

# INTERNATIONAL LAW ASSOCIATION

## LISBON CONFERENCE (2022)

### PARTICIPATION IN GLOBAL CULTURAL HERITAGE GOVERNANCE

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## FINAL REPORT

### Participation in Cultural Heritage Governance at the Global Level

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## PREFACE

1. This Committee, established in 2017, started its work at the ILA’s Seventy-Eighth Conference in Sydney.<sup>1</sup> The Committee’s mandate addresses the pressing challenge in the field of international heritage law stemming from its sectoral fragmentation and specialization. Indeed, international cultural heritage law suffers from a problem of operating as a series of almost ‘self-contained’ regimes, without meaningful engagement with other instruments in this domain, not to mention non-heritage instruments. Part of this isolation stems from the lack of engagement of actors other than states and heritage domain-specific experts. The Committee’s focus on participation therefore serves to address broader issues of heritage governance, just seen through the lenses of the conceptualization and implementation of participation.
2. The Committee is aware of the importance of global heritage governance, given the UNESCO Constitution’s connection between cultural understanding and peace, which requires that culture transcend national projects.<sup>2</sup> However, there is still a fair degree of opacity as to how this connection works, and who gets to speak on behalf of heritage and in doing so shape its meaning, uses, and future. These are also not questions lawyers systematically ask, as the reports submitted to this Committee on the work of the predecessor Committee (ILA Committee on Cultural Heritage Law (1988-2016)) testify.<sup>3</sup> Conversely, the phenomenon of trying to map and understand participation in governance is not restricted to heritage, nor is heritage restricted to UNESCO. Therefore, the

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<sup>1</sup> Annabelle Spence, ‘Committee on Participation in Global Heritage Governance, Working Session’ in Marcel Brus and Alexander Kunzelmann (eds), *International Law Association, Report of the Seventy-Eight Conference Held in Sydney, 19-24 August 2018* (ILA 2019), pp 1090-97.

<sup>2</sup> Constitution of UNESCO (adopted 16 November 1945, entered into force 4 November 1946), 4 UNTS 275.

<sup>3</sup> James AR Nafziger, *Frontiers of Cultural Heritage Law* (Brill 2021), pp 24-25.

Committee has looked more broadly at how a range of regional and universal bodies, in and beyond heritage, engage with affected participants.

3. The Final Report is a fruit of a four-year work of the Committee (2018-2022) pursued through plenary and closed working sessions organized within the framework of the ILA biennial conferences in Sydney (August 2018), Kyoto (December 2020), and Lisbon (June 2022). Deliberations and discussions also took place at a number of working intersessional meetings. The global pandemic had an impact on the work of the Committee, as both the Kyoto session and the intersessional meetings in January, July and December 2021 were held in an online format. In fact, Committee members only had the chance to meet in person in 2018 (Sydney), in 2019 (Oxford)<sup>4</sup> and in 2022 (Lisbon). Notwithstanding these difficulties, the work of this body of truly numerous and geographically diverse membership, proceeded according to the initially designed scheme.
4. The Committee's activities also involved the enhanced partnership with academic and non-academic partners. During the ILA's Seventy-Eighth Conference (2018), the Committee co-organized with the Faculty of Law of the University of Technology, Sydney (UTS), and the Faculty of Law of the University of New South Wales (UNSW) a joint roundtable, entitled 'Reimagining Community in International Legal Governance'.<sup>5</sup> The roundtable featured two sessions 'Intersectionality', and 'Tapping into Global Governance Processes' that engaged experts, each representing a different interest group: Indigenous peoples; refugees; women and gender rights; children's rights; and disability rights. A broad programme on the topic 'Cultural Heritage, Participation and Sustainable Development' was also designed for the Committee's second intersessional meeting held online and hosted by the Strathmore School of Law in Nairobi (6-7 July 2021). These included two sessions 'Community Participation and Holistic Approaches to Sustainable Development with Special Focus on Africa', and 'Heritage and Resource Management for Sustainable Development', with participation of experts from the Committee, and invited speakers from Kenya: lawyers, heritage experts and anthropologists.
5. All these events and discussions formed the views expressed in this Final Report.

## I. INTRODUCTION

6. Cultural heritage has today become a global concern, operating 'at a range of different spatial, temporal and institutional scales',<sup>6</sup> which can be observed within various layers and areas of international law, mostly at the level of treaty law, but also in soft law and international policy documents. On the one hand, this global concern is usually associated with the gradual recognition of the value of cultural heritage for people's identity as a key component of social development. On the other hand, it stems from the increased global awareness on the holistic value of cultural heritage in supporting international frameworks of peace, security and sustainable development as well as a means of addressing the real and alleged threats associated with globalization, the rise of transboundary organized crime, and fundamentalism. Yet the regulatory basis for global cultural heritage governance is profoundly compartmentalized into specialized, and methodologically fragmented regimes that often lack harmony between various norm-systems and institutions. These fragmented dynamics exist at the international, regional and domestic levels, the latter being important in that they are the central pathway for the implementation of international law, and often a source of inspiration for the development of new international obligations. These legal regimes are predominantly characterized by a top-down approach, within given operating mandates, thus undermining effective and entrenched governance and leaving a limited space for the enhancement,

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<sup>4</sup> For a summary of proceedings see Rangga Dachlan, 'Intersessional Meeting of the International Law Association Committee on Participation in Global Cultural Heritage Governance Oxford, 2-3 July 2019' (2019) 5(2) SA&CLR 277.

<sup>5</sup> See Annabelle Spence, 'Committee on Participation in Global Heritage Governance, Working Session and Roundtable. Sydney, 22 August 2018' (2018) 4(2) SA&CLR 341, 343.

<sup>6</sup> Rodney Harrison, *Heritage: Critical Approaches* (Routledge 2013), p 5.

enforcement and reconciliation of various cultural interests and the rights of individuals and communities who have created or enjoyed a given heritage.

7. In addition to these shortcomings, the Committee observes that the current challenges arising from the globally-observed domestic measures directed to tackle pandemics threats (such as limitations on free movement or restrictions on freedoms of peaceful assembly and of association)<sup>7</sup> may possibly turn against effective cultural heritage governance. Such negative effects may occur, even if in some instances, where digital barriers do not exist, the move to a wider range of online meetings can remove certain financial and logistical obstacles to participation. In particular, they may affect a wide range of cultural human rights, such as access to and enjoyment of cultural heritage and participation in cultural life. Viewed in this light, participatory governance of cultural heritage becomes more important than ever.
8. In light of the above, the key research question of the Committee's mandate was to understand and substantiate to what extent the present-day global governance of cultural heritage is inclusive and participatory. Hence the study undertaken endeavoured to reconstruct regulatory and doctrinal foundations of participation in global cultural heritage governance, to analyse and assess the existing participatory legal frameworks and their synergies, and finally to identify best practices that may serve to build guidelines and recommendations for most inclusive procedural models of legal governance.

#### ***Working agenda***

9. In order to answer these questions, the Committee established its working agenda that splits into two key phases: (1) a general overview: forms and conditions of participation as regulated by international law and the typology of subjects who may efficiently exercise their right to participate in cultural heritage governance at the global level; and (2) national practices of ensuring participation in cultural heritage.
10. The first phase of the Committee's working agenda based on the individual reports and studies prepared by the Committee members, was concluded with the 'Interim Report. Participation in Cultural Heritage Governance at the Global Level',<sup>8</sup> and presented and debated at the Seventy-Ninth Biennial Conference in Kyoto (2020). It offered an overview of the practice of cultural heritage governance and participation based on research reports prepared by Committee members for our two intersessional meetings. The first set of reports, presented in Oxford in 2019, focused on international and regional legal practices. They were: (1) 'UNESCO and Its Particular Bodies' – UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP); UNESCO Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions; UNESCO and its governance regime for the safeguarding of intangible cultural heritage; UNESCO International Code of Ethics for Dealers in Cultural Property; and UNESCO World Heritage Committee; (2) 'The Specificity of Cultural Heritage Governance' – Economic and Social Council (ECOSOC); Internet Corporation for Assigned Names and Numbers (ICANN); UN Environment Programme (UNEP); and the World Health Organization (WHO); (3) 'Participation, Heritage, and Regional Organizations' – Arctic Council; Organization of Islamic Cooperation (OIC); Organization for Security and Co-operation in Europe (OSCE); European Union (EU); Caribbean Community and Common Market (CARICOM); African Regional Intellectual Property Organization (ARIPO); Organization of American States (OAS); Andean Community; (4) 'Specialized Organizations and International NGOs' – INTERPOL; International Labour Organization (ILO); Southern Common Market

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<sup>7</sup> See HR Council, 'Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Clément Nyaletsossi Voule: Access to Justice as an Integral Element of the Protection of Rights to Freedom of Peaceful Assembly and Association' (12 May 2021), UN Doc A/HRC/47/24, para 19.

<sup>8</sup> See <<https://www.ila-hq.org/images/ILA/docs/kyoto/Comm%20Participation%20Global%20Cultural%20Herit%20Interim%20Report%20Kyoto%202020.pdf>> accessed 10 December 2021.

(MERCOSUR); World Trade Organization (WTO); UN World Tourism Organization (UNWTO); ILO; and Food and Agriculture Organization (FAO); (5) ‘Human Rights, Heritage, and Participation’ – European Court of Human Rights (ECtHR); UN Human Rights Council (HR Council) and Special Rapporteur in the Field of Cultural Rights; UN Committee on the Rights of Persons with Disabilities (UNCRPD); International Organization for Migration (IOM), and UN High Commissioner for Refugees (UNHCR); Committee on Economic, Social and Cultural Rights (CESCR). This phase of the Committee’s work also included follow-up summary reports (highlighting drawbacks of the existing governance frameworks, observed best practices, and tentative recommendations for the future); as well as the following additional reports submitted by the end of March 2020: the practice of the UNESCO Convention on the Protection of the Underwater Cultural Heritage (UCHC); peacekeeping operations and participation; International Council of Museums (ICOM); International Criminal Court (ICC) and the Trust Fund for Victims of the ICC; Council of Europe (CoE); Organization of African Unity; South American Union of Nations (UNASUR); UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict; Group of Seven (G7); World Bank; UN Human Rights Committee (HRC); Association of South-East Asian Nations (ASEAN); and South-Asian Association for Regional Co-operation (SAARC).

11. The studies on the second item of the agenda, i.e. national practices of ensuring participation in cultural heritage, also based on the content of individual reports, were carried out in 2021-2022. Early drafts were debated at online meetings in 2022, and led to the present Final Report. Hence the second phase of the Committee’s work focused on domestic practices of governance (as discussed in further detail below), and included research reports prepared by Committee Members for discussion at the Committee’s intersessional virtual meeting hosted in collaboration with Strathmore University (Nairobi), as well as follow-up reports. These reports covered the thirty-three jurisdictions of: Afghanistan, Angola, Antigua and Barbuda, Australia, Belgium, Brazil, Canada, Cape Verde, Colombia, Dominica, Germany, Guinea-Bissau, Grenada, Ireland, Italy, Japan, Malaysia, Mozambique, the Netherlands, New Zealand, Pakistan, Qatar, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, São Tomé and Príncipe, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, the United Kingdom, and the United States. In addition, a case study on participation of source communities in museum collections from a colonial context was delivered as well as two short comments regarding Poland (intangible cultural heritage governance) and Germany (restitution of cultural property removed during the colonial era).

### ***Methodology and structure***

12. Methodologically, this Final Report consists of a comprehensive investigation into the legal sources of participation and cultural heritage governance as well as into the practices of select international bodies, alongside our consideration of domestic practices as a pathway to further enrich our understanding of the possibilities of international law. It is based on the overview of legal sources, official reports, and related scholarship. It was also largely founded on the original research questionnaires followed by the Committee for both phases of the work. Hence the Committee’s work involved both doctrinal and comparative analysis of public law and international law sources.
13. For the first phase of the Committee’s work, comprising a general overview of the actors, forms and conditions of participation in cultural heritage governance at the global level, members were invited to consider the following research question: How does the organization frame the concept of participation? This question was split into three sub-questions: (1) Does the organization define who gets to participate? If so, in what terms?; (2) What is the nature of participation (consultation/consent/observation/other)?; (3) In what contexts does participation take place?
14. For the second phase, i.e. the comparative analysis of national practices of ensuring participation in cultural heritage, the Committee discussed and adopted a questionnaire to guide the work, so as to ensure comparability of the relevant domestic experiences. While some general data were sought to situate the different jurisdictions, the primary focus was on the identification of specific examples of practice within the state, whether positive or negative, that could inform our thinking about participation in heritage governance. In international law, ‘the state’ is largely treated as a monolithic

agent, and it is only through our examination of domestic practices that those barriers can be broken, and a plurality of voices is more easily identifiable. The Committee members were also invited to look at examples in areas outside strictly cultural heritage, bearing in mind that in many jurisdictions heritage governance is classified under different bodies of law, such as environmental or general administrative law. These classification issues led to the insight that much could be learned from analysing the operation of the background domestic norms with which heritage concerns interact.

15. In this (second) phase of the Committee's work was guided by the following questions: (a) Basic legal facts: whether common law or civil law, unitary or federal, status of international law in domestic law, and where heritage sits in the governmental structure (with an eye to the 'jurisdictional fragmentation' of heritage discussed above); (b) With respect to federal countries, what is the role of federalism specifically in relation to both culture and heritage matters?; (c) What are the key legal instruments affecting governance of cultural heritage (e.g. urban planning legislation, requirements that formal associations be constituted for communities to participate in public decision-making, environmental law, specific heritage legislation, etc.)?; (d) Who are the stakeholders with a 'seat at the table' in the relevant legal regimes (consider political appointees, career civil servants, civil society, non-community experts, communities, individuals, among others)?; (e) What type of governance or participation is available to each stakeholder under the relevant rules (consider identification, description, interpretation, promotion, and management of heritage)? To the extent that there are available data, which forms are most effective, and why? And how do they compare to the power left to state authorities?; (f) Are financial / budgetary decisions with respect to heritage preservation and safeguarding made as part of this decision-making process, or are they done through a separate pathway?; (g) Who decides whether to list / protect / safeguard heritage?; (h) Whether the pandemic situation and relevant anti-COVID legislation can change or has already modified/alterd the existing forms and modalities of participation in relation to heritage matters?; (i) Could you list best practices, in terms of legal framework, practice and/or decision-making observed?
16. Accordingly, the structure of this Final Report is built on seven general sections. First, it unpicks the notion of global governance in relation to cultural heritage. Second, it fleshes out the ways in which the notion of participation is addressed in international legal debates. Next it focuses on the importance of participatory governance of cultural heritage more specifically. In this regard, the report lists the weaknesses in the existing governance frameworks on the one hand, and describes the best practices observed on the other. The fifth section examines those insights on the basis of domestic practices, contextualizing the practice of participation through the legal frameworks that implement or challenge international heritage mandates. Sixth, this report offers some conclusions from the Committee's work, and finally a list of recommendations that may serve international law and policy makers as guidelines to render cultural heritage governance, within their respective mandates, more participatory and inclusive. A special effort has been made to make this report accessible and clear to non-specialized audiences as well.

## II. GLOBAL GOVERNANCE OF CULTURAL HERITAGE

17. While the central issue for this report is participation in global governance with respect to cultural heritage, the Committee acknowledges that there is no one commonly-accepted notion of the term 'global governance'. However, it recognizes that it generally refers to 'a political system founded on normative principles and reflexive authorities'<sup>9</sup> that address problems and challenges affecting various actors on the international plane.<sup>10</sup> Global governance involves the exercise of power and authority by various actors (including international organizations, private entities, national government agencies, and other non-state actors) beyond a single state. It encompasses a wide

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<sup>9</sup> Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (OUP 2018), p 248.

<sup>10</sup> Alain Akl, 'Global Governance V/S COVID-19: A Human Security Approach' (2021) 4 *Open Political Science* 219; also see Christopher C Joyner, *International Law in the 21st Century: Rules for Global Governance* (Rowman & Littlefield Publishers 2005), p 288.

spectrum of governance frameworks: from megaregulatory projects<sup>11</sup> to local arrangements. Moreover, it is also accepted that global governance should take place in the best suitable legal context or forum, considering the principles of good governance substantiated in international policy since late 1980s, such as: openness, transparency and accountability by institutions; fairness and equity, ‘including mechanisms for consultation and participation; efficient and effective services; clear, transparent and applicable laws and regulations; consistency and coherence in policy formation; and high standards of ethical behaviour.’<sup>12</sup>

## A. The features of global governance of cultural heritage

18. Cultural heritage, being an important resource for present-day and future generations, constitutes one of the major areas of the system of global governance.<sup>13</sup> Accordingly, four major features of the system of global governance can be identified as relevant for the protection, safeguarding and enjoyment of cultural heritage: 1) the existence of global goods shared and enjoyed by all humankind; 2) diversity of law-making processes of global relevance; 3) expanding the institutional global frameworks, comprising formal and less formal mechanisms of law enforcement; 4) the increasing role of non-state actors in law-making and law-implementing processes.

### 1) Cultural heritage as a global good

19. Global governance is founded on the presumption that all humankind shares common aims: peace and security, human rights and development that also correspond to the three pillars of the UN system.<sup>14</sup> Indeed, the achievement of these aims pursuant to diverse modalities of governance of common interests, values and goods lies at the heart of global governance. In this context, cultural heritage has increasingly been associated with global common goods or global public goods. Importantly, this is explicitly addressed in the Preamble to UNESCO’s World Heritage Convention,<sup>15</sup> and has been referred to by the UN Development Programme on various occasions.<sup>16</sup> While the Committee is fully aware that the conceptualization of cultural heritage as global goods may be problematic due to its very nature, often involving claims to its uniqueness and exclusivity, the protection of its substance and diversity aligns with other global common goods and values. Cultural diversity is ‘embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind’, leading to the conclusion that as ‘a source of exchange, innovation and creativity, cultural diversity is as necessary for humankind as biodiversity is for nature’.<sup>17</sup> Cultural diversity has been recognized and promoted as a global common value for a number of reasons and purposes, including its importance to peace and stability, progress and development, and the full

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<sup>11</sup> For instance, see Benedict Kingsbury et al (eds), *Megaregulation Contested: Global Economic Ordering After TPP* (OUP 2019).

<sup>12</sup> Magdalena P Ferreira-Snyman and GM Ferreira, ‘Global Good Governance and Good Global Governance’ (2006) 31 SAfrYIL 52, 57.

<sup>13</sup> See Irina Bokova, *Global Governance for the 21st Century: The UNESCO Angle* (2011), UNESCO Doc ERI.2011/WS/4, p 11; also see Lucas Lixinski, *International Heritage Law for Communities. Exclusion and Re-Imagination* (OUP 2019), p 233; Jorge Sánchez Cordero, *Rupturas culturales: los grandes desafíos. Ensayos sobre patrimonio y derechos culturales en México y el mundo* (Tirant lo Blanch 2019), pp 49-53.

<sup>14</sup> Cf. Janne Mende, ‘The Contestation and Construction of Global Governance Authorities: A Study from the Global Business and Human Rights Regime’ (2021) 10 *Global Constitutionalism* 377, 380.

