




CASE NOTE

Final Report of the ILA Committee on Participation in Global Cultural Heritage Governance

Sophie Starrenburg 

Department of Public Law and Governance, Tilburg Law School, Tilburg University, The Netherlands
Email: s.h.starrenburg@tilburguniversity.edu

Abstract

International cultural heritage regimes such as the World Heritage Convention have faced increasing scrutiny with regard to the impact of heritage governance on local communities. An oft-positing solution to this problem is to increase the possibilities for these communities to participate in decisions that will potentially affect the heritage they live in, with, or around. For international lawyers, this discussion is usually framed through the lens of the right to take part in cultural life guaranteed by human rights law. This case note reflects on the *Final Report* of the International Law Association's Committee on Participation in Global Cultural Heritage Governance, which analyzes the current state of the law on these issues and formulates several proposals for its future development. The case note underlines the potentialities of human rights-based approaches to heritage management and the importance of adopting a cross-sectoral approach to participation in international governance.

Keywords: communities; participation; international governance; human rights; right to take part in cultural life

In June 2022, the International Law Association's (ILA) Committee on Participation in Global Cultural Heritage Governance completed its mandate. The output of the committee's four years of work has been bundled in its *Final Report*,¹ accompanied by a resolution adopted by the members of the ILA at its eightieth conference in Lisbon.² The committee, comprised of fifty-one members and chaired by Andrzej Jakubowski, with Lucas Lixinski acting as rapporteur, succeeded the previous Committee on Cultural Heritage Law, which operated from 1988 to 2016.³ While "participation talk" abounds in discussions on cultural heritage governance,⁴ international heritage lawyers have mostly refrained from entering the fray.⁵

¹ International Law Association (ILA) Committee on Participation in Global Cultural Heritage Governance (Committee on Cultural Heritage Law), *Final Report*, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4220401 (accessed 11 October 2022) (henceforth *Final Report*). On the previous meetings of the committee, see Spence 2018; Dachlan 2019.

² ILA, Resolution 01/2022, 2022, https://www.ila-hq.org/en_GB/documents/resolu-1-1 (accessed 11 October 2022).

³ On the work of the Committee on Cultural Heritage Law, see Nafziger 2021.

⁴ See Waterton and Smith 2010; Deacon and Smeets 2013; Adell et al. 2015; Chitty 2017.

⁵ However, see Vrdoljak 2018; Blake 2019; Lixinski 2019; Hausler 2020.

The committee's report neatly bridges this divide, providing a welcome perspective on the practice of participation in cultural heritage governance at the international and domestic level on the basis of an analysis of 43 international governance regimes and 33 domestic jurisdictions. In examining this practice, the committee sought to "understand and substantiate to what extent the present-day global governance of cultural heritage is inclusive and participatory."⁶ The present case note summarizes the most important findings of the committee and critically reflects upon some of the consequences of its conclusions for the field at large.

Definitions and methodology

For the purposes of the report, the committee defines global cultural heritage governance as "involving a wide spectrum of regulatory, institutional and policy frameworks regarding and/or affecting cultural heritage, and operating beyond a single state."⁷ Moreover, such 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."⁸ In adopting this definition, the committee captures the conflicting strands at work within the practice of heritage governance. On the one hand, it is clear that cultural heritage regimes such as the World Heritage Committee have been dogged by complaints of human rights violations, despite the fact that global cultural heritage governance seeks to commit itself to human rights standards.⁹ Scholars often place the blame for this state of affairs at the feet of the other core normative element of the committee's definition: that global cultural heritage governance "does not undermine or challenge state sovereignty and sovereign cultural heritage competences."¹⁰ Despite adopting a definition of cultural heritage governance that explicitly includes respect for human rights, the committee ultimately also appears to share this broader critique as the report explicitly challenges the overwhelming presence of the state in matters of global cultural heritage governance.¹¹

Indeed, one