at the start of the video. As I reflect on his journal entry, I can only wonder at the vantage of my own convict ancestor when he was finally set free in '...this country and other parts equally barren'.<sup>119</sup>

There is much to appreciate in this artwork. Relevant to my thesis, I can interrogate different features of the environment's 'aesthetic' value that are debated in aesthetic philosophy as it concerns the natural environment and the arts. I can imagine the sensory engagement of the tourists depicted in this natural place in the philosophical terms of environmental aesthetics. At the same time, I have a critical understanding of the aesthetic pleasure of these people as an imposition on others – notably Australia's Indigenous peoples. At best, it is a pleasure not shared with some or even many and available to only a few. At worst, it is a relentless violation of the law of Aboriginal peoples.

Also relevant to my thesis, I am conscious of the many ways in which an aesthetic sense of the environment is mediated, starting with the very form in which the original moving image is presented here on the page: a photographic still. Between the picture I see (and think I know), and the word I read (but do not understand), I comprehend 'image' as veils of graphic expression, representation and contested facts. Perhaps most of all, I am struck by an intimacy between image, the environment and law in the Indigenous conception of 'Country' which is so distinct from understandings of environmental images for international law.<sup>120</sup> Next to this, international law – protecting the environment through the treaties, rules and principles of states that comprise 'international environmental law' – appears to me an impoverished and misguided endeavour. But one I am not ready to abandon as a tool used by states to protect the planet.

So I propose that jurists and legal practitioners return to the values that underlie the particular body of laws conceived as international environmental law. Understanding that scientific, economic and ethical values of the environment have been well-accommodated in the practice and theory of the discipline, I look elsewhere, to aesthetic value, to see what it might do to make international law work to protect the environment. To know what aesthetic value of the environment means for international environmental treaties, I use image – starting with the photographic images that already populate the practice of those treaties.

With these *graphic images* already there in treaty practice, I maintain as jurist that international bodies should know what work images are doing in their decision-making processes governed by international law. I say the expertise of art scholars well-versed in understandings of image in aesthetic philosophy can and should guide the thinking and practice

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<sup>118</sup> Gough, *ibid.*

<sup>119</sup> Journal of George Augustus Robinson, 2 November 1830, North East Tasmania, cited in Julie Gough, *Observance* (2012), video projection.

<sup>120</sup> Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Taylor and Francis, 2014); CF Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2010); see also Lee Godden, 'Indigenous Heritage and the Environment: "Legal Categories Are Only One Way of Imagining the Real"' (2002) 19 *Environmental and Planning Law Journal* 258; Shaunnagh Dorsett and Shaun McVeigh, 'Just So: "The Law which Governs Australia is Australian Law"' (2002) 13(3) *Law and Critique* 289.



of international law with graphic images. With these graphic images of the *environment* already there in treaty practice, I also see an opportunity to understand aesthetic value for international environmental law in terms redeemed by the philosophy of environmental aesthetics: away from a conventional aesthetic in Western European and British landscape to what I call a pluralised now-world aesthetic of sensory affect, imagination, emotion and knowledge, including personal and cultural knowledges. A value that is meaningful – to people, states and international bodies – in ways that justify international laws for the natural environments represented in photographs which, for now at least, are still experienced in myriad but exquisite ways in real lives.

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