<sup>15</sup> Convention Concerning the Protection of World Natural and Cultural Heritage (adopted 16 November 1972, entered into force 17 December 1975), 1037 UNTS 151: ‘the 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’ (2<sup>nd</sup> recital).

<sup>16</sup> See, e.g. Inge Kaul et al (eds), *Global Public Goods: International Cooperation in the 21st Century* (OUP 1999), p 453.

<sup>17</sup> Universal Declaration on Cultural Diversity (2 November 2001), UNESCO Doc 31C/Res 25 Annex 1 (2001), art 1.

realization of all human rights.<sup>18</sup> Moreover, the protection of cultural heritage in its diversity has been considered by bodies like the United Nations Security Council as a crucial element for maintaining global peace and security,<sup>19</sup> and by the United Nations General Assembly as essential to sustainable development.<sup>20</sup> Hence, the mainstreaming of cultural diversity and cultural heritage is increasingly seen as a global good that supports the realization of all common aims of the international community.<sup>21</sup>

## 2) Diversity of law-making processes

20. Normatively, one of the major mechanisms of global governance is expanding the diversity of law-making processes, including the variety of regulatory instruments of a non-legally-binding nature.<sup>22</sup> While international law constitutes the major normative context in which global governance takes place, the system of global governance also considers other regulatory levels and contexts, such as instruments of self-regulation (e.g. codes of ethics and professional conduct), and their interconnectedness and interdependence. Hence global governance may be seen as constituting an answer to the deficiencies in existing international law frameworks, boundaries between self-contained regimes, competing layers of authority, and traditional forms of decision-making. The Committee's research has indeed demonstrated that global cultural heritage governance is nowadays intertwined with the growing regulatory framework. In fact, international cultural heritage regulation has expanded beyond the realm of culture-oriented instruments.<sup>23</sup> This expansion is sometimes described as the emergence of a new discipline or area of the law – 'cultural law' – that would encompass a wide spectrum of instruments and regulatory documents covering distinct aspects of human existence.<sup>24</sup> This 'cultural law' makes the legal basis for cultural heritage regulation a truly diverse area of regulatory processes, also including self-regulation instruments enacted by powerful international non-governmental organizations, such as the Code of Ethics for Museums,<sup>25</sup> adopted by the International Council of Museums (ICOM).

## 3) The institutional matrix of global cultural heritage governance

21. Another key feature of the global governance system regards both the renunciation of hierarchical structures in decision-making processes at the international level, and the increasing of the law-enforcement mechanisms and processes. Global governance is becoming networked, and vertical and hierarchical ties are gradually losing importance in favour of horizontal ties and cooperation between often institutionally unrelated and autonomous entities. In this regard, the Committee has first examined the practice of various UNESCO bodies in relation to different aspects of cultural heritage governance (see paragraph 10, above). Generally speaking, the key functions and powers of these bodies regard listing procedures, financial and expert assistance, and awareness and capacity

<sup>18</sup> See Ana F Vrdoljak, 'Human Rights and Cultural Heritage in International Law' in Federico Lenzerini and Ana F Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (Hart Publishing 2014), pp 168-72.

<sup>19</sup> UN Security Council, 'Resolution 2347 (2017): Maintenance of International Peace and Security' (24 March 2017), UN Doc S/RES/2347.

<sup>20</sup> UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (25 September 2015), UN Doc A/RES/70/1, goals 4.7 and 11.4.

<sup>21</sup> See Kristin Hausler, 'Cultural Heritage and the Security Council: Why Resolution 2347 Matters' (2018) 48 QIL 5; Manlio Frigo, 'Approaches Taken by the Security Council to the Global Protection of Cultural Heritage: An Evolving Role in Preventing Unlawful Traffic of Cultural Property' (2018) 101 RivDirInt 1164.

<sup>22</sup> For instance, see Karsten Nowrot, 'Global Governance and International Law' (2004) 33 *Beiträge zum Transnationalen Wirtschaftsrecht* 6.

<sup>23</sup> See Francesco Francioni and Ana F Vrdoljak, 'Introduction' in Francesco Francioni and Ana F Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (OUP 2020), pp 3-13.

<sup>24</sup> James AR Nafziger, Robert K Paterson and Alison D Renteln (eds), *Cultural Law: International, Comparative and Indigenous* (CUP 2010), intro.

<sup>25</sup> Available at <<https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf>> accessed 15 December 2021.



building. It may be said that, due to the high degree of fragmentation and specialization of UNESCO's cultural heritage treaty law, actual governance operates within methodologically differentiated regulatory and institutional frameworks often employing distinct notions of cultural heritage (e.g. intangible heritage, built, movable, and underwater heritage). On the other hand, it has been observed that UNESCO, as the key cultural heritage governance international organization tends to overcome these boundaries while launching cross-sectoral initiatives, platforms of multi-stakeholder dialogue, or fostering and enhancing cooperative mechanisms between various international organizations and organs. For instance, in 2015 UNESCO initiated a global campaign #Unite4Heritage aimed at raising awareness among a wider public about the value of cultural heritage endangered by armed conflicts and terrorism.<sup>26</sup> The campaign is based on the regime of the four UNESCO treaties: the Convention for the Protection of Cultural Property in the Event of Armed Conflict ('1954 Hague Convention');<sup>27</sup> the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ('1970 UNESCO Convention');<sup>28</sup> the World Heritage Convention; and the Convention for Safeguarding of the Intangible Cultural Heritage (ICH).<sup>29</sup> #Unite4Heritage has already engaged with a wide range of state and non-state actors committed to supporting UNESCO's agenda in the protection of cultural heritage originating from conflict-ridden territories. Significantly, this campaign has also been supported by the G7 governments, which recognized the distinct role of culture and cultural heritage as an instrument for dialogue, reconciliation, and responses to emergency situations, and included the cultural action of this forum of the world's most advanced economies. Moreover, they also affirmed the leadership role of UNESCO in the coordination of international efforts to protect cultural heritage globally.<sup>30</sup> Hence it may be argued that UNESCO's governance modalities may often multiply the influence of international law rules and standards alongside traditional mechanisms of compliance with international law obligations. It is also worth noting that other organizations like the UNODC, UNIDROIT, ICC, and the UNSC have been engaging more creatively with cultural heritage as defined by UNESCO instruments and in many ways going beyond the regimes created by these instruments. Untethered to the institutional constraints of the regimes created by UNESCO's instruments, these other bodies can rely on the conceptual framework and reimagine its possibilities, partly out of necessity due to these bodies' own constitutional requirements, and also because of the evolution of ideas around cultural heritage safeguarding and governance. This report highlights some of these good practices.

22. The Committee's work has also demonstrated how the notion and the value of cultural heritage is approached by other organizations with a less explicit cultural heritage mandate. The examination of the practice of the various agencies of the UN has evidenced that they refer to cultural heritage as a well-established notion in the international legal vernacular. Moreover, various ways of cooperation between UNESCO and other organizations within the UN framework have been identified. In particular, UNESCO has played an important role in shaping cultural and cultural heritage actions of several UN organs and agencies, such as the Security Council and the Department of Peacekeeping Operations. In turn, outside the UN cultural heritage is generally addressed in the constitutional documents and the practice of a number of regional organizations examined by the Committee. It is to be noted that in some instances, e.g. CARICOM,<sup>31</sup> OAU, EU, CoE, OAS, SAARC, the Andean Community, and increasingly ASEAN, cultural heritage and cultural diversity are perceived as two of the core values and resources fostering and legitimizing common actions of the members.

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<sup>26</sup> See <<https://www.unite4heritage.org>> accessed 25 December 2021.

<sup>27</sup> (Adopted 14 May 1954, entered into force 7 August 1956), 249 UNTS 240.

<sup>28</sup> (Adopted 14 November 1970, entered into force 24 April 1972), 823 UNTS 231.

<sup>29</sup> (Adopted on 7 October 2003, entered into force 20 April 2006), 2368 UNTS 1.

<sup>30</sup> See 'Joint Declaration of the Ministers of Culture of G7 on the Occasion of the Meeting "Culture as an Instrument for Dialogue among Peoples"' (30 March 2017), available at <<http://www.g7.utoronto.ca/culture/culture-2017-en.html>> accessed 17 December 2021; see in particular paras 11-12.

<sup>31</sup> See 'Caribbean Community Strategic Plan 2015-2019' available at <<https://caricom.org/documents/strategic-plan-caribbean-community-2015-2019>> accessed 20 December 2021; see Section 4.1.3 para 1, and 'Description of the Ideal Caribbean Person'.

23. It has also been observed that the work of certain organizations touches upon specific forms of cultural heritage without referring to it directly. For example, in the case of the ICANN, names submitted for application of Internet domains could be a form of cultural heritage of an Indigenous population. At the same time however, in some organizations cultural heritage is subject to governance mechanisms in a very narrow manner (e.g. MERCOSUR, WTO). This is particularly the case of INTERPOL, which engages with cultural heritage only with respect to its database ‘Stolen Works of Art’.<sup>32</sup> However, in distinct, specialized organizations consideration has been given to a more holistic vision of cultural heritage. For instance, the WHO’s work demonstrates how ‘cultural awareness’ has recently been acknowledged by this organization as a significant factor in understanding public health and wellbeing. Also, the practice of FAO evidences that an important emphasis is put on cultural aspects of the production of food.<sup>33</sup>
24. It needs to be stressed that much of current global governance of cultural heritage takes place within distinct international human rights frameworks, with their growing focus on the promotion and enhancement of cultural rights. Undoubtedly, the major conceptual enhancement of cultural rights, including those attached to cultural heritage, is embodied in the UN special procedure in the field of cultural rights, adopted by the HR Council.<sup>34</sup> Since 2009, UN Special Rapporteurs have published a series of thematic reports dealing with various aspects of the operationalization of cultural rights in their individual and collective dimensions, offering recommendations on the further implementation of such rights. Alongside the work of the HR Council, the practice of international human rights monitoring bodies (particularly, the HRC, CESCR, CRPD, African Commission and Court on Human and Peoples’ Rights, Inter-American Commission on and Court of Human Rights (IACHR), and ECtHR) have greatly developed the concept of cultural rights through their progressive interpretations of human rights treaty provisions, encompassing those attached to cultural heritage, in both their individual and collective dimensions.<sup>35</sup> Importantly, cultural heritage is indirectly addressed by organizations which engage with Indigenous peoples in their work, such as the ECOSOC and the ILO. In addition, it is also worth emphasizing that the expanding human rights governance of cultural heritage has profoundly affected the practice of international courts and tribunals, as evidenced in the Order on Provisional Measures in the case of *Armenia v Azerbaijan*, issued by the International Court of Justice (ICJ) on 7 December 2021.<sup>36</sup> This Order calls for a halt to the destruction of cultural heritage by a State within its own borders (namely Armenian cultural heritage situated in Azerbaijan) on the basis of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>37</sup> Finally, the ICC judgment in *Al-Mahdi* (2016),<sup>38</sup> and subsequent reparations order (2017) are to be recalled,<sup>39</sup> as the implementation of this reparations order involves the victims’ participation in cultural heritage rehabilitation, memorialization and management programmes (see paragraph 56, below).<sup>40</sup>

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<sup>32</sup> See <<https://www.interpol.int/Crimes/Cultural-heritage-crime/Stolen-Works-of-Art-Database>> accessed 28 December 2021.

<sup>33</sup> See Harriet V Kuhnlein et al (eds), *Indigenous Peoples’ Food Systems & Well-Being: Interventions & Policies for Healthy Communities* (Food and Agriculture Organization of the United Nations, Centre for Indigenous Peoples’ Nutrition and Environment 2013).

<sup>34</sup> HR Council, ‘Resolution 10/23: Independent Expert in the Field of Cultural Rights’ (26 March 2009), UN Doc A/HRC/RES/10/23.

<sup>35</sup> For instance, see Andrzej Jakubowski (ed), *Cultural Rights as Collective Rights. An International Law Perspective* (Brill-Nijhoff 2016), and Andreas J Wiesand et al (eds), *Culture and Human Rights: The Wroclaw Commentaries* (De Gruyter 2016).

<sup>36</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v Azerbaijan)* (Request for the Indication of Provisional Measures: Order) <<https://www.icj-cij.org/public/files/case-related/180/180-20220121-ORD-01-00-EN.pdf>> accessed 30 April 2022.

<sup>37</sup> (adopted 21 December 1965, entered into force 4 January 1969), 660 UNTS 195; see *Application of the International Convention* (n 36) para 92.

<sup>38</sup> *Prosecutor v Al Mahdi*, Judgment and Sentence of 27 September 2016, ICC-01/12-01/15-171.

<sup>39</sup> *Prosecutor v Al Mahdi*, Reparations Order of 17 August 2017, ICC-01/12-01/15-236.

<sup>40</sup> *Prosecutor v Al Mahdi*, Decision on the Updated Implementation Plan from the Trust Fund for Victims of 4 March 2019, ICC-01/12-01/15, para 66.

#### 4) The expanding role of non-state actors

25. In addition to the diversity of law-making and the growing complexity of the institutional international framework, the recognition of non-state actors is another critical element of the global governance system.<sup>41</sup> This is particularly true in the case of cultural heritage governance.<sup>42</sup> It has indeed been noted that ‘the challenge facing international law in this field is to try to satisfy as many of the legitimate interests in heritage as possible, while at the same time operating within a system primarily established by and for sovereign and equal States.’<sup>43</sup> While the status of individuals and groups will be discussed in further sections of this report, it needs to be underlined that the present-day global cultural heritage governance increasingly takes place in collaboration with powerful non-state actors, such as global non-governmental organizations (e.g. ICOM, International Council of Monuments and Sites (ICOMOS), human rights organisations), professional and heritage-oriented associations and other entities, and public and private institutions and various less formal alliances and coalitions, which can either strengthen or hinder the implementation of international standards in managing cultural resources (e.g. the complex role of cultural industries and their actors).

#### B. The notion of global cultural heritage governance

26. Considering this overview of international practice, which is a short summary of the Committee membership’s much more extensive work, the Committee has agreed that for the purposes of its mandate and this report, global cultural heritage governance is understood as one involving a wide spectrum of regulatory, institutional and policy frameworks regarding and/or affecting cultural heritage, and operating beyond a single state. Global cultural heritage governance takes place with full respect for human dignity and the observance of human rights; it does not undermine or challenge state sovereignty and sovereign cultural heritage competences; and it is built upon the rule of law.

### III. PARTICIPATION AND GLOBAL GOVERNANCE

#### A. Participation and governance

27. The connection between participation and governance is longstanding. There is a participation paradigm that deeply informs our assumptions about good governance and in effect ties governance projects to a participation paradigm. This paradigm posits that, for any governance project (legal or otherwise) to be successful, it requires legitimacy and buy-in from affected stakeholders, which can only be truly gained from meaningful participation, at least in some modality. The question of who is a stakeholder has many answers, one of which, in the same liberal tradition as the connection between democracy and governance, is that of the ‘all-affected principle’. Both these themes are discussed in further detail in the remainder of this section.

#### 1) Good governance

28. The participation paradigm, inherently linked to both cultural life and global governance, has gained much attention in two recent decades. It is broadly employed as a policy principle of sustainable development, environmental governance, global constitutionalism,<sup>44</sup> and global administrative law

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<sup>41</sup> Zürn (n 9), p 249; also see Joyner (n 10), pp 27-35.

<sup>42</sup> Cfr Alessandro Chechi, ‘Non-State Actors and Cultural Heritage: Friends or Foes?’ (2015) 19 *Anuario de la Facultad de Derecho de Madrid* 457.

<sup>43</sup> Janet Blake, *International Cultural Heritage Law* (OUP 2015), p 21.

<sup>44</sup> See René Urueña, *No Citizens Here: Global Subjects and Participation in International Law* (Brill-Nijhoff 2012).

(GAL).<sup>45</sup> Participation has come to be considered as a key principle of good governance, inasmuch as (admittedly Western) readings of democracy are a baseline for governance. In international law, the use of participatory principles in their relationship to democratic traditions goes a long way toward addressing the key democratic deficit of international law, i.e. the idea that international law, being driven by states (and sometimes experts) lacks legitimacy, and therefore is fundamentally flawed.<sup>46</sup>

29. A direct consequence of the connection to democracy is that good governance is largely a liberal construct, as is participation within it. As such, modes of engagement that challenge the very premises of governance are harder to accommodate. At one extreme, participation in good governance should not challenge the state; this caveat echoes the ways in which self-determination in the context of Indigenous peoples have been turned from a claim to statehood to one that works within the confines of the settler state.<sup>47</sup> While there is largely agreement on that extreme, the effects of seeing participation as not challenging or undermining the state can be stretched to mean that the privileged position of the state is to remain privileged, and participation will never take place on equal terms. In other words, calls for equality of arms for non-state actors can be seen as pathways to undermine the state, and the only way in which said undermining is precluded is if the state remains in a fundamentally superior position, which in consequence reduces the scope of participation, particularly in terms of management of sites by non-state actors.
30. Another key element of good governance, as alluded to in paragraph 24 above, is respect for human rights. There are two key aspects of this connection. First, it means that governance practices are intrinsically connected to, and draw from, international human rights obligations. These are further discussed below. Second, a consequence of this connection is that participation is restricted to cultural practices that conform to an understanding of universal human rights that is often imposed from outside of participants' worldviews, and the latter are expected to conform to the former, lest they be deemed illegitimate. This idea has been referred to as 'the cunning of recognition' in the Indigenous rights context,<sup>48</sup> and while there is some leeway for accommodating cultural relativism in heritage processes in practice,<sup>49</sup> it is worth keeping in mind that the connection to human rights plays on a more fundamental level that may curtail the possibilities of participation in governance by excluding certain worldviews, even though for the most part the connection to human rights makes available a powerful toolkit of participatory rights, and draws attention to marginalized participants.

## 2) The 'all-affected principle'

31. Participation is usually associated with a requirement that all those who are affected by a given social structure or institution should have standing as subjects in relation to it – the so-called 'all-affected principle'.<sup>50</sup> According to this principle, based on the premises of democratic inclusion, transparency and procedural justice, *all* who are or will be *affected* by a decision should have a right to participate

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<sup>45</sup> Benedict Kingsbury, Nico Krisch and Richard B Stewart, *The Emergence of Global Administrative Law* (International Law and Justice Working Papers, NYU School of Law 2004), pp 20-21, 24-31, 35-43; also see Clémentine Bories (ed), *Un droit administratif global?: actes du colloque organisé les 16 et 17 juin 2011* (Pédone, 2012).

<sup>46</sup> Steven Wheatley, 'A Democratic Rule of International Law' (2011) 22(2) EJIL 525, 548.

<sup>47</sup> Karen Engle, *The Elusive Promise of Indigenous Development: Culture, Rights, Strategy* (DUP 2010).

<sup>48</sup> Elizabeth A Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (DUP 2002).

<sup>49</sup> See Lucas Lixinski, 'The Convention for the Safeguarding of the Intangible Cultural Heritage and Human Rights: Relativism and Collectivism 2.0?' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (OUP 2020), pp 463-77.

<sup>50</sup> For instance see Sofia Näsström, 'The Challenge of the All-Affected Principle' (2011) 51(1) *Political Studies* 116.

in making it. In other words, the achievement of procedural justice entails a fair participatory process. Moreover, this process itself must lead to a fair outcome.<sup>51</sup>

32. In addition to the ‘all-affected principle’, other candidates to determine participatory frameworks include the ‘membership principle’, which uses the fact of membership in a given group as a grounds for allowing participation; the ‘principle of humanism’, through which participation is allowed on the basis of considerations of humanity, but which fundamentally puts the new participant into a position of victimhood and vulnerability in relation to prior, more established, participants; and Nancy Fraser’s ‘all-subjected principle’, which means participation on the basis of ‘their joint subjection to a structure of governance, which sets the ground rules that govern their interaction.’<sup>52</sup> For the purposes of this report and the Committee’s work, we will focus on the more recognizable ‘all-affected principle’, even if the ‘all-subjected principle’ also holds great promise for helping unpack participation questions, particularly the question of ground or stage management rules, and informs our debates.
33. Changing the way we govern heritage through engagement with the conditions of those affected by heritage governance, or subject to heritage structures, can lead to better distributive outcomes, and more sustainable engagement in the long term.<sup>53</sup> It also allows us to discuss possibilities more pragmatically, possibilities that the current duality deems unthinkable within these governance regimes, for instance that the use of these resources in ways that diminish them may not be acceptable in light of competing priorities. In addition, participation is a key element in transforming governance, since increasing and reconfiguring participation can breathe fresh air into institutional arrangements, creating the possibility of altering the composition of decision-makers and thus leading to more input into setting out goals.
34. There is a case to be made that international heritage law should be geared primarily at protecting the interests of heritage communities, i.e., communities that generally live in, with, or around heritage (but also including diasporic communities and other heritage-creating communities, as communities that also have a close connection to heritage). However, international law in its current configuration has a number of blind spots, which underscore the unintended consequences of the field’s current arrangements. The direct participation of communities should thus be one possibility for participation, but other stakeholders are, and should also be, involved.

## **B. Participation and its legal notion**

35. Participation as a legal concept can be treated as both a substantive and/or procedural matter. It is more often than not the latter, but a focus on distributive outcomes required by the ‘all-affected principle’ forces thinking about participation as a substantive legal concept, even if this focus can also create a blind spot that the ‘all-subjected principle’ seeks to remedy. What follows focuses on general legal concepts underpinning participation, as well as modes of participation in international legal processes.

### **1) Participation and legal process: general concepts**

36. In addition to the connection to democracy and good governance, participation has been framed within the debates on cultural justice, originally stemming from the premises of cultural liberalism, multiculturalism, and group rights. The protection of culture and cultural self-determination have

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<sup>51</sup> Luke Tomlinson, *Procedural Justice in the United Nations Framework Convention on Climate Change: Negotiating Fairness* (Springer 2015); Robert R Kuehn, ‘A Taxonomy of Environmental Justice’ (2000) 30(9) *Environmental Law Reporter* 10681.

<sup>52</sup> Nancy Fraser, ‘Abnormal Justice’ in Susan Dieleman et al (eds), *Pragmatism and Justice* (OUP 2017), pp 51-53.

<sup>53</sup> Some of this discussion appeared in Lucas Lixinski, ‘A Third Way of Thinking about Cultural Property’ (2019) 44(2) *BrookJIntlL* 563; also see Francesca Fiorentini and Andrzej Jakubowski, ‘Istria’s Artistic and Spiritual Heritage in Abeyance: International Cooperation and Cultural Community Rights’ (2016) 26 *ItYIL* 211, 237-40.

been translated into special representation rights for minorities within already-functioning legislative institutions, polyethnic group rights constructed to ensure the preservation of cultural practices, and powers of self-government for ‘national minorities’,<sup>54</sup> also including ‘new minorities’ – migrants and refugees –<sup>55</sup> as well as recognition of and respect for ethno-cultural differences. In relation to new minorities, it is important to emphasize that the enjoyment of heritage and effective participation in cultural activities are important, inter alia, for their integration in the host country and for promoting cultural diversity, meaning that new and ‘established’ minorities have comparable connections to cultural heritage that can be addressed via enhanced participation in its governance. This connection to self-determination as a legal matter stems from the membership and humanity principles outlined above, because of the link between self-determination and human rights. Given the application of human rights (the humanity principle) to all persons subject to a state’s jurisdiction (the membership principle), this legal configuration of participation seems ill equipped to accommodate concepts like the ‘all-affected’ and ‘all-subjected’ principles.

37. For instance, the Charter for African Cultural Renaissance, under Article 15, calls on states to ‘create an enabling environment to enhance the access and participation of all in culture, including marginalized and underprivileged communities’.<sup>56</sup> It therefore frames participation on the basis of the right of ‘all’ to take part in cultural life. In this guise, participatory cultural justice can be understood as a means and goal for settling and reconciling ethno-cultural conflicts by recognizing and enabling assertions of or claims to power by marginalized groups, particularly Indigenous peoples; but it is also framed in much broader terms that do not shed particular light on the threshold for, and terms of, participation. In relation to the African context, but also applicable to other regions of the world, it is worth noting that poverty and conflict are key obstacles to bringing the mandate of the Charter for African Cultural Renaissance to life.
38. Similarly, the predominant orientation of existing work by lawyers in relation to participatory cultural justice refers to mechanisms designed to resolve, alleviate, or repair past cultural injustices, discrimination, persecution or exploitation; and to address present-day inequalities. In the latter case, this also refers to the participation of victims in reparation programmes. These initiatives align more closely to the ‘all-affected principle’, but assume a system of claims that frames participation against specific issues that are found more naturally in dispute settlement contexts, as opposed to participation in governance more broadly, which does not, or at least should not, require a dispute to arise (even if, at least in domestic contexts as discussed below, standing is an important pathway for participation in many jurisdictions).
39. The focus of law (especially in the common law world) on disputes as a key analytical unit therefore encodes participation in a register of conflict that is less conducive to thinking about participation in proactive terms, and thus constrains the lessons that can be learned. Nonetheless, this version also forces thinking about participation in terms of representation and agency, which are important to understand both those affected as well as those subjected. These lessons translate into international legal frameworks and the way participation takes place in these regimes.

## 2) Participation and international law

40. Modalities of participation and their procedural boundaries are rarely substantiated in international law instruments. It appears that to date procedural guarantees of public participation have

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<sup>54</sup> In particular, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995).

<sup>55</sup> For instance, see Michael Johns, *The New Minorities of Europe: Social Cohesion in the European Union* (Lexington Books 2014); Eduardo J Ruiz Vieytes, ‘Immigration and Cultural Justice. A Reflection on Human Rights of “New Minorities”’ in Jean-Christophe Merle (ed), *Spheres of Global Justice*, vol 1, Global Challenges to Liberal Democracy. Political Participation, Minorities and Migrations (Springer 2013), pp 365-77.

<sup>56</sup> (Adopted 24 January 2006, not yet entered into force), available at <<https://au.int/en/treaties/charter-african-cultural-renaissance>> accessed 15 April 2020.

comprehensively been defined only with respect to environmental governance. Civic participation and access to justice in environmental matters (as key elements of environmental impact assessment procedures) has been discussed at domestic forums and addressed in domestic legislation since the 1960s, while at the international level the issue of participation has gradually grown in prominence beginning in the 1990s.<sup>57</sup> Already in 1992 the United Nations Rio Declaration on Environment and Development (1992 Rio Declaration)<sup>58</sup> set out three fundamental ‘access rights’ – access to information; access to public participation; and access to justice – as central pillars of transparent, inclusive and accountable environmental governance.<sup>59</sup> At the treaty law level, these core objectives are embodied in the text of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (commonly referred to as the Aarhus Convention),<sup>60</sup> adopted in 1998 under the auspices of the United Nations Economic Commission for Europe. The Aarhus Convention, while providing a complex of multi-level participatory governance, extensively develops and substantiates the three-pillar system of environmental governance: 1) access to information: everyone has the right to obtain a wide and easy access to environmental information, which authorities can deny only under particular situations; 2) access to public participation in decision-making: the public must have the chance to participate during the decision-making and legislative processes; and 3) access to justice: the right to judicial or administrative recourse procedures in environmental matters. Human rights treaties also refer to these ideas as part of the right to freedom of expression, and as part of the right to take part in the conduct of public affairs, and the right to take part in cultural life.

41. Indeed, the participation paradigm lies today at the core of environmental justice<sup>61</sup> and global governance of the environment and sustainable development,<sup>62</sup> although its practical operationalization faces a number of challenges stemming from persistently ineffective or flawed procedural mechanisms of participation.<sup>63</sup> Significantly, because of these developments environmental regimes hold great promise for addressing claims by historically disadvantaged groups like Indigenous peoples.<sup>64</sup>
42. Contrary to these developments in international environmental law, public participation in governance of the cultural aspects of the human environment has long lacked regulatory, procedural mechanisms in international law. In fact, it has usually been referred to as participatory forms of cultural manifestations, enabling the wider public to more actively participate in cultural activities, to access cultural goods and products,<sup>65</sup> and to prevent social cultural exclusion.<sup>66</sup> In this regard, participation in cultural life, and in particular access to culture, has become an important indicator in measuring and assessing given economic and social developments.<sup>67</sup>

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<sup>57</sup> See Jonas Ebbesson, ‘The Notion of Public Participation in International Environmental Law’ (1997) 8(1) *YIntlEnvL* 51.

<sup>58</sup> Rio Declaration on Environment and Development (14 June 1992), UN Doc A/CONF.151/26 (Vol I).

<sup>59</sup> *Ibid*, Principle 10.

<sup>60</sup> (Signed 25 June 1998, entered into force 30 October 2001), 2161 UNTS 447.

<sup>61</sup> See Andrew Harding (ed), *Access to Environmental Justice: A Comparative Study* (Nijhoff 2007).

<sup>62</sup> UN General Assembly, ‘Resolution 66/288: Future We Want’ (27 July 2012), UN Doc A/RES/66/288.

<sup>63</sup> Leslie-Anne Duvic-Paoli, ‘The Status of the Right to Public Participation in International Environmental Law: An Analysis of the Jurisprudence’ (2012) 23(1) *YIntlEnvL* 80; Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples: International & Domestic Legal Perspectives* (Earthscan 2012).

<sup>64</sup> Federica Cittadino, *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection: Access, Benefit-sharing and Conservation in Indigenous Lands* (Brill 2019).

<sup>65</sup> For instance, see Koen Van Balen and Aziliz Vandesande (eds), *Community Involvement in Heritage* (Garant 2015).

<sup>66</sup> See UNESCO Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It (26 November 1976), UNESCO Doc 19C/Resolutions, Annex I.

<sup>67</sup> See Paola Monaco, ‘Measuring Culture and Development: Unlocking the UNESCO Indicators’ Potential’ (2016) 2 *Italian Journal of Public Law* 328.

43. The matter of participation leads directly to the matter of subjects of international law, and the alignment to state sovereignty and the liberal international legal order discussed above. Nevertheless, any mapping of global heritage governance must start with an acknowledgement that there are more than just states and a rather opaque category of ‘institutions’ (to use Merryman’s terminology in his discussion of the dichotomy he created between national and international heritage).<sup>68</sup> Instead, while international heritage law does, in fact, include states in a fairly central role, there are also a number of other stakeholders who are involved to varying degrees, some of whom have a fairly pervasive influence on the field, such as international organizations, non-governmental organizations (NGOs), and powerful transnational corporations. This debate has attracted growing recognition, sometimes even explicitly framed against Merryman’s dichotomy,<sup>69</sup> but it has often fallen short of articulating the stakes within international heritage law, making use instead of issues that doctrinally fall outside the scope of the relevant treaty law.
44. UNESCO is, naturally, a central figure in cultural heritage governance and its safeguarding in international law, and in many respects it is a stand-in for internationalism, in opposition to states. To be clear however, while there is a group of dedicated international civil servants at UNESCO, the Organization is an intergovernmental organization that is not above being co-opted by political interests of states.<sup>70</sup>
45. A small part of this group of international civil servants, as well as a large group working parallel to them, is the class of experts, whose individual commitment to cultural heritage is quite remarkable. As a group, though, these experts are largely responsible for the rise of the Authorized Heritage Discourse, a term coined by Laurajane Smith to mean that:

[T]here is ... a hegemonic discourse about heritage, which acts to constitute the way we think, talk and write about heritage. The ‘heritage’ discourse ... naturalises the practice of rounding up the usual suspects to conserve and ‘pass on’ to future generations, and in so doing ... validates a set of practices and performances, which populates both popular and expert constructions of ‘heritage’ and undermines alternative and subaltern ideas about ‘heritage’.<sup>71</sup>

46. It is beyond the scope of this report to discuss the role and extent of ‘expert rule’ in this area,<sup>72</sup> fully, but suffice it to say that experts are prominent and powerful stakeholders, who in many respects are meant to be stand-ins for people who have intrinsic links to a given heritage. But in effect, the way expertise is governed allows this group to pursue agendas that do not necessarily align with the interests of those whose aspirations they are meant to translate. They work for heritage, not for the people living in, with, or around it, often losing sight of the fact that their role is ‘to protect not only objects, but also the relationships between those objects and people.’<sup>73</sup> And, as we focus on the way this class of experts view heritage, we stop working on the problem of international governance of cultural resources, and start working on the field of international cultural heritage law.
47. Other groups with a stake in cultural heritage and its management include museums, collectors, possessors, owners, dealers in cultural property, and the community in general. The ‘community’ is an elusive concept, but much hinges on it, as it is at the centre of whom cultural property law should serve. The promise of community involvement in heritage is to ‘realign’ the very concept of heritage,

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<sup>68</sup> John H Merryman, ‘Two Ways of Thinking About Cultural Property’ (1986) 80(4) AJIL 831.

<sup>69</sup> For instance, see Joe Watkins, ‘Cultural Nationalists, Internationalist, and “Intra-nationalists”: Who’s Right and Whose Right?’ (2005) 12(1) *IntJ Cult Prop* 78, 79.

<sup>70</sup> Lynn Meskell et al, ‘Multilateralism and UNESCO World Heritage: Decision-making, States Parties and Political Processes’ (2015) 21(5) *International Journal of Heritage Studies* 423.

<sup>71</sup> Laurajane Smith, *Uses of Heritage* (Routledge 2006), p 11.

<sup>72</sup> For more on this discussion, see Lucas Lixinski, ‘International Cultural Heritage Regimes, International Law and the Politics of Expertise’ (2013) 20(4) *IntJ Cult Prop* 407.

<sup>73</sup> Watkins (n 69).



and to suggest that everyone is a heritage expert.<sup>74</sup> In fact, beyond the European context there is a colonial baggage tied to the term community, from the time when ‘communities’ were created as managerial units for colonial projects.<sup>75</sup> At the same time though, the alternative to not facing the challenge of trying to define a community is to default to the positions of the dichotomy, and the rather invisible but pervasive and problematic issue of expert rule.

48. The community can be best defined relationally, in opposition to other stakeholders. Viewed in this way, communities are groups who are not states, nor UNESCO, and at the same time have no claim to scholarly expertise with respect to their heritage, but have expertise based on their experience with it, by living in, with, or around heritage, or practicing it as part of their cultural lives. In this respect, the ‘all-affected principle’ and the ‘all-subjected principle’ are useful in helping identify who the community is. Within the realm of heritage, the experiences within the ICHC with communities, groups, and individuals are particularly relevant,<sup>76</sup> as it has developed a tiered system to identify and assign rights to different participants. Likewise, the UCHC also has a tiered system of interests, focusing on the prerogatives of states based on maritime zones and their proximity to the relevant underwater heritage. Both these systems, one within a treaty text (UCHC), and the other established by the practice under a treaty (ICHC), suggest that stakeholders and their interests can be defined on the basis of their relational engagement with a specific heritage.
49. This definition of community, or of who gets to participate, is still fairly open-ended, but it is already a step further than what most of current international law in the area offers. Under the text of the ICHC, for instance, the definition of community is left to the nation-state, which of course leaves some room for abuse.<sup>77</sup> However, the subsequent practice within the treaty modifies its meaning in positive ways, also thereby exemplifying the importance of measures outside of hard (treaty) law. A way to attempt to define the community is as the set of actors who wish to engage in decision-making about the control of resources to which they have a physical, cultural, economic or other connection. This criterion further underscores the lack of adequate fora for engagement by non-expert actors, thus making the issue somewhat circular in nature.
50. Despite the promises of participation in governance, it would be impractical (and sometimes inadvisable) to suggest that communities replace the state entirely in the governance of cultural heritage and other resources. This caution arises not only in response to the liberal constraints of good governance, but also in thinking strategically about the fundamental building blocks of the field. After all, states are still the ones who, under international law, have the primary duties and responsibilities in relation to those resources, not to mention the means to secure their safeguarding or exploitation. States are the ones to protect and weigh the interests of different communities and society as a whole. Safeguarding efforts can be expensive in certain heritage domains, meaning communities can face sustainability challenges if left unsupported. So it is unnecessary and unwise to replace one set of participants with another. Instead, **the objective is to broaden the field of participants**. There are a range of international processes where participation already goes beyond states, but the presence of these actors is still largely under-noticed.

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<sup>74</sup> John Schofield, ‘Heritage Expertise and the Everyday: Citizens and Authority in the Twenty-First Century’ in John Schofield (ed), *Who Needs Experts? Counter-Mapping Cultural Heritage* (Ashgate 2014), p 1.

<sup>75</sup> John D Kelly and Martha Kaplan, *Represented Communities: Fiji and World Decolonization* (ChUP 2001), p 5.

<sup>76</sup> This formulation is significant, since it reminds us of the human rights approach that (1) communities are composed of individual members, not all of whom may accept ‘community’ views about heritage and how to safeguard it and (2) there are also groups of specialist practitioners (e.g. violin-makers) or others (e.g. gender-based minorities) within these communities. For a discussion of the importance of these three categories of participants, see generally Marc Jacobs, ‘Article 15: Participation of Communities, Groups, and Individuals – CGIs, not Just “the Community”’ in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (OUP 2020), pp 273-89.

<sup>77</sup> As discussed in Lucas Lixinski, ‘Selecting Heritage: The Interplay of Art, Politics and Identity’ (2011) 22(1) EJIL 81.

51. As Di Otto has suggested, in her reading of Spivak, there are important disruptive effects associated with making the unseen visible; however, at the same time there is a large problem in the movement from rendering the mechanism visible to giving a voice to the neglected subaltern.<sup>78</sup> The same happens with respect to heritage and in other resource contexts, particularly environmental governance.<sup>79</sup>
52. Operating within the boundaries of the state and its international legal obligations, international human rights law immediately springs to mind as a means of framing the participation paradigm in the domain of culture. International human rights law operates in three different dimensions: individual human rights; collective human rights; and the right to self-determination.
53. Generally speaking, within international individual human rights, participation in heritage governance is founded on the right of everyone to participate in cultural life, as provided under Article 27 the Universal Declaration of Human Rights (UDHR)<sup>80</sup> and Article 15(a) of the International Covenant of Economic, Social and Cultural Rights (ICESCR),<sup>81</sup> as well as enshrined in a vast number of international human rights law instruments.<sup>82</sup> This right is conceived as fundamental for the realization of all cultural rights, enabling the exercise of other human rights. According to the UN Committee on Economic, Social and Cultural Rights (CESCR), this right ‘may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group, as such.’<sup>83</sup> It is also recognized that this right presupposes equal and free access for all to a variety of cultural resources.<sup>84</sup> Yet this right has long been seen as a mere political commitment or policy objective rather than a substantive (enforceable) right.

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<sup>78</sup> Dianne Otto, ‘Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference’ (1996) 5(3) *Social & Legal Studies* 337, 354 (citing Gayatri Ch Spivak, ‘Can the Subaltern Speak?’ in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press 1988), p 285).

<sup>79</sup> For instance, see Graham R Marshall, ‘Nesting, Subsidiarity, and Community-based Environmental Governance beyond the Local Level’ (2008) 2(1) *International Journal of the Commons* 75.

<sup>80</sup> (Adopted 10 December 1948), UN Doc A/810, p 71.

<sup>81</sup> (Adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3. However, it needs to be stressed that this right is not the sole foundation of participation in heritage governance. Particularly, freedom of religion – a fundamental human right – is also relevant in this regard since without access to and enjoyment of buildings, sites, objects, and practices by which one’s religion is manifested, there can be no freedom of religion; see art 18 UDHR, art 18 ICESCR, art 18 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (adopted 25 November 1981), UN Doc A/RES/36/55.

<sup>82</sup> These include, *inter alia*, CERD; Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981), 1249 UNTS 13; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3; Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008), 2515 UNTS 3; United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (adopted 3 February 1992), UN Doc A/RES/47/135; Council of Europe Framework Convention for the Protection of National Minorities (signed 10 November 1994, entered into force 1 February 1998), ETS No 157; United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007), UN Doc A/61/295; International Labour Organization Indigenous and Tribal Peoples Convention (No 169) (adopted 27 June 1989, entered into force 5 September 1991), 1650 UNTS 383.

<sup>83</sup> CESCR, ‘General Comment No 21: Right of Everyone to Take Part in Cultural Life (art 15, para 1a of the Covenant on Economic, Social and Cultural Rights)’ (21 December 2009), UN Doc E/C.12/GC/21, para 9. Cf the approach within the ICHC, discussed above.

<sup>84</sup> CoE, ‘Cultural Access and Participation – from Indicators to Policies for Democracy’ (30 June 2012), available at <<https://rm.coe.int/16806a34cd>> accessed 23 December 2021.

54. There is an increasing push for the recognition of collective rights in international human rights law,<sup>85</sup> most often grounded on the right to culture and/or involving Indigenous rights. Success in this area has been somewhat limited, and the enforcement of collective rights is difficult within existing international human rights legal structures. Taken collectively, the right to participation imbues communities with the ability to control their heritage, and individual rights in the area of culture have gained an important recognition of their collective dimensions. Participation in cultural life has gradually been translated into the right, for both individuals and groups,<sup>86</sup> to participate in the decision-making processes, consultation, governance, and information sharing.<sup>87</sup> Significantly, Farida Shaheed, the UN Special Rapporteur in the Field of Cultural Rights, in her 2011 report devoted to the right of access to and enjoyment of cultural heritage concluded that:

It also includes the right to participate in the identification, interpretation and development of cultural heritage, as well as to the design and implementation of preservation/safeguard policies and programmes.<sup>88</sup>

55. At the treaty law level, participation in cultural heritage governance has perhaps been best substantiated by the 2005 Faro Convention<sup>89</sup> that linked the human right to participate in cultural life with cultural heritage governance. Accordingly, the Convention specifies the issue of public and democratic participation in the governance of cultural heritage, confirming ‘the necessity for involving all members of society in a rationale of democratic governance in all matters connected with the cultural heritage’ (Article 11). In particular, the parties to this Convention are called upon to undertake to ‘develop the legal, financial and professional frameworks which make possible joint action by public authorities, experts, owners, investors, businesses, non-governmental organizations and civil society’ (Article 12). The language of this instrument assumes this right to be collective. Notably, however, the 2005 Faro Convention declares the human right to heritage to be non-enforceable.

56. Suffering from many of the same limitations as collective rights is the right to self-determination, which is itself framed as a group right. Common Article 1(1) to the International Covenant on Civil and Political Rights (ICCPR)<sup>90</sup> and the ICESCR specifies that ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and *cultural* development’ (emphasis added). Therefore, culture is an integral part of the right to self-determination. However, the right to self-determination is also largely seen as non-justiciable within international human rights law, despite the fact that the drafting history of the Covenants suggests otherwise. Therefore, rendering it less useful in the dispute-centric logic of the legal framing of participation that enables it to move beyond the ‘membership’ and ‘humanity’ principles, and towards the ‘all-affected’ and ‘all-subjected’ principles. Significantly, the Trust Fund for Victims of the ICC (TFV) has recently articulated the concept of ‘restorative agency’. Under this working principle of the TFV, adopted by the ICC’s Trial Chamber in the *Al Mahdi* case,<sup>91</sup> victims

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<sup>85</sup> We note that regional bodies have usually gone further towards this recognition than universal ones, particularly the African and Inter-American bodies. In the African system, note particularly the concept of *Ubuntu* and Article 22 of the African Charter on Human and People’s Rights.

<sup>86</sup> UNESCO, “Measuring Cultural Participation” 2009 Framework for Cultural Statistics Handbook No 2’, pp 51ff, available at <<http://unesdoc.unesco.org/images/0021/002192/219213e.pdf>> accessed 29 December 2021.

<sup>87</sup> See Céline Romainville, ‘Defining the Right to Participate in Cultural Life as a Human Right’ (2015) 33(4) *Netherlands Quarterly of Human Rights* 405; Yvonne Donders, *Towards a Right to Cultural Identity?* (Intersentia 2002), p 332.

<sup>88</sup> HR Council, ‘Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed: Access to Cultural Heritage’ (21 March 2011), UN Doc A/HRC/17/38, para 78.

<sup>89</sup> Framework Convention on the Value of Cultural Heritage for Society (signed 27 October 2005, entered into force 1 June 2011), CETS No 199.

<sup>90</sup> (Adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171.

<sup>91</sup> See *Prosecutor v Al Mahdi* (Lesser public redacted version of ‘Updated Implementation Plan’ submitted on 2 November 2018 ICC-01/12-01/15-291-Conf-Exp) ICC-01/12-01/15-291-Red3 (14 October 2019) paras 7, 162-167.

should act as active participants and beneficiaries of memorialization measures. In other words, victimized communities are invited to discuss and decide on three related questions: whether, what and how to memorialize.<sup>92</sup>

57. Beyond human rights and humanitarian entitlements to participation, which seek ultimately to provide direct avenues for individuals, groups, and even communities to participate, international law also offers a range of mediated methods of participation. These happen primarily through global civil society, particularly NGOs. As is discussed below, international institutions are particularly amenable to opening participation avenues to NGOs, or at least more likely to allow participation of NGOs over direct participation. The principle behind NGO participation is that it is a means to concentrate and filter the interests of participants and render them intelligible in the language and registers within which international legal regimes and governance usually operate. It is therefore a means of mediated or represented participation.
58. While laudable in its objectives, and despite there being numerous positive examples in international practice of NGO contributions to governance, there are also significant shortcomings.<sup>93</sup> The filtering requirement, while it serves the international regime's functioning, can at times do a disservice to other potential participants, especially if their objectives do not align with those of a given NGO which, in spite of its representative or translator function, in practice forms its own agenda. Further, NGOs participating in global governance initiatives tend to be highly specialized and expert-driven (which is also the consequence of the complexity of the UN and international organizations systems, which requires special knowledge and expertise to participate meaningfully). There are many contexts in which NGOs themselves represent expert interests, particularly in the Global North. In the Global South, grassroots civil society organizations can often be a lot closer to communities, but are often excluded from governance processes in favour of more 'professional-looking' expert NGOs, at the expense of effective participation. While this focus serves the regime well, it can again do a disservice to other potential participants as discussed above, particularly if NGOs are the only ones who get to speak to interests beyond those of states. Lastly, like with all forms of non-state participation in global governance, NGOs have limited procedural capacity, are often only consultative, and exert limited (even if still effective in many instances) influence.
59. The participants canvassed so far assume formalized participation within formalized governance structures. There are, however, also numerous forms of participation that can take place in non-formalized governance structures, including organizations or arrangements like the G-20 and the OSCE. In these instances, the lack of a formal constitutional instrument renders the rules of engagement and participation fragile, and more often than not these structures default to international governance baselines, engaging only states as legitimate participants, to the exclusion of other entities. Therefore the lack of formal governance structures should be avoided. This notion aligns with the 'all-subjected principle', since that principle's operation presupposes a formalized institutional framework and, in the absence of the latter, the former cannot be engaged, thereby demonstrating the undesirability of informal governance structures.

### 3) Participatory governance and its modalities

60. Participatory governance of cultural heritage has long been one of the key themes of cultural and heritage studies, widely debated within various cultural policy frameworks.<sup>94</sup> Today, it is usually understood as referring to 'organizing and joining collaborative ventures aimed at intercepting,

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<sup>92</sup> Marina Lostal, 'Implementing Reparations in the *Al Mahdi* Case: A Story of Monumental Challenges in Timbuktu' (2021) 19(4) *Journal of International Criminal Justice* 831, 833, 850.

<sup>93</sup> For instance, see Alessandro Chechi, 'Non-State Actors and the Implementation of the World Heritage Convention: Achievements, Problems and Prospects' (2018) 18(2) *Asian Journal of International Law* 461; Diane Barthel-Bouchier, *Cultural Heritage and the Challenge of Sustainability* (Left Coast Press 2013), pp 34-40.

<sup>94</sup> See discussions included in Gabriela García et al, *The Future of the Past: Paths towards Participatory Governance for Cultural Heritage* (Routledge 2021).

extracting, processing, and transforming knowledge to make it useable in decision-making processes' in the realm of cultural heritage and its societal context.<sup>95</sup> Yet participatory governance has not yet been fully conceptualized in legal scholarship and practice. Hence a recurring theme in the Committee's work is that there are two ways of thinking about participatory governance, depending on whether participatory mandates come from within specific institutions, or from general international law. The normative option relies on international legal requirements that all institutions should follow, and is thus largely *de lege ferenda*. An institutional reform option is largely *de lege lata*, but it reinforces the challenge of institutional fragmentation and regime diversity. The Committee's work has largely focused on mapping and describing the latter option.

61. **The normative (regulatory) option** is to change existing rules to make sure communities are included in international heritage processes. Given the concern with listing across a range of instruments, including communities in these listing processes would be an ideal first step. One of the avenues in this respect involves the requirement of free, prior, informed, and sustained consent (FPISC) before a community's heritage is used internationally, a mechanism that is already being used in the broader context of access and benefit-sharing in the area of traditional knowledge and genetic resources,<sup>96</sup> and which also has specific potential for intangible cultural heritage. In the area of traditional knowledge, access and benefit-sharing protocols have been successful in promoting community development (in spite of it not being a clear objective of the international treaty that serves as the foundation of these protocols), as well as overall conservation of natural resources (often with cultural significance for affected communities), bringing together corporate actors, states, experts and communities.<sup>97</sup> FPISC, however, should be read as meaning 'consent', and not 'consultation', let alone participation that is restricted only to observation. Efforts have been undertaken within some UNESCO regimes<sup>98</sup> and by other heritage organisations, but are still largely restricted to only consultative status, with limited input in actual decision-making.
62. The Committee also notes that different non-state actors intervene in governance in different ways. For instance, minorities (such as ethnic, national, racial, religious or sexual minorities) in countries where they are not oppressed tend to have somewhat easier access to participation, or at least recognition of the need for their participation, than other groups. One of the reasons for this treatment of minorities has to do with reparations for historical oppression, which often has involved the disruption or destruction of said group's cultural practices, in isolation and vis-à-vis the majoritarian culture. Historically, in efforts to create unitary nation-states, many countries have purposefully downplayed, underfunded, or wilfully destroyed or prevented the perpetuation of cultural practices and heritage of groups that did not fit a unified the national narrative. This impetus was often

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<sup>95</sup> See Sakarias Sokka et al, 'Governance of Cultural Heritage: Towards Participatory Approaches' (2021) 11(1) *European Journal of Cultural Management & Policy* 4, 8.

<sup>96</sup> For a relatively recent overview and review of the literature, see Daniel F Robinson, *Biodiversity, Access and Benefit-Sharing: Global Case Studies* (Routledge 2015), pp 29-44.

<sup>97</sup> *Ibid*, pp 176-77. Intellectual property rights also have the potential to facilitate participation and promote community development; see Benedetta Ubertazzi, *Intangible Cultural Heritage, Sustainable Development and Intellectual Property: International and European Perspectives* (Routledge 2022).

<sup>98</sup> For example, in 2018, the ICH Convention's Committee decided to launch a global reflection process (Decisions 13.COM 6 and 13.COM 10) and decided to convene an Intergovernmental Working Group within the Framework of the Global Reflection on the Listing Mechanisms. The working group's mandate is to reflect on the procedures for the removal and the transfer of an element, the nature and purposes of the Lists and the Register and the relevance of the various criteria for each of the three mechanisms (UNESCO Doc LHE.21/16.COM/WG/2). The Committee adopted the working group's recommendations at the 16<sup>th</sup> Session of the Intergovernmental Committee on the Safeguarding of the Intangible Cultural Heritage in December 2021. Recommendation 7 proposed amendments to the Convention's Operational Directives to widen the participation of communities, groups and individuals in the listing mechanisms, by inserting two new paragraphs 16.3 and 16.4 through regarding inscription on an extended or reduced basis. These paragraphs require 'concerned communities, groups and if applicable, individuals' to give their consent for the submission of the original nomination and subsequent extensions must agree with the proposed extensions (Recommendation 7, steps 1.a and b).

enshrined in heritage law and management practices, and is reflected in international law's predilection for national heritage.

63. Therefore, there is an argument to be made about minorities deserving, in matters of participation in heritage governance, better protections than other non-state groups. Specifically, in principle minorities should be entitled to 'consent' as the standard for state interference in their heritage (therefore, central participation in decision-making), flowing in significant part from the counter-majoritarian instincts of international human rights law, which seeks to prevent minorities being oppressed by the proverbial 'dictatorship of the majority'. Other non-state groups, in contrast, may not be entitled to as high a level of protection of their participation as "consent", and the aim of their participation should be to, as much as possible, seek consensus.
64. There is, of course, a fair amount of ambiguity in how the terms 'consensus' and 'consent' are construed. In public international law, consensus is usually construed as meaning that every party needs to consent, whereas consent can be attributed to only a subset of involved actors. In less formalized legal settings, consensus can mean simply a cooperative mindset with an aim of finding a mutually agreed outcome. This constructive ambiguity of terminology can be of significant tactical value, of course, and exploited by many different participating actors to pursue different agendas. But, in the Committee's view, it is paramount that, regardless of precise terminology, participation pathways be interpreted to correct power asymmetries among different actors, so as to enable (particularly more vulnerable) parties to participate effectively in decision-making. Further, in our view, the correction of asymmetries generally warrants that minorities deserve stronger rights than other non-state participants.
65. Once more extensive rights are given to minorities over other non-state actors, however, there are two outstanding questions often used to give pause to progress in this area. The first is the matter of internal dissent within a community, and how it should be addressed in governance matters. Of course, no collective entity behaves monolithically, and internal dissent is common. Usual responses have been in the sense of allowing international human rights law to serve as a limit, allowing for segments of a community (such as women, or children, or older persons) to invoke their rights to overrule a community's decision-making when needed.<sup>99</sup> More current international practice in the area of Indigenous rights, however, suggests simply that states allow for those internal dissents to be resolved within the group's own terms, using their own process, as the imposition of external standards from international human rights, however well-meaning, could themselves be a form of colonial violence.<sup>100</sup>
66. The second is a question of whether, and to what extent, local groups who normally would not think of themselves as minorities might wish tactically to recast themselves as minorities to seek those more extensive rights. The question, while largely hypothetical, can have practical importance. It is beyond this report's remit to solve the problem in the abstract, since case-by-case consideration would be required. But the Committee's position is that the theoretical possibility of abuse of minority status should not be an obstacle for making reparation for historical oppression and adequate participation rights in heritage governance. In fact, the abuse of rights doctrine might well be a pathway to resolve this potential conundrum.
67. The Committee recalls the fact that, historically, the standard of FPISC read as 'consultation' has seldom worked, it being manipulated in practice to create an appearance of consultation that is used as a shield to validate decisions made by the stronger actor, which probably would have been made similarly even without consultation. In this sense, the purpose of FPISC, which the Committee sees

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<sup>99</sup> For one instance, see Lucas Lixinski, *Intangible Cultural Heritage in International Law* (OUP 2013), pp 105-42.

<sup>100</sup> IACHR, 'Derecho a la libre determinación de los Pueblos Indígenas y Tribales' (28 December 2021), OAS Doc OEA/Ser.L/V/II, Doc 413, para 100.

as correcting power imbalances, is frustrated. Therefore, the language of ‘consent’ is more appropriate. Even though at first glance ‘consent’ might itself create a power asymmetry in the opposite direction (that is, in favour of the weaker actor), in practice it is a more symmetrical solution precisely because it allows for the power imbalance to be corrected. Further, as noted above in paragraph 66, doctrines like abuse of rights can be used to correct potential abuses of ‘consent’.

68. Appealing to the access and benefit-sharing mechanism shifts the legal form to safeguard heritage away from ‘heritage’ and ‘property’ and towards ‘contracts’. This shift, while contravening many of the foundations of the field, and somewhat unfamiliar in international legal spaces, presents novel possibilities of community control over heritage. A downside however, is that these mechanisms can be easily abused. In practice they are often relegated to the domestic law, with no international oversight of how FPISC is carried out.
69. Instead of, or in addition to, normative reform, **the second option is institutional (structural) reform**. For instance, one of the few attempts to institutionalize community involvement in international heritage management has been undertaken through the World Heritage Indigenous Peoples Council of Experts (WHIPCOE),<sup>101</sup> an initiative taken in response to concerns about the lack of involvement of Indigenous peoples in the management of World Heritage sites internationally (see paragraph 78, below).<sup>102</sup> Here, like with other community-based initiatives, failures stemmed from colonial legacies and state sovereignty.<sup>103</sup>
70. One of the objections to WHIPCOE was that it engages a large number of ‘unwieldy bureaucratic procedures, for an issue which only concerns a limited number of States Parties and which can be treated by other means.’<sup>104</sup> Even if this bureaucratic objection is deemed valid with respect to Indigenous peoples, it does not hold true with respect to communities in general, as every country would have local communities affected by a number of heritage management practices and laws. Therefore, in this instance the focus on Indigenous peoples’ special rights was paradoxically used as an argument against other communities’ aspirations. This ghettoization of communities is one of the strategic problems with promoting more community-based forms of governance over heritage, and needs to be combatted.<sup>105</sup>
71. But at the same time the Indigenous rights movement offers several lessons that can be useful for community-based heritage management. For instance, an important lesson from the Indigenous movement is that, historically, international standard-setting as regards Indigenous peoples has often moved forward without acknowledging the need for Indigenous participation in establishing the rights pertaining to them (with the 2007 UN Declaration on the Rights of Indigenous Peoples being a notable exception),<sup>106</sup> and those omissions cause deep problems with implementation and the legitimacy of legal standards and institutional machineries. Another lesson draws from the recent action, centred on involving Indigenous peoples in participatory processes, which has been on the agenda of the HR Council.<sup>107</sup> This recent action revived in some way the proposal for the WHIPCOE, but even more broadly, by saying the UNESCO needed to create procedures to involve Indigenous

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<sup>101</sup> For more on Indigenous involvement generally, see Mohsen Al Attar Ahmed, Nicole Aylwin and Rosemary J Coombe, ‘Indigenous Cultural Heritage Rights in International Human Rights Law’ in Catherine Bell and Robert K Paterson (eds), *Protection of First Nations’ Cultural Heritage: Laws, Policy and Reform* (UBC Press 2009), pp 311-42.

<sup>102</sup> Lynn Meskell, ‘UNESCO and the Fate of the World Heritage Indigenous Peoples Council of Experts (WHIPCOE)’ (2013) 20(2) *IntlJCultProp* 155.

<sup>103</sup> *Ibid*, p 156.

<sup>104</sup> *Ibid*, p 164.

<sup>105</sup> For more on strategic choices of the Indigenous rights movement in general, see Engle (n 47).

<sup>106</sup> Al Attar Ahmed, Aylwin and Coombe (n 101), p 315.

<sup>107</sup> In particular, see HR Council, ‘Indigenous Justice Systems and Harmonisation with the Ordinary Justice System: Report’ (2 August 2019), UN Doc A/HRC/42/37.

communities directly in international decision-making.<sup>108</sup> Elsewhere in international law, within the framework of the UN Framework Convention on Climate Change (UNFCCC),<sup>109</sup> the Local Communities and Indigenous Peoples' Platform was launched in 2021 as a co-designed resource aimed at bringing together the experience of these actors in climate change resilience, creating a pathway for them to showcase expertise and influence the implementation of commitments under the treaty.<sup>110</sup>

72. Communities face a number of challenges in their attempts to gain a seat at the international table. First, international law's exceptions to state sovereignty are usually rights-based narratives; while communities cannot be easily accommodated in individualistic rights' narratives that allow stakeholders such as museums and collectors to have more influence in some areas of international heritage action. That is because they are collectivities, and the rights paradigm has so far advanced relatively little vis-à-vis group or peoples' rights. This reluctance can be partially explained since groups, far more than individuals, can pose an actual challenge to state sovereignty. Group rights dynamics often also pose challenges to individual rights, placing the group in a difficult position caught between two fundamental international legal positions (the state and individual rights), and the tension between individual and group rights is often cast as a reason to dismiss group rights efforts.<sup>111</sup> And that is the second great challenge communities face: their position vis-à-vis states is usually assumed to be one of opposition, rather than cooperation, which creates difficulties in even entering into a conversation about community rights in international law. Groups are accommodated, to larger or smaller extents, under many states' constitutional or other public law systems, but that always happens well within the confines of the state, with little input from international law.
73. The third challenge faced by communities seeking to becoming more represented in international decision-making vis-à-vis their heritage is that, at least in theory, communities are already represented. Experts and expert organizations are, after all, meant to translate communities' desires with respect to the definition, management and future of heritage in international fora. Again, while good intentions abound, there is always room for improvement, and a system that sees heritage as an end in itself is less likely to be able to accurately convey community aspirations, which largely see heritage as an instrument in the pursuit of broader goals. As a result, translation filters fall short. Further, even for those organizations that have been successful in bringing communities closer to heritage listing processes, their efforts are still largely voluntary, and communities are brought in under someone else's umbrella, playing under someone else's 'stage management', and never in full.
74. A fourth challenge has to do with the very definition of who the community is, and how their agency is exercised. Particularly in the case of territories under authoritarian regimes, or groups spread across multiple territories, there are ongoing risks of unequal treatment and discrimination, which speak to disparate levels of recognition, or no recognition at all. There is always a risk of essentializing the community, turning it into a monolithic entity with a single voice. This push towards strategic essentialism<sup>112</sup> creates a context that not only fails to acknowledge the intersectionality in identity, but even taking the potential strategic advantage at its highest, often backfires in that any semblance

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<sup>108</sup> See generally the HR Council, 'Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-making – Report of the Expert Mechanism on the Rights of Indigenous Peoples' (17 August 2011), UN Doc A/HRC/18/42, para 37.

<sup>109</sup> (Done 9 May 1992, entered into force 21 March 1994), 1771 UNTS 107.

<sup>110</sup> 'The Engagement of Indigenous Peoples and Local Communities Crucial to Tackling Climate Crisis', *UN Climate Change News* (3 June 2021), available at <<https://unfccc.int/news/the-engagement-of-indigenous-peoples-and-local-communities-crucial-to-tackling-climate-crisis>> accessed 15 January 2022.

<sup>111</sup> See Janet Blake, 'Collective Cultural Rights Considered in the Light of Recent Developments in Cultural Heritage Law' in Andrzej Jakubowski (ed), *Cultural Rights as Collective Rights – An International Law Perspective* (Brill 2016), pp 74-82; Lucas Lixinski, 'Heritage for Whom? Individuals' and Communities' Roles in International Cultural Heritage Law' in Ana F Vrdoljak and Federico Lenzerini (eds), *International Law for Common Goods: Nomative Perspectives on Human Rights, Culture and Nature* (Hart 2014), pp 193-214.

<sup>112</sup> See Engle (n 47).



of a crack in the monolith is exploited in order to deny the existence of a claim altogether. Therefore, it is important to acknowledge and conciliate multiple voices within a community. It is not for the Committee or for international law more generally to dictate the ways in making sense of internal plurality, but intersectionality of identities ought to be taken into account, meaning diverse sections of the community should have a say, considering their age, and gender identity and sexual orientation, among other factors usually found in non-discrimination rights in human rights law. Further, and importantly, the connection of different segments of a community to the heritage at stake should be taken into account to accord more weight to the creators and practitioners of that heritage, as opposed to defaulting to a community's leaders. The international human rights law paradigm, with its difficulties in accommodating community interests, may in fact be partly responsible for this move towards strategic essentialism, inasmuch as it expects the community to operate with one voice (i.e. akin to an individual). In this respect, the ICHC's approach of speaking to communities, groups, and individuals (CGIs) can be seen as an attempt to capture the collective aspect of individually-predicated rights.<sup>113</sup> Despite this promise, implementation has been fraught because of statist preferences and the lack of community input in the framework rules that shape participation. This example, therefore, is an important reminder that even important initiatives on the substance can fail without the proper institutional framework, and participation is also required in those background management structures. Bringing communities to the international table brings about a realization of pluralism and intersectionality that contains the possibility to become deeply destabilizing.

75. In sum, the potential and promise of participation and governance in international heritage law are high, but also includes the potential of exacerbating already-existing challenges. There are, however, important regional and global practices across heritage and non-heritage institutions that can greatly benefit from thinking and strategizing around these topics. The work of this Committee in its first biennium of operation has sought to investigate the possibilities inherent in these practices, with members focusing on one organ at a time. The next section aims to identify and discuss general trends and patterns of participation and governance in these institutions.

#### **IV. PARTICIPATORY GOVERNANCE OF CULTURAL HERITAGE IN PRACTICE: ITS NATURE AND MAJOR SHORTCOMINGS**

76. Taking these challenges into consideration, the Committee examined the drawbacks in the operationalization of participatory governance of cultural heritage in the practice of specific international organizations and organs, grouped in accordance with the general typology explained in paragraph 10, above. These shortcomings are summarized and explained below in relation to the four major aspects of participation: actors, access, scope, and effectiveness.

##### **A. Actors of participation**

77. In reference to the practices of governance bodies on the global level, including UNESCO and its particular bodies, it has been shown that there is a great inconsistency in approaches across various bodies under examination. This affects participation, since different rules need to be found and navigated for each organ, rendering participation mechanisms non-transparent. The major problem lies in the state-centrism of governance frameworks, which is still a prevalent issue impairing participation, even if more recent heritage instruments and regimes have made significant progress towards a wider participation by other actors (in particular the ICHC).<sup>114</sup> Indeed, states appear to still

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<sup>113</sup> See Jacobs (n 76).

<sup>114</sup> Read further: Filomena Sousa, *The Participation in the Safeguarding of the Intangible Cultural Heritage: The Role of Communities, Groups and Individuals* (Memória Imaterial 2018); Gabriele D'Amico Soggetti, 'Art. 15 Participation of Communities, Groups, and Individuals: Participation and Democracy' in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (OUP 2020), pp 296-97. Also see Janet Blake, 'Engaging "Communities, Groups and Individuals" in the International Mechanisms of the 2003 Intangible Heritage Convention' (2019) 26(2) *IntlJCultProp* 113.

be the only driving force of organizational agendas and/or stage management parts of the different processes, which makes participation at a later stage constrained by those aspects. It is also sometimes argued that in light of globalization, culture and cultural heritage constitute one of the best protected areas of states' competences, or even 'bastions of state sovereignty'.<sup>115</sup>

78. At the global level, mediation via the participation of non-state actors seems inevitable. This also concerns various dispute resolution mechanisms. A striking example is the UNESCO mechanism for return and restitution of cultural objects managed by the ICPRCP. This body, created in 1978, has been equipped since 2010 with a new system of mediation and conciliation.<sup>116</sup> Only UNESCO Member States and Associate Members may bring cases in relation to these elaborated procedures, although states may represent the interests of public or private institutions located in their territories, as well as those of their nationals.<sup>117</sup> Perhaps the sole mechanism within UNESCO's organizational framework in which a person, group of persons, or organization may act directly within the UNESCO's forum is that of the Committee on Conventions and Recommendations in relation to violations of human rights falling within UNESCO's competence in the fields of education, science, culture and information, under the procedure adopted by UNESCO's Executive Board decision 104 EX/3.3 of 1978.<sup>118</sup> While UNESCO does not play the role of an international judicial body, this procedure mainly aims as a consultative modality to help prevent and stop violations of human rights and fundamental freedoms within the competence of the organization.<sup>119</sup> Another example relates the World Heritage Committee (WHC). This has been called upon to exercise its power under Article 10(3) of the World Heritage Convention to expand the consultative bodies. In particular, the World Heritage Indigenous Peoples' Forum lobbied it to establish the WHIPCOE in response to the challenge by the Mirarr people with respect to the World Heritage-listed Kakadu National Park in Australia in the late 1990s.<sup>120</sup> The WHC had accepted the findings and recommendations of its expert report,<sup>121</sup> and emphasized 'the fundamental importance of ensuring thorough and continuing participation, negotiation and communication with Aboriginal traditional owners, custodians and managers' in the conservation of the site'.<sup>122</sup> Despite persistent criticism, the WHC remains reluctant to establish such a consultative body. Instead, it amended its Operational Guidelines and noted the establishment of an NGO, the International Indigenous Peoples' Forum on World Heritage

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<sup>115</sup> See Fiorentini and Jakubowski (n 53) 213.

<sup>116</sup> UNESCO, 'Rules of Procedure for Mediation and Conciliation in accordance with Article 4, paragraph 1, of the Statutes of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation' (October 2010), UNESCO Doc CLT-2010/CONF.203/COM.16/7.

<sup>117</sup> Subject to the express agreement of the state where the public or private institution holding the contested object is located, such institutions might, however, act a (defending) party. This implicates it is more advantageous to 'institutions' (i.e. museums) than to other non-state right-holders wishing to reclaim their cultural heritage (who do not have recourse to the procedure).

<sup>118</sup> UNESCO, 'Study of the Procedures which should be Followed in the Examination of Cases and Questions which might be Submitted to UNESCO Concerning the Exercise of Human Rights in the Spheres of its Competence, in Order to Make its Action More Effective; Report of the Working Party of the Executive Board Set Up in Pursuance of 102 EX/Decision 5.6.2' (3 March 1978), UNESCO Doc 104 EX/3; see UNESCO, 'Committee on Conventions and Recommendations: 2018 Edition' (2018), UNESCO Doc 204 EX/BROCHURE CR; also see Leif Holmström (ed), *Cases of the UNESCO Committee on Conventions and Recommendations: Communications examined under the 104 EX/Decision 3.3 Procedure of the Executive Board (1978-1988)* (Brill-Nijhoff 2019).

<sup>119</sup> Yvonne Donders, 'UNESCO and Human Rights' in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Springer 2018), pp 261-64.

<sup>120</sup> See WHC, 'Report on the Proposed World Heritage Indigenous Peoples Council of Experts' (25 June 2001), UNESCO Doc WHC-2001/CONF.205/WEB.3; and Responses to Circular Letter 9 (August 2001), concerning a proposal to establish a World Heritage Indigenous Peoples Council of Experts (WHIPCOE), available at <<http://whc.unesco.org/en/activities/496/>> accessed 30 December 2021.

<sup>121</sup> WHC, 'Report on the Mission to Kakadu National Park, Australia, 26 October to 1 November 1998' (29 November 1998), UNESCO Doc WHC-98/CONF.203/INF.18, p. 5.

<sup>122</sup> WHC Decision CONF 203 VII.28 State of Conservation – Kakadu National Park (Australia).

(IIPFWH), which has observer status only and all the restrictions that entails with respect to participation.<sup>123</sup>

79. The theme of a democratic deficit recurs with regard to regional organizations and international NGOs and specialized organizations. Indeed, the intergovernmental and state-centric nature of international organizations continues to be a recurring theme that needs addressing. However, rather than a blanket rejection of, or infringement of, state sovereignty, more creative strategies are needed that engage and modify the rules of the game that allow sovereignty's enduring primacy. As regards regional organizations, although some of them provide for a limited participation of non-state cultural actors (e.g. CoE, OAS, UNASUR, ARIPO) the political obstacles, such as different approaches to cultural policies, need to be addressed. Moreover, some regional organizations, e.g. the Andean Community and CARICOM, offer no procedural measures of participatory governance for non-state entities. As to the specialized organizations and international NGOs examined in this report, culture and cultural heritage are often not clearly a part of their mandates and do not have a major impact on it, and the mentality of self-contained regimes can be an obstacle to heritage safeguarding more broadly, and prevent the need for participation from being apparent. While participation can be selective to a certain extent (like INTERPOL's focus on law enforcement because of its mandate), there should still be avenues for broader participation and self-selection for participation purposes. In this regard, *amicus curiae* and judicial participation can be a useful, if somewhat restricted, pathway to broadening participation, but it requires legal disputes, which are often not possible in the majority of international institutions. It also should be noted that some organizations, lacking formalized mandates and constitutions, cannot properly lay out forms and rules for participation, which make participation, while possible because informal, also inconsistent and *ad hoc*.
80. The international human rights monitoring bodies unsurprisingly provide for the widest participation of non-state cultural actors. However, human rights monitoring systems embodied in individual rights' narratives give few avenues for accommodating the participation of collective actors such as communities and groups,<sup>124</sup> notwithstanding the progressive jurisdiction of some regional human rights monitoring bodies with respect to collective cultural rights (in particular, the African Commission and Court on Human and Peoples' Rights, IACHR).<sup>125</sup> In fact, participation in dispute settlement mechanisms is still constrained by procedural rules, particularly jurisdiction and representation rules, and by the fact that the international (and some regional) mechanisms are optional.

## B. Access to participatory mechanisms

81. Importantly, the problems related to access to participatory mechanisms of culture and cultural heritage governance have already been tackled within the framework of the HR Council's special procedure on cultural rights.<sup>126</sup> Since 2009, the two UN Special Rapporteurs in the Field of Cultural Rights (Farida Shaheed (2009-2015), and Karima Bennouna (2015-2021), have often addressed these issues in their thematic reports. In particular, the already-cited (paragraph 54, above) Report on 'Access to cultural heritage' observed that in most cases the final decision for identification and/or

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<sup>123</sup> UNESCO, 'Operational Guidelines for the Implementation of the World Heritage Convention' (as of 10 July 2019), UNESCO Doc WHC.19/01, para 40; WHC Decision 41 COM 17 – State of Conservation of the Properties Inscribed on the World Heritage List. See also Kristin Hausler, 'Non-State Actors and Cultural Heritage Law' in Francesco Francioni and Ana F Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (OUP 2020), pp 776-80.

<sup>124</sup> Lixinski, *International Heritage Law* (n 13), pp 252-53.

<sup>125</sup> See Kristin Hausler, 'Collective Cultural Rights in the Inter-American Human Rights System' in Andrzej Jakubowski (ed), *Cultural Rights as Collective Rights. An International Law Perspective* (Brill-Nijhoff 2016), pp 222-51; Ana F Vrdoljak, 'Indigenous Peoples, World Heritage, and Human Rights' (2018) 25(3) *IntJ Cult Prop* 245, 260; also see Enyinna Nwauche, *The Protection of Traditional Cultural Expressions in Africa* (Springer 2017), pp 151-94.

<sup>126</sup> HR Council, 'Resolution 10/23' (n 34).

classification of cultural heritage lies with state institutions, that definitions of ‘stakeholders’ or ‘interested persons’ are generally lacking (even if there are some shifts in this regard within UNESCO treaties such as the ICHC and the 2005 Convention), and that the need to ensure the participation (and consent) of source or local communities is not always clearly stated.<sup>127</sup> It was noted that the ‘rights-holders, and concerned individuals and communities’ include ‘individuals and groups, the majority and minorities, citizens and migrants all have the right to access and enjoy cultural heritage’.<sup>128</sup> While referring to the Faro Convention, the 2011 Report highlighted that different rights holders may have different interests to a particular heritage, a distinction that ‘has important implications for States, notably when establishing consultation and participation procedures, which should ensure the active involvement of source and local communities, in particular. Therefore, general calls for public participation may not be sufficient.’<sup>129</sup> It was also noted that ‘participation, access and enjoyment are closely interrelated’.<sup>130</sup> Furthermore, while recalling the UNESCO Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It (1976),<sup>131</sup> the UN Independent Expert added that ‘[a]ccess to and enjoyment of cultural heritage are interdependent concepts – one implying the other ... Effective participation in decision-making processes relating to cultural heritage is a key element of these concepts’.<sup>132</sup> It was, therefore, concluded that states have the obligation to establish ‘procedures ensuring the full participation of concerned individuals and communities’,<sup>133</sup> calling on states to include, in their periodic reports to treaty bodies:

‘information on action taken to ensure the full participation of concerned individuals and communities in cultural heritage preservation/safeguard programmes, as well as on measures taken, particularly in the field of education and information, to ensure access to and enjoyment of cultural heritage’.<sup>134</sup>

82. The increasing complexity of such procedures in several UNESCO regimes, including periodic reporting and participating in developing nomination files, is being progressively recognised as posing challenges for the full participation of communities, groups and individuals.<sup>135</sup> For example, during the 16<sup>th</sup> Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, UNESCO’s Internal Oversight Service (IOS) acknowledged that the recent implementation of the Overall Results Framework in regional periodic reporting, while constituting an important reference in guiding the implementation of the 2003 Convention, is ‘complex and takes time to grasp, often requiring further guidance on its use’.<sup>136</sup>
83. In light of these observations, the Committee considers, as noted in paragraphs 81-82 above, that representation constitutes one of the key obstacles in accessing the participation modalities. Firstly, the issue of the identity and appropriateness of representatives is at stake, especially when ‘professional’ NGO operators and experts are speaking on behalf of non-specialist/broad interest participants. Significantly, this is one of the major problems raised with regard to the practice of

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<sup>127</sup> HR Council, ‘Access to Cultural Heritage’ (n 88), para 53.

<sup>128</sup> *Ibid*, para 61.

<sup>129</sup> *Ibid*, para 63.

<sup>130</sup> *Ibid*, para 22.

<sup>131</sup> This recommendation defines access to culture as ‘concrete opportunities available to everyone, in particular through the creation of appropriate socio-economic conditions, for freely obtaining information, training, knowledge and understanding, and for enjoying cultural values and cultural property’ (adopted 26 November 1976), UNESCO Doc 19 C/Resolutions + CORR para 2(a).

<sup>132</sup> HR Council, ‘Access to Cultural Heritage’ (n 88), para 58.

<sup>133</sup> *Ibid*, para 70.

<sup>134</sup> *Ibid*, para 80.

<sup>135</sup> See UNESCO, ‘Report of the Evaluation Body on its Work in 2021’ (December 2021), UNESCO Doc LHE/21/16.COM/8; UNESCO, ‘Report of the Internal Oversight Service (IOS Report)’ (7 December 2021), UNESCO Doc LHE/21/16.COM/10.Rev.

<sup>136</sup> UNESCO, ‘IOS Report’ (n 135), para 9.

ECOSOC – the most important global forum for international NGOs. Secondly, in many instances, the most common form of non-state participation is via experts, which is also problematic inasmuch as it is mediated, and puts forward a view of heritage safeguarding that disregards other forms of engagement by other potential participants. Representatives or mediated participation poses ongoing issues of legitimacy, independence, and accountability. This is a recurring problem within UNESCO’s governance system. Thirdly, it must be noted that industry self-regulation exists in some heritage domains, but it only takes into account the views of one type of participant, thus lacking key pluralistic or democratic elements. Finally, there are entry barriers to participation in terms of language and costs, access to technology that facilitates remote participation, the dominance of certain actors who monopolize the discussion and entry into it, and cultural biases. In fact, taking advantage of participation opportunities is further complicated by issues like funding for participation in meetings, identification of representatives, etc.<sup>137</sup> This is also the case of proceedings before international human rights adjudicating and monitoring bodies, where financial and material support for participation is often scarce, thus impairing access.

### C. Scope of participatory governance

84. Within the organizational framework examined here, participation still appears to be primarily consultative only, and to take place early in the process of decision-making, with little allowance for participation in the evaluation stages of the heritage management process beyond top-down periodic reporting obligations. In fact, the issue of participation being restricted to observation recurs in nearly all instances of global governance analysed by the Committee. Therefore, turning participation into a right, rather than a concession by states and international civil servants, seems to be an urgent priority. Participation should aim to achieve consent, and not settle for the lowest common denominator of consultation – not to mention the even lower threshold of observation – at least for organizations where particularly vulnerable communities (like minorities and Indigenous peoples) are affected. The Committee acknowledges that consent is not always possible when there are multiple participants with divergent views. Therefore, to render effective the all-affected and all-subjected principles through consent may lead to stalemates. While consensus is ideal, it is also not always reachable, and in those instances the views of the stakeholder for whom heritage means the most to their identity (the ‘most-affected’) should prevail. In the event of participants who are in equivalent positions as ‘most-affected’, then status quo, in the sense of no action that would negatively harm the relevant heritage, would prevail. Similarly, participation should be included in the design of all elements of heritage safeguarding, from procedural rules to the design of specific safeguarding programs. Moreover, it should not be restricted only to consultation in measuring the effectiveness of certain programs.

### D. Effectiveness

85. The fundamental problem addressed by the Committee as to effective modalities of participation reflects a more general deficit of methodologies for measuring participation. A second problem relates to the environment and circumstances in which participation takes place. Significantly, participation is often outside of international fora and restricted to other environments which may be less effective in bringing up issues that go against state priorities, since the state will act as a filter of those participation forms when bringing them to international venues. The third obstacle to effective participatory governance consists in the failure to follow the principles of good governance and subsidiarity. The latter principle is a key concept in the cultural field, including heritage, and is often used to reject ‘one-size-fits-all’ approaches. The democratic deficit with which many international and regional organizations are accused is based in part on the failure to apply the principle of subsidiarity properly.

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<sup>137</sup> Here, the experience of the NGO Forum of the ICHC is valuable, showcasing a large preponderance of western hemisphere NGOs while Asia-Pacific – which is otherwise extremely active in the treaty – is very under-represented.

86. The Committee has also addressed two other more general problems of effective participatory global governance with respect to cultural heritage. It has been recalled that the current international law relations demonstrate a persistent crisis of multilateralism, including the diminishing authority of global organizations in favour of inter-state unilateral and bilateral relations. Recent examples of the crisis of multilateralism are the US withdrawal from both UNESCO and the HR Council.<sup>138</sup> In relation to these challenges to multilateral governance, the rise of populism, nationalism, extremism and fundamentalism in various parts of the world needs to be considered as an important threat to effective participatory governance in the field of cultural heritage. Obstacles to participatory governance might be strengthened in light of the anti-democratic state policies – suppressing the participation of non-state entities – that have recently been launched as part of measures to counteract the COVID-19 pandemic.<sup>139</sup> Finally, economic difficulties and inequalities, increasingly driven by climate change and the challenges of the pandemic, may also have a crucial effect on global governance and participation.<sup>140</sup> Some of these challenges, framed in the context of domestic law and practices, are discussed in the next section.

## V. DOMESTIC PRACTICES OF PARTICIPATORY GOVERNANCE: HERITAGE AND BEYOND

### A. The jurisdictions under analysis

87. The Committee agreed that the experience of regional entities and the importance of subsidiarity suggests the need to investigate the ways in which participation happens with respect to cultural heritage in domestic contexts. Domestic implementation can open greater avenues for thinking beyond the state as the only agent with full capacity in legal governance processes (as usually assumed in international law), and provide an insight into what is possible for heritage governance on the ground, in the terms set by participants themselves and without the filtering of states or NGOs. Further, insight into national legal systems allows the Committee to better account for differences between developed and developing countries, and to be mindful of religious or traditional influences that have a bearing on how participation works across intersectional identities within a group. In view of these possibilities, the Committee set out to undertake research on a range of domestic jurisdictions (see paragraph 11 above), reflecting their nationalities, expertise, and language abilities.
88. Domestic experiences in community-based governance differ significantly across the world, from participatory budgeting and other direct democracy experiments to citizen participation in governing or oversight bodies and boards. In some countries, there is no participation beyond political appointments to relevant decision-making entities, or exclusive participation of career civil servants and other ‘expert’ stakeholders. Further, in multiple jurisdictions culture and heritage are also ‘jurisdictionally fragmented’, with different domains or aspects of heritage being within the mandate of different governmental agencies or entities, which potentially further splinters participation rules, making it harder for participants to access decision-making fora.
89. The thirty-four jurisdictions under examination include a wide range of civil law, common law, and customary law jurisdictions. They also include federal and unitary states, which, in the realm of culture and heritage in particular, raise important questions about legislative competence across different levels of government (noting that these questions affect both unitary states – like Ireland – and federal states – like Belgium, Brazil, and Canada). These jurisdictions also cover all continents, many different levels of economic development, and different levels of participation in international and regional legal instruments about cultural heritage safeguarding. All these considerations animated

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<sup>138</sup> See, e.g. Jutta Brunnée, ‘Multilateralism in Crisis’ (2018) 12 *Proceedings of the ASIL Annual Meeting* 335, 338.

<sup>139</sup> Michele Roccato et al, ‘The Lasting Effects of the COVID-19 Pandemic on Support for Anti-Democratic Political Systems: A Six-Month Longitudinal Study’ (2021) 102(5) *Social Science Quarterly* 2285.

<sup>140</sup> See HR Council, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights: Climate Change and Poverty’ (17 July 2019), UN Doc A/HRC/41/39.

our analysis and debates, and created the conditions for a wide range of different experiences to come to the fore.

## **B. Legal instruments of heritage safeguarding and participation**

90. Besides international legal instruments, there is a wide range of domestic legislation that affects heritage safeguarding and participation in the jurisdictions under analysis. This variety of legislation speaks directly to the issues of framing of heritage and the fragmentation of norms, indicated above. Further, the variety of instruments can also reflect different levels of political and normative commitment to heritage.
91. Most importantly, the framing of heritage under different domains reflects variations in the levels of participation that are possible at the outset. When heritage is framed within areas of law where participation or private agency are more common, participation is strengthened. The same can be said when heritage legislation is framed in the context of specific legislation for the protection of minorities. Note that in certain countries heritage appears across a plurality of different legal regimes, and these overlaps can both create confusion in terms of access, but also tactical possibilities for communities to exploit.
92. Countries like Afghanistan, Brazil, Poland, Spain, and Switzerland include provisions on heritage directly in their constitutional texts. Many, but not all, of the countries we surveyed have specific legislation on cultural heritage (Afghanistan,<sup>141</sup> Angola, Brazil, Canada, Cape Verde, Germany, Italy, Japan, Mozambique, the Netherlands, New Zealand, Qatar, São Tomé and Príncipe, Saudi Arabia, South Africa, Spain, Sweden, Switzerland, the United States). For many countries, however, cultural heritage is classified as belonging in other legal domains, meaning in practice that heritage interests are shaped by the background normative priorities animating those areas of the law.
93. A common way of framing heritage outside of tailored heritage legislation is in urban or local planning legislation (Belgium, Brazil, the Netherlands, New Zealand, Sweden, UK), or environmental law (Afghanistan, Belgium, Canada, Germany, the Netherlands, Sweden). Some countries have specific legislation on cities (Afghanistan, Brazil) which makes specific reference to heritage. Criminal law is used in relation to heritage (Afghanistan, Brazil, Canada), as well as intellectual property law (Canada, New Zealand), and specific legislation on Indigenous rights (Australia, Canada, New Zealand, the United States). Qatar stands out as an example of a country where legislation on heritage safeguarding is substantially complemented by policy documents on urban planning and zoning regulations. This diversity of responses often reflects different domains of heritage being treated and regulated as falling within the purview of different legal regimes, which can lead not only to normative, but also institutional fragmentation.
94. In some domestic jurisdictions under examination, heritage legislation falls generally under the purview of administrative law, often including specialized jurisdictions (Afghanistan, Canada, the Netherlands, Sweden). It is worth noting, however, that the framing of heritage under administrative law often translates into state discretion on heritage matters, which has a clear effect of limiting participatory governance possibilities, or at the very least relegating them to a mere advisory or consultative status. One exception is the Netherlands, where general administrative law requires the participation of a wide range of stakeholders in decision-making, implementation and review. Countries like New Zealand and Sweden have special jurisdictions on environmental law, within which heritage sits. However, these specialized jurisdictions do not do away with the risk of overlap and jurisdictional confusion, as is particularly apparent in the case of Sweden.

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<sup>141</sup> The information gathered on Afghanistan reflects the situation pertaining between 2004 and 2021, and is not necessarily applicable to the situation after the restoration of the Taliban regime.

95. Institutional diversity of responses is also reflected in the governmental bodies charged with heritage safeguarding. Beyond specific ministries of Culture or Heritage, a range of different ministries have direct mandates with respect to heritage safeguarding, sometimes multiple ministries in the same jurisdiction. Examples include ministries of Tourism (Afghanistan, Brazil, Japan), Urban Development (Afghanistan), Finance (Afghanistan), Religion or Minorities (Afghanistan, Pakistan, Spain), and even Agriculture (Japan). Much like the legal instruments themselves, but perhaps more tangibly from the perspective of access to and participation in governance processes, this institutional fragmentation also translates into different levels of propensity (measured in relation to the nature of each government department) to include different participants in decision-making processes. It is also to be added that much depends on the constitutional system of the jurisdiction concerned. For example, in some federal states the competence in culture and cultural heritage primarily lie with constituent units. In Belgium the competence for monuments and sites was transferred in 1988 to the regions, separating immovable cultural heritage from movable cultural heritage. In states with autonomous provinces and regions, a number of competences in the field of culture and heritage belong to regional and local authorities (e.g. Germany, Italy, and Spain).

### **C. Actors and forms of participation**

96. As expected, and mirroring international legal instruments' tendency to protect state sovereignty, in most countries the state holds the prerogative on deciding whether to safeguard heritage, with the law clearly specifying so in a number of jurisdictions (Afghanistan, Angola, Belgium, Brazil, Canada, Cape Verde, Japan, Mozambique, the Netherlands, New Zealand, South Africa, Sweden, Switzerland), and in some (Afghanistan) even going as far as explicitly excluding non-state entities from having a say on the matter. The fact that states maintain the ultimate decision on whether heritage is listed or safeguarded has significant implications for participation, as it excludes other actors from the fundamental decision of whether something is considered heritage. Only after the state has endorsed an element to be worthy of heritage designation under the law, can one contemplate other actors being involved in its governance. While there are significant roles to be performed by non-state actors in governance, the importance of the decision as to whether something is considered heritage under the law is not to be underestimated.

97. Switzerland is known for its allowance for direct democracy, which extends to heritage matters. Direct democracy in this context means that, despite it being the state's prerogative to decide what heritage is worth listing in the first place, there is room for direct input from non-state actors at that crucial moment. But Switzerland is an exception in this matter. Other exceptions in which non-state actors can have input on listing decisions are parts of Belgium, Brazil, Italy and Spain. In most heritage governance matters, participation of non-state actors only happens after that initial safeguarding decision, meaning it is inevitably a mediated participation, constrained by the background rules of the institutional setting, as well as the substantive parameters of the heritage that the state selected for safeguarding (and to a large extent the narrative around the heritage, which is often attached to the initial decision on whether to safeguard).

98. Once heritage has come under the safeguarding purview of a legal instrument, a number of different modalities of (mediated) participation exist. One key obstacle even for this mediated participation is whether stakeholders are qualified to participate to begin with. In other words, a key threshold requirement is whether different stakeholders have sufficient legal personality to engage legal regimes before different institutions. New Zealand is notable in this respect for having no requirements for the formal constitution of legal persons with standing on heritage matters, which multiplies the possibilities in particular of civil society participation.

99. Civil society participation is common across a range of jurisdictions (e.g. Belgium, Brazil, Canada, Germany, Ireland, Italy, Japan, Netherlands, New Zealand, Spain, Switzerland, UK). However, in many jurisdictions it is stakeholders appointed through less direct channels that come to the fore, whether experts (Afghanistan, parts of Belgium, Brazil, Japan, South Africa, Spain, Switzerland, UK), career civil servants (Afghanistan, Brazil, Japan, New Zealand, South Africa, Spain, the United States), political governmental appointees (Afghanistan, Brazil, Japan, Qatar, South Africa, Spain,



UK), or elected officials (Belgium, New Zealand). While there is often overlap across these categories, we have chosen to adopt the labels indicated in national legislation. In other jurisdictions, recognized minorities have legislated rights to participate in heritage governance (Afghanistan, Canada, Japan, Pakistan, Qatar, the United States). The qualifier of ‘recognized’ minorities underscores once again the mediated nature of participation, and flies in the face of international standards on Indigenous rights that suggest that the state putting a requirement of formal recognition onto Indigenous peoples can be a violation of the right to self-determination.<sup>142</sup> In Qatar, legislation also allows explicitly for private foundations with large capital to participate in heritage governance processes, reflecting the Islamic legal tradition in which trusts (*waqfs*) play a significant role in the safeguarding of cultural heritage.

100. In some jurisdictions, there is little clarity in relevant legislation about which actors are able to participate in governance (Canada, Sweden), while countries like Afghanistan have attempted to broaden participation through its legislative branch, in effect attempting to disrupt the executive branch’s governmental prerogative over heritage governance.
101. Participation as described so far extends primarily to participation in governance processes through the executive branch of government. A related issue is that of legal standing for judicial action, which is a pathway for participation via the judicial branch of government. Standing for legal action is available in jurisdictions as varied as Afghanistan, Brazil, Colombia, Japan, and Sweden. Some countries, like Brazil, have fairly open standards for standing, whereas in countries like Afghanistan and Sweden legal standing continues to be a problem. Afghan law restricts standing to state organs, and Sweden as a base rule requires that potential parties prove actual or potential economic interests in relation to affected heritage. Swedish rules, further, create conditions for civil society organizations to have standing, aimed at proving lasting connections to local communities. This restriction, while on the face meritorious for requiring a connection to the local context, functions as a hurdle against concerted efforts at strategic litigation in relation to cultural heritage. In the case of Colombia, there is the possibility of bringing an *actio popularis* before a tribunal in case an NGO considers that a public authority is managing a particular cultural site in accordance with legal requirements, which can open important avenues if one of these requirements is adequate participation.
102. Once the actors who may participate have been identified, the next step is to identify the modalities of participation available to them. Focusing on the participation of non-state actors in particular, it is perhaps unsurprising that for the most part the modes of participation are primarily consultative (Afghanistan, Angola, Cape Verde, Germany, Italy, Japan, Mozambique, São Tomé and Príncipe, Sweden, UK). Consultative status exists, but does not apply to all stakeholders equally in all jurisdictions. For instance, it is restricted to governmental experts in Afghanistan.
103. Other modalities of participation include direct submissions to government (New Zealand, Spain), lobbying (Sweden), grassroots direct action (Japan, Sweden), and direct democracy processes (Switzerland). The Japanese experience also points out to important modalities of participation by non-state actors, at least in some contexts. When it comes to private property being listed as heritage, the consent of the title holder is required. And, when the heritage of recognized minorities is at stake, Japanese law requires co-management between the state and the minority group. Importantly, as already alluded, the Dutch system involves the enhanced system of participatory system of governance in cultural matters at all levels, including the review of policies and decisions undertaken.
104. In relation to the current agenda for making reparations to colonial wrongs and returning cultural objects, several states have developed national guidelines (Belgium, France, Germany, the Netherlands) for dealing with contested heritage, particularly collections of movable cultural objects from colonial contexts. These countries identify the participation of (source) communities in the countries of origin as well as migrant or diasporic communities as vital and thus prominent in

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<sup>142</sup> IACHR (n 100), para 95.

instruments developed at the sub-state level in these national policies, especially with regard to return, digitization, and future cooperation.<sup>143</sup> The question of return and restitution is predominantly perceived as a matter of state sovereignty and, thus, only states have a ‘seat at the table’ (France and the Netherlands). In Germany, for example, the 2019 Framework Principles state that returns should only be made in agreement with the countries and societies of origin, thus including both, government and communities. In countries with similar contexts of dealing with the continuing legacy of dark or dissonant heritage like the United States in relation to confederate statues and other monuments, formal participation has been less structured, but debates in the country have brought to the fore the question of who the relevant community for the purposes of heritage decision-making is – specifically, whether a specially affected minority should have a bigger voice in heritage decision-making. United States practice to date on the matter of confederate monuments stands in contrast with the much more structured and formalized participation processes in the United States vis-à-vis Indigenous heritage (via the Native American Grave Protection and Repatriation Act<sup>144</sup>).

105. These experiences point out to a diversity of stakeholders that have to be considered and can participate, in different modalities. They also underscore, however, the central role of the state in making the fundamental early decisions which set the basic parameters of participation, and how governance is mediated by those background norms. Another way in which the state has significant power in relation to heritage management is through its financial power, which we also surveyed and discuss next.

#### **D. Financial instruments**

106. The financing of heritage safeguarding affects heritage in multiple ways. One of them is through decision-making on expenditure directly, through initiatives like participatory budgeting available in countries like Brazil and Spain. Another pathway is financial incentives and the overall financial constraints on heritage safeguarding, which can influence access to resources and the privileging of heritage. Heritage for the most part is financed out of pre-approved state budgets (Brazil, Japan, New Zealand, South Africa, Switzerland), with some role for philanthropy in countries like South Africa, and dedicated income streams, including lotteries, in countries like New Zealand and the UK. In Spain, a levy on construction budgets helps finance heritage safeguarding as well, operating as a separate revenue stream. In parts of Belgium, financial resources (or lack thereof) have meant the temporary delisting of heritage. Tax breaks (Switzerland) offer incentives for non-state actors to indirectly influence the safeguarding of heritage, and in some jurisdictions there are programs on state grants as separate (and at least partly discretionary) procedures for directing governmental expenditure on heritage (Afghanistan, New Zealand, Sweden, Switzerland). Non-state actors participate in these mechanisms through influencing the direction of expenditure in some circumstances, whether it is through participatory budgeting, applying for grants, making tax-deductible donations, or philanthropy. But, for the most part, financial decisions on heritage safeguarding tend to elude the participation of non-state actors.

#### **E. COVID-19 impacts**

107. Given the timeline of the second phase of the Committee’s work, this Final Report would be remiss not to attempt to document, however briefly, the impact of the COVID-19 pandemic on participation in domestic contexts. In some countries, there were no significant impacts from the pandemic at the time of measurement (Brazil, Japan). But in many countries there were significant impacts on heritage governance, with less participation in local associations charged with grassroots safeguarding (Sweden), a halt on state approvals for safeguarding projects (Afghanistan, Sweden), budget cuts (New Zealand), and other difficulties on access to information on proposed changes to heritage (South

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<sup>143</sup> NB both the ICOM Code of Ethics for Museums (Principle 6) as well as UNDRIP (Articles 12 and 13) focus on source communities, not states.

<sup>144</sup> Pub L 101-601, 25 USC 3001 et seq, 104 Stat 3048 (16 November 1990).

Africa). In Switzerland, festivals, as an element of intangible cultural heritage, have been cancelled, while in many countries the access, use and enjoyment of heritage have been deeply affected (e.g. Belgium). Only in Spain there seemed to be proactive positive responses, with additional recovery funds allocated to the cultural and heritage sector. In Italy, the use of digital technology as part of a mixed modality for festivals facilitated participation from home and decreased decontextualization, since festivals (digitally) featured heritage-bearers practising their cultural heritage within their customary spaces, rather than temporarily performing them in the space provided by the festival.

108. What these examples show is that the pandemic, perhaps like other forms of crises, can have negative effects on heritage management in general, and on participation in heritage governance specifically. In other words, enshrining clearer requirements of participation might be necessary to insulate them from crisis responses that can claw back on participatory gains by non-state actors.

#### **F. Selected domestic exemplars**

109. There is a wide range of domestic exemplars of participatory safeguarding practices worth pointing out. While impossible to describe them in full detail in this report, the Committee would like to draw attention to initiatives such as the use of local heritage societies as key elements in safeguarding processes (Sweden), with Belgian law even allowing for neighbours to come together to propose the listing of heritage in most regions. A further exemplar of practice in this realm is co-governance and co-design processes used in particular with recognized minorities (Japan, New Zealand, and the United States in relation to Indigenous heritage). These pathways underscore the importance of involving local levels because they are the ones who bear the brunt of safeguarding heritage, meaning their recognition should happen in relation to heritage management, and also extend to the design of safeguarding strategies.
110. Beyond action through the executive branch, the participation of civil society in legal proceedings (Brazil, Spain) also offers important avenues for challenging governmental action, important when so much of heritage decision-making, framed as administrative law, is subject to the discretion of the governmental authority. In other words, it is a worthwhile lesson to keep in mind that, tactically, participation can happen, or be enforced, through multiple legal channels.
111. In relation to the third branch of government, the legislature, there is important practice through legislative action aimed at creating clear and unified legislative frameworks on heritage in South Africa. Doing so allows for clearer pathways to be available to non-state actors, and does away with institutional and legal fragmentation as a threshold barrier for participation. Of course, it does not resolve all problems, since many state authorities will still operate against other legal frameworks not specific to heritage, but at least non-state actors will have a clear single pathway in front of them.
112. Another example of legislative action helping improve participation comes from law reform in one specific heritage domain. In Belgium, Canada, Italy, the Netherlands, and Switzerland, legislation on intangible cultural heritage can potentially help expand non-state actor participation, partly because of the requirements on community participation in the international treaty. These more discrete reforms can have ripple effects to other heritage domains. In Italy, local-level legislation has facilitated increased participation at a local level. In the Netherlands, in particular, it is worth noting that community participation extended even to the process of ratification of the ICHC, which is an important exemplar of practice of co-design of the basic legal and institutional framework behind this heritage domain.
113. Free access to cultural heritage, and educational action through exhibitions (UK) offer important non-legal pathways. UK practice in this sense highlights that the law, while important, is not the only (and not even the main) means through which participation happens, and that, fundamentally, a critical part of participation is to create incentives for non-state actors to wish to participate in the first place.

114. There are therefore myriad lessons to be learned from domestic practices on participation in cultural heritage governance. Coupled with the lessons from international practice, they point at a range of important elements to be considered as lessons for promoting more inclusive and participatory governance at the international law level. We return to those in the next section, underscoring in particular the connections to international legal regimes.

## VI. GOOD PRACTICES OF PARTICIPATORY GOVERNANCE

115. While a number of shortcomings of the current participatory global governance of cultural heritage have been identified, a closer look into the practice of participation also evidences a wide spectrum of good practices. Although these manifest certain similarities, at the same time they are deeply differentiated among various regulatory and institutional frameworks, reinforcing the fragmentary nature of participation in international legal governance. Below, these practices are grouped in accordance to the same categories described in the previous sections of this report as key weaknesses to participation, i.e. in relation to the four major aspects of participation: actors, access, scope, and effectiveness. In addition to this general scheme, a separate section lists good practices observed beyond the field of cultural heritage (paragraph 130, below). In this section we focus primarily on good international practices, since they are the main target of the Committee's work, even if we acknowledge the importance of domestic practices, as underscored in the previous section and make cross-references as appropriate.

### A. Actors of participation

116. With respect to various UNESCO organs and bodies, analysis of the most current practice has evidenced some trends toward engaging a wider spectrum of participants in governance processes. In particular, the regimes of the World Heritage Convention and that of ICHC provide for the engagement of local communities in the designation and management of cultural heritage, and countries like Japan, the Netherlands, and New Zealand proactively engage in co-design and co-management processes. Accordingly, the implementation of the World Heritage Convention requires the '[e]ffective and inclusive participation in the nomination process' of a variety of non-state entities, including local communities and Indigenous peoples. In this regard, 'States Parties are encouraged to prepare nominations with the widest possible participation of stakeholders and shall demonstrate, as appropriate, that the free, prior and informed consent of indigenous [sic] peoples has been obtained.'<sup>145</sup> Indeed, although the procedural modalities of participation by non-expert stakeholders at the global level are still underdeveloped, the voice of various heritage stakeholders has been increasingly taken into consideration in the practice of the World Heritage Convention (see paragraph 78 above).<sup>146</sup> In turn, the ICHC, while addressing the participation of communities, groups and individuals, adopts a broad notion of participation in line with the inclusive social sustainable development set out in Article 15 of the treaty. Furthermore, paragraph 177 of the Operational Directives to this treaty<sup>147</sup> highlights the need to consider intangible cultural heritage as capable of contributing to 'sustainable food security, quality health care, quality education for all, gender equality and access to safe water and sanitation.' In order to achieve such ends these goals must be underpinned by the 'freedom for people to choose their own values systems' and the encouragement and facilitation of 'inclusive governance'. The term 'inclusive' has been used in paragraphs 174 and 194 of the Operational Directives as being 'inclusive of all sectors and strata of society, including indigenous [sic] peoples, migrants, immigrants and refugees, people of different ages and genders, persons with disabilities and members of vulnerable groups'. The implementation of these standards is scrutinized and evaluated by the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage pursuant to its analysis of State Parties' periodic reports.<sup>148</sup>

<sup>145</sup> UNESCO, 'Operational Guidelines' (n 123), para 123.

<sup>146</sup> See Vrdoljak, 'Indigenous Peoples' (n 125).

<sup>147</sup> UNESCO, 'Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage' (as of 6 June 2018), UNESCO Doc KAT/2018/PI/H6.

<sup>148</sup> See Soggetti (n 114), p 296.

117. Another important area of good practices with respect to the broadening of the spectrum of participants observed in UNESCO's machinery of global governance concerns the increasing modalities of capacity-building and consultative forums supporting the implementation of treaty provisions, and the evaluation of periodic reports. Alongside UNESCO's activities in relation to world heritage and intangible cultural heritage, this is also the case in other regimes: the 1954 Hague Convention; the 1970 UNESCO Convention; the 2001 UNESCO Convention; and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005 UNESCO Convention).<sup>149</sup> As regards the armed conflict regime, armed non-state actors have only obligations but no legal avenue to participate in the protection of cultural heritage during armed conflict if they wished to do so.<sup>150</sup> In this respect, the participation of various stakeholders (including other organizational frameworks, such as the OSCE) has particularly been enhanced in relation to peacekeeping operations and post-conflict building processes.<sup>151</sup> UNESCO, pursuant to the agenda of the Subsidiary Committee of the Meeting of States Parties to the 1970 UNESCO Convention, has also recently engaged a wide range of stakeholders for the purposes of the protection of movable cultural heritage against trafficking.<sup>152</sup> In this context, important developments regard the recognition and adoption of standards enshrined in UNESCO's International Code of Ethics for Dealers in Cultural Property.<sup>153</sup> In fact, according to the Report of the UN Secretary-General on the implementation of Security Council resolution 2347 (2017) many countries, such as Canada, have adopted and implemented this code, while others applied specific measures stemming from ethical principles in art trade such as 'licensing and requirements to maintain registers to track transactions, or applying obligatory provenance-check provisions in accordance with national legislation.'<sup>154</sup> In this regard, UNESCO's International Code of Ethics for Dealers in Cultural Property may be seen as a way of engaging various actors of international art trade, including relevant business associations, in global efforts to reinforce measures to prohibit cross-border trafficking in cultural property and promoting due diligence standards, and within and beyond the UNESCO regime umbrella.<sup>155</sup> UNESCO is currently working on revising the 1999 Code of Ethics for Dealers in Cultural Property.
118. As to the protection of underwater heritage, UNESCO has reached out to a wide range of non-state actors, including donors, the diving community, museums, universities, tour operators, fishing and shoreline communities, and NGOs. In this latter regard, the governance system of the 2005 UNESCO Convention offers a new normative framework,<sup>156</sup> and a number of good examples of ensuring participation of civil society organizations (these include NGOs, non-profit organizations, professional organizations in the culture and media sector and associated sectors, and groups that support the work of artists and cultural sectors).<sup>157</sup>

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<sup>149</sup> (Adopted 20 October 2005, entered into force 18 March 2007), 2440 UNTS 311.

<sup>150</sup> Marina Lostal, Kristin Hausler and Pascal Bongard, 'Armed Non-State Actors and Cultural Heritage in Armed Conflict' (2017) 24(4) *Int'l J Cult Prop* 407.

<sup>151</sup> In particular, see UNESCO 'Reinforcement of UNESCO's Action for the Protection of Culture and the Promotion of Cultural Pluralism in the Event of Armed Conflict' (2 November 2015), UNESCO Doc 38 C/49; for more, see Ida Caracciolo and Umberto Montuoro (eds), *Preserving Cultural Heritage and National Identities for International Peace and Security* (G Giappichelli Editore 2018).

<sup>152</sup> See UNESCO, 'Cooperation with the Art Market' (April 2016), UNESCO Doc C70/19/7.SC/8b, paras 10, 13-15.

<sup>153</sup> (Adopted by the ICPRC at its Tenth Session, January 1999), UNESCO Doc CLT/CH/INS-06/25 rev.

<sup>154</sup> (17 November 2017), UN Doc S/2017/96, paras 31-32.

<sup>155</sup> Also see UNESCO, 'Due Diligence' (April 2019), UNESCO Doc C70/19/7.SC/8a, and UNESCO Doc C70/19/7.SC/8b (n 152).

<sup>156</sup> See arts 9 and 11 of the 'Operational Guidelines to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions' (as of 2019), available at <<https://en.unesco.org/creativity/convention/about/guidelines>> accessed 29 December 2021.

<sup>157</sup> See <<https://en.unesco.org/creativity/donors/swedish-international-development-cooperation-agency>>; <<https://en.unesco.org/creativity/activities#Type=capacity-development>> accessed 29 December 2021.

Many good practices concerning the involvement of civil society can also be observed within the global UN system. One of the prime examples is ECOSOC: its Permanent Forum on Indigenous Issues appears to represent a genuine attempt to source expert advice and recommendations on Indigenous issues and with respect to Indigenous culture, and the specific issue/theme considered by the Forum in 2019 related directly to cultural concerns ('Traditional knowledge: Generation, transmission and protection').<sup>158</sup> This engagement may also be viewed as a genuine attempt to enter into dialogue with Indigenous communities in a manner beyond mere 'consultation'. Other frameworks within this UN body include ECOSOC's Partnership Forum and Youth Forum, and the UN Civil Society Conference. The involvement of civil society through the participation of NGOs is also noticeable in other UN organs and institutions under examination, as global specialized bodies and regional integrative organizations. Special attention should be paid to the practice of the World Bank's development projects. Accordingly, while community participation has long been present in various initiatives of this organization,<sup>159</sup> the engagement of local communities and Indigenous peoples in performing and coordinating World Bank-funded development projects has become more visible in recent decades, as well as the support rendered by this organization to UNESCO and other entities in the cultural heritage sector. Domestic co-design and co-management practices, mentioned above, are also important in this realm. Failures to carry out adequate consultations have resulted in adverse consequences for the communities affected by infrastructure projects financed by Multilateral Development Banks more in general. For example, the Rural Water Supply and Sanitation Project for Low Income States project in India, the Alto Maipo Hydroelectric Project in Chile, the Nenskra dam construction project in Georgia, and the Bujagali Hydropower Project (BHP) in Uganda, all raised issues stemming from lacking, incomplete or culturally inappropriate consultations.<sup>160</sup>

119. A number of good practices of involvement of a wide spectrum of actors (including NGOs) in participatory process in the realm of culture and cultural heritage has also been observed in all regional organizations under examination (Andean Community, Arctic Council, ARIPO, ASEAN CARICOM, CoE, MERCOSUR, OAS, OAU, OIC, OSCE, SAARC, UNASUR).

120. Unsurprisingly, the openness to NGOs and to the larger civil society characterizes various human rights monitoring frameworks. Accordingly, NGOs are invited to participate in the work of the CESCR and there are several means and ways for them to do so. In 2000 the CESCR adopted a document setting out in detail the modalities of NGO participation in the CESCR's work.<sup>161</sup> In a similar vein, civil society regularly engages with the CRPD,<sup>162</sup> and actively participates in the Universal Period Review process within the Human Rights Council. Many good practices regarding the inclusion of civil society and a wide range of cultural heritage stakeholders can be observed in the practice of the UN Special Rapporteurs in the Field of Cultural Rights. Importantly, the IOM, and UNHCR entail various forms of participation ranging from passive observation to active involvement

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<sup>158</sup> See <<https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2/18-2.html>> accessed 29 December 2021.

<sup>159</sup> See Samuel Paul, *Community Participation in Development Projects: The World Bank Experience*, vol 6 (World Bank Discussion Papers, World Bank 1987).

<sup>160</sup> See Berenika Drazewska and Kristin Hausler, 'The Role of Multilateral Development Banks in the Protection of Intangible Cultural Heritage' (BIICL 2021) available at <<https://www.biicl.org/publications/the-role-of-multilateral-development-banks-in-the-protection-of-intangible-cultural-heritage>> accessed 30 April 2022.

<sup>161</sup> CESCR, 'NGO Participation in the Activities of the Committee on Economic, Social and Cultural Rights' (7 July 2000), UN Doc E/C.12/2000/6.

<sup>162</sup> CRPD, 'General Comment No 7 on the Participation of Persons with Disabilities, Including Children with Disabilities, through Their Representative Organizations, in the Implementation and Monitoring of the Convention' (9 November 2018), UN Doc CRPD/C/GC/7.

(migrants give feedbacks to organisers, share stories, engage in dialogue, take part in seminars or courses, perform activities, including cultural activities).

## B. Access to participatory governance

121. The operationalization of participation in the practice of UNESCO's organs throughout various segments of its cultural heritage governance demonstrates two important trends: an increasing role of capacity-building; and enhanced multi-stakeholder dialogue. Access is possible through accreditation within a given organization. In this regard, it appears that the most open, unrestricted way of accessing heritage is offered by the HR Council's special procedure on cultural rights. In order to prepare thematic reports, the UN Special Rapporteur in the Field of Cultural Rights generally meets with experts in the field and calls for submissions from all concerned stakeholders (including academics, experts, artists, scientists, cultural workers and practitioners, as well as civil society organizations) to respond to a given mandate's questionnaire, thus adding muscle to the all-affected principle.<sup>163</sup>
122. Another important way of accessing cultural heritage governance refers to the increasing role of online platforms and surveys. A good example is the deliberative works on the new definition of 'museum' launched by ICOM and carried out on a global scale.<sup>164</sup>

## C. Scope

123. While the main objective of existing participatory global governance is consultation, a limited number of international organizational frameworks provide or at least promise involvement in decision-making. The best example can be seen in the CESR system, which provides for the true involvement of civil society organizations in the actual work of this body. Accordingly, the participation of NGOs is outlined in relation to the reporting procedure and the drafting of General Comments. NGOs have also assisted victims of alleged rights' violations to bring individual complaints before this committee.<sup>165</sup>
124. The scope of participation has also been clearly substantiated in the practice of the ILO in relation to Indigenous peoples. The Committee of Experts on the Application of Conventions and Recommendations ('CEACR'), a special body of this organization, is in charge of, *inter alia*, monitoring the implementation of ILO Convention No 107<sup>166</sup> and ILO Convention No 169. Through its observations and direct requests, the CEACR has reaffirmed that the principle of 'participation' [right to participate effectively] of indigenous [sic] peoples must be applied to all decisions that may affect them, as well as in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.<sup>167</sup> Moreover, while referring to the situation in Guatemala, the CEACR referred to Article 6 of Convention No 169 and recalled that:

[T]he Government is required to consult the peoples concerned through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly. The consultations must be undertaken in good

<sup>163</sup> See <<https://www.ohchr.org/EN/Issues/CulturalRights/Pages/PublicSpaces.aspx>> accessed 29 December 2021.

<sup>164</sup> See <<https://icom.museum/en/news/icom-announces-the-alternative-museum-definition-that-will-be-subject-to-a-vote>> accessed 29 December 2021.

<sup>165</sup> CESCR, 'NGO Participation in the Activities' (n 161).

<sup>166</sup> Indigenous and Tribal Populations Convention (No. 107) (adopted 26 June 1957, entered into force 2 June 1959), 328 UNTS 247.

<sup>167</sup> For instance, see ILO, 'General Observation (CEACR) – adopted 2018, published 108th ILC session (2019)', available at <[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100\\_COMMENT\\_ID,P11110\\_COUNTR Y\\_ID,P11110\\_COUNTRY\\_NAME,P11110\\_COMMENT\\_YEAR:3996110,,2018](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID,P11110_COUNTR Y_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3996110,,2018)> accessed 25 December 2021.

faith, through genuine dialogue, and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures. Furthermore, indigenous [sic] peoples must be *given sufficient time to organize their own internal decision-making processes and to participate effectively in the decisions adopted*<sup>168</sup> (emphasis added).

125. Other good examples with respect to the scope of participatory governance can be seen in the EU and CoE approaches to participatory governance of cultural heritage. Since the early 2000s, the use of participatory vocabulary has been an important element of cultural heritage discourse of the European integration process, particularly within the framework of the CoE and the EU. Following the principles of the 2005 Faro Convention, participatory governance or management constitutes one of the key objectives of the CoE's European Cultural Heritage Strategy for the 21st Century, essentially founded on the principle of an integrated approach to cultural heritage governance. Accordingly, participatory management is referred to as 'a shortcut for openness to the needs and expectations of stakeholders, readiness of the holders of public authority to listen to them and provide responses to their expectations or queries, delivering public policies in a spirit of openness, accountability and shared ownership.'<sup>169</sup> Moreover, in the CoE policy goals participatory governance of cultural heritage also became an explicit element of the concept of 'good governance'.<sup>170</sup> The participation paradigm in relation to culture and cultural heritage also became an explicit element of the EU policy agenda in 2012. Cultural governance was associated with 'the involvement of the relevant civil society actors in order to make cultural governance more open, participatory, effective and coherent' and Member States were invited 'to promote a participatory approach to cultural policy-making by enhancing partnerships between public cultural institutions and civil society and by stimulating participation of civil society through appropriate dialogue and consultation.'<sup>171</sup> The importance of multilevel participation has also been emphasized by the Council conclusions of 21 May 2014 on cultural heritage as a strategic resource for a sustainable Europe,<sup>172</sup> and substantiated in the Council's conclusions of 25 November 2014 on participatory governance of cultural heritage.<sup>173</sup> The latter instrument 'seeks the active involvement of relevant stakeholders in the framework of public action — i.e. public authorities and bodies, private actors, civil society organizations, NGOs, the volunteering sector and interested people — in decision-making, planning, implementation, monitoring and evaluation of cultural heritage policies and programmes to increase accountability and transparency of public resource investments as well as to build public trust in policy decisions.'<sup>174</sup> In this regard, the agenda of the European Year of Cultural Heritage (EYCH 2018) stands out. The decision establishing this programme<sup>175</sup> stated that the cultural heritage action of the EU and its Member States shall 'promote innovative models of participatory governance and management of cultural heritage, involving all stakeholders, including public authorities, the cultural heritage sector, private actors and civil society organizations' (Article 2(2)(b)). It also addressed the human dimension of heritage: '[t]he increased recognition at international level of the need to put people and human values at the centre of an enlarged and cross-disciplinary concept of cultural

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<sup>168</sup> ILO, 'Observation (CEACR) – adopted 2018, published 108th ILC session (2019)', available at <[https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID,P11110\\_COUNTRY\\_ID,P11110\\_COUNTRY\\_NAME,P11110\\_COMMENT\\_YEAR:3965832,102667,Guatemala,2018](https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3965832,102667,Guatemala,2018)> accessed 29 December 2021.

<sup>169</sup> See CoE, 'Recommendation of the Committee of Ministers to Member States on the European Cultural Heritage Strategy for the 21st Century' (22 February 2017), at 5, available at <<https://rm.coe.int/16806f6a03>> accessed 29 December 2021.

<sup>170</sup> For instance, see art 5(c) of the European Landscape Convention (open for signature 20 October 2000, entered into force 1 March 2004), ETS No 176.

<sup>171</sup> See the Preamble to the Council conclusions of 26 November 2012 on cultural governance [2012] OJ C 393/8.

<sup>172</sup> [2014] OJ C 183/36.

<sup>173</sup> [2014] OJ C 463/1.

<sup>174</sup> Ibid, para 9.

<sup>175</sup> See Decision (EU) 2017/864 of the European Parliament and of the Council of 17 May 2017 on a European Year of Cultural Heritage (2018) [2017] OJ L 131/1.



heritage reinforces the need to foster wider access to cultural heritage’ (Preamble, 13<sup>th</sup> recital). In other words, it linked the human right to access cultural heritage with various measures ‘to protect, safeguard, reuse, enhance, valorise and promote Europe’s cultural heritage,’ including participatory governance of heritage (Article 2(1)). Moreover, it explicitly called for measures to fulfil human rights obligations under Article 30 of the Convention on the Rights of Persons with Disabilities, to which the EU and most of its Member States are parties.

#### D. Effectiveness

126. Meaningful participation in cultural heritage governance schemes largely depends on the procedural and financial foundations and constraints. In this latter regard, good practices of funding capacity-building programmes and participation are provided by earmarked funds and funds-in-trust arrangements within UNESCO<sup>176</sup> and World Bank programmes.<sup>177</sup> Capacity-building regarding participatory modalities of cultural heritage governance is also supported by the 2014 EU Council’s conclusions on participatory governance of cultural heritage. Moreover, the Remembrance strand of the *Europe for Citizens* programme (EfC), launched in 2014, constitutes ‘the way to promote this kind of participatory approach since participation lies at the core of the programme’.<sup>178</sup> The programme is also envisaged as an attempt ‘to promote tolerance, mutual understanding, intercultural dialogue and reconciliation as a means of moving beyond the past and building the future’.<sup>179</sup> Hence *Creative Europe* and EfC ‘mutually support each other in the fields of civil society activities and cultural heritage, but EfC complements *Creative Europe* with its focus on citizens’ participation in decision making.’<sup>180</sup>
127. Other factors that impact upon the effectiveness of participation are financial resources, expertise, and the relationships among affected participants. On financial resources, the fact that governments or international organizations have the vast majority of funding available for governance in this area gives them a disproportionate voice in decision-making. Diversifying sources of funding from potential donors, like several organizations have already done in partnership with the private sector, can be helpful. UNESCO has some useful practice in this area in the underwater cultural heritage and historic urban landscape spaces. Despite the potential of private sector participation, one must be wary of not allowing dependence on voluntary donations to hamper efforts, nor give those private donors likewise disproportionate voices in relation to the voices of more affected and vulnerable participants. It should be noted that some corporate private actors possess more financial resources than even some states, and therefore their influence can be disproportionate. Most importantly, improved financial resources are meant to dilute power and pay for the costs of participation, and not concentrate power elsewhere and replicate existing shortcomings. Further, money can also be counterbalanced by local knowledge and presence, both of which are brought to the table as in-kind, but often unquantified, contributions of more vulnerable stakeholders. It is thus important that the

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<sup>176</sup> For more on funding capacity-building projects in the realm of intangible cultural heritage, see Andrzej Jakubowski, ‘Art. 25–28 Intangible Cultural Heritage Fund’ in Janet Blake and Lucas Lixinski (eds), *The 2003 UNESCO Intangible Heritage Convention: A Commentary* (OUP 2020), p 392.

<sup>177</sup> For instance see World Bank, *Cultural Heritage and Development: A Framework for Action in the Middle East and North Africa* (World Bank 2001).

<sup>178</sup> See European Parliament, ‘Research for CULT Committee – Europe for Citizens: Towards the Next Programme Generation’ (May 2018), at 12, available at <[http://www.europarl.europa.eu/RegData/etudes/STUD/2018/617478/IPOL\\_STU\(2018\)617478\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/617478/IPOL_STU(2018)617478_EN.pdf)> accessed 29 December 2021.

<sup>179</sup> European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards an Integrated Approach to Cultural Heritage for Europe’ (7 July 2018), at 9-10, available at <[http://ec.europa.eu/assets/eac/culture/library/publications/2014-heritage-communication\\_en.pdf](http://ec.europa.eu/assets/eac/culture/library/publications/2014-heritage-communication_en.pdf)> accessed 29 December 2021.

<sup>180</sup> European Parliament, ‘Research for CULT Committee – Europe for Citizens’ (n 178), p. 20.

contributions beyond those of states and international organizations be properly accounted for, whether financial or in-kind.

128. In relation to expertise, that of affected participants is as valuable as the expertise of experts (professional or academic), and should be acknowledged as such. Partnerships among those groups should be held in equal terms, and not with the local participant being placed in a secondary position as ‘informant’ to the expert. In this respect, growing bodies of practice around community heritage, community archaeology, and citizen science are valuable sources of expertise. Therefore, professional experts need to harness the expertise, drive and enthusiasm of communities as a means to facilitate and ensure participation in equal terms in the management of cultural heritage. Said engagement should occur in the early stages of projects, to ensure co-design.

#### **E. Good practices beyond the cultural heritage field**

129. From among the vast practice of global governance, undoubtedly the experience of environmental law and policy needs to be recalled. As already described (paragraph 40, above) the Aarhus Convention substantiated the three-pillar system of environmental governance. In EU law, the construction of environmental impact assessments as crucial for participatory governance has been extended to cover cultural heritage considerations in assessment procedures, involving the effective participation of the public concerned in the decision-making.<sup>181</sup> That said, a lot of the experience of international environmentalism is focused on participation in terms of consultation only. Further elements can be drawn from the practice of human rights bodies such as the ECOSOC, and the substantive jurisprudence of bodies like the HRC, which point to the need for participation to extend beyond mere consultation and include substantive input affecting decision-making.

### **VII. CONCLUSIONS**

130. On the basis of the Committee’s work in the four years of its mandate, a number of conclusions can be drawn from its extensive mapping of participation in international and domestic legal governance, both within and beyond the heritage field. The conclusions that follow are mostly geared at international legal regimes, and phrased as such, even if they draw on lessons from domestic experiences as well.

131. First of all, there is still a sense of real paternalism when it comes to participation. Either key actors are not factored at all into decision-making, or their views are filtered outside the actual decision-making process (and inserted via states or NGOs). To counter this tendency, participation should be direct and unfiltered. The representation of community interests via NGOs, while resource-saving, is often insufficient. Modalities and procedures should be made uniform across the UN system to account for intersectionality and facilitate participation across multiple fora, thereby also countering fragmentation. Participation both enables and assumes that values other than those for which the specialized agency were created be on the table in decision-making processes, thus performing an integrative function that is beneficial to counter the fragmentation of international law. Conversely, wider participation can also lead to international legal pluralism, which can be beneficial. Direct participation bodies should be standing bodies with clearly defined powers. The formalization of constitutional processes within organizations should be treated as a precondition to participation.

132. Further, participation should not be treated as a concession on the part of states, but as a right of those affected by decisions of the relevant organization or subjected to their constitutional reach. The state-centric nature of most heritage instruments and mechanisms remains a key obstacle to their appropriate implementation. In this respect, consultation is not sufficient as a modality of

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<sup>181</sup> See art 3 of the Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance [2014] OJ L 124/1.

participation, and – within democratic decision-making – consent should be the standard aimed to be achieved. When consensus cannot be achieved among participants affected by a given cultural heritage law instrument, then the views of those whose identities are most affected, should prevail. In the event of participants with equivalent stakes and opposing views, then status quo should prevail, or the views of other participants be considered. In a similar vein, participation needs to be more than just program evaluation; it needs to feed into the design of programs themselves.

133. Environmental legal regimes offer elements to consider in terms of consultation, but tend to fall short of consent. Human rights offer a stronger framework for advanced modalities of participation. Participation has over time evolved into a right in international heritage law instruments, and even a precondition for the recognition of heritage internationally. However, one must be wary of the framing of human rights law in such a way that necessarily portrays participants as vulnerable victims, rather than equal parties in the process. Similarly, and both within and beyond human rights, participation should not be restricted to dispute settlement, even if that is a key area where participation already exists and has had significant positive impacts.
134. In relation to human rights, intersectionality should also be used to give the UN Special Rapporteurs, particularly but not limited to the field of cultural rights, the mandate to investigate modalities of participation across other human rights mechanisms and beyond in the UN system, identifying points of intersection in the fields of Indigenous peoples, minorities, education, religion, and others. Similarly, UN treaty bodies should also be more mindful of these intersections in their work, with a view to cooperation and the identification of shared practices.
135. Participation starts with the exchange of knowledge and best practices, but needs to evolve quickly into direct input in decision-making and standard-setting. The embrace of participation needs to be matched by proper funding and co-design of the decision-making rules. Participation needs to be transparent and accessible, and its entry points easily identifiable.
136. Modalities and rules of participation should be drafted in accessible and inclusive language and provide specific guidance towards achieving the stewardship of global public goods. The focus on public goods can allow regimes to look inward and in this respect can be in tension with the integrative or anti-fragmentation potential of participation. This is an important element that is unlikely to be resolved owing to the lack of clear and uniform standards on participation. Determining who gets to participate can vary significantly from one regime to the other, but it is central to think beyond the state in these processes, as well as to determine those who stand to gain most from existing rules and mechanisms.
137. Overall, participation thus needs to be taken seriously by the authorities of the bodies where it is carried out, and should not be of a token nature or treated in paternalistic terms. Participation helps achieve effectiveness and compliance within international, regional, national, and local governance regimes, both within and beyond heritage, and can even help refresh rights-based regimes. While this committee's mandate is restricted to heritage, there is a strong case to carrying these lessons to regimes involving other global public goods.
138. Regional organizations can set examples of optimal participation through their own standard-setting activities and through their own participation in UNESCO processes, and their experiences are worth considering. The importance of regionalism is key in opening up the possibilities of imagining participation while respecting subsidiarity, which is important in the cultural field.
139. Domestic practices, while they offer important positive elements for consideration, tend to reinforce the idea of heritage as primarily state-centric. Participation avenues exist, but are often mediated by the state. Nevertheless, the number of tactical possibilities available to non-state actors are still worth considering, particularly inasmuch as domestic law opens avenues for engagement with legal regimes beyond a monolithic administrative or managerial level, creating more avenues, for instance, for judicial engagement, or for triggering legal reform through representative democratic processes via domestic legislatures. Further, domestic experiences remind us of the importance of local actors, who

bear the brunt of safeguarding costs, being involved in management processes, and particularly in co-designing safeguarding strategies. It is somewhat regrettable that non-state actors are not more clearly involved at the domestic level in making the fundamental decisions about whether to legally safeguard heritage in the first place, and that financial incentives also remain for the most part entirely within the purview of the state, but there are fruitful avenues in domestic law for enforcing participatory rights and non-state actors being influential in some aspects of heritage governance, perhaps more so than at the international level.

### VIII. COMMITTEE RECOMMENDATIONS

140. On the basis of those conclusions, the Committee adopts the following recommendations:

- 1) **Heritage actors should be recognized in their diversity, with legal instruments and processes designed to facilitate participation in cooperative ways that also account for and incorporate this diversity.**

Different levels of participation may be accorded when doing so will assist in correcting historical disadvantage, and / or ongoing power asymmetries. Special consideration, and greater participatory powers, should probably go to historically oppressed and marginalized minorities, including Indigenous groups. Doctrines like abuse of rights can play a central role in mediating the potential for abuse of these powers, and constructive disagreements can be exploited by different actors, always with a view to levelling power imbalances. In the event of unresolvable conflicts among the equivalent preferences of different actors, a status quo protective of heritage should prevail.

- 2) **Legal regimes should be designed or reformed to convey clearly that heritage identification and safeguarding are not an exclusive prerogatives of the state, or of some abstract international community, but instead primarily of affected heritage communities.**

Communities and their members are far more likely to co-operate with cultural heritage authorities if they feel that the cultural heritage concerned is theirs or if they have had meaningful participation in the decisions relating to the cultural heritage concerned. Otherwise local stakeholders will often act for their own short term personal gain. Regime reform in international law can be driven in particular through amendments to operational guidelines and directives.

- 3) **Decision-makers (like states), gatekeepers (such as experts), and other affected stakeholders shall be included in governance decisions with respect to heritage and shall all be considered in equal terms in heritage governance matters, except when the interest of minorities warrants more privileged status to these groups.**

The incorporation of actors beyond the state and experts in governance processes after these processes have already been decided necessarily renders their input less valuable and actionable, making therefore a case also for co-design of regimes to ensure that participation is equal across all levels.

- 4) **State entities, and experts alongside them, need to understand that heritage safeguarding is not possible or sustainable in a way that maintains its human dimension without equal input from other interested parties, thereby necessitating that state and expert actors relinquish some of their privilege in heritage governance.**

Pro forma and poorly designed consultations, in which decision-makers and gatekeepers selectively reinforce their own views while lending them a veneer of consultative legitimacy, are paternalistic and insufficient. They protect the prerogatives of decision-makers and gatekeepers, and do a disservice to heritage safeguarding.

- 5) **Participation shall be treated as a right of non-state actors, and a duty of state actors, with the aim of establishing consent or consensus as the baseline for action in heritage governance.**

Admittedly, consensus is difficult, and, as this report discusses above (paragraphs 64, 84, 133), it should be treated primarily as a pathway to correct power imbalances. In minority contexts, in particular, consent is more appropriate than consensus, which is better deployed in non-minority contexts.

6) **Participatory governance should have clear procedural pathways, and its rules should be easily accessible to all involved and affected.**

These pathways include due consideration of levels of participation, as well as the inclusion of participation in all stages of decision-making after the initial formal decision, including but not limited to implementation, review, and evaluation. These pathways also include due consideration of language, digital, logistical, and other barriers to participation.

7) **Participatory governance of cultural heritage frameworks should be founded on synergies among various regulatory and governance regimes.**

UNESCO, as a central international organization in the area of heritage governance, has encouraged actors to seek these points of intersection, so as to draw lessons from regimes both within and beyond heritage, in line with the work undertaken by this Committee. Further, to exploit these points of contact also means that lessons drawn from cultural heritage governance can also impact other forms of international legal governance. Finally, synergies also mean leveraging alignments and constructive dissonances among national and international levels. Leveraging these synergies also includes the use of intersectionality to build upon the work of UN Special Rapporteurs and UN treaty bodies, as indicated above in paragraph 135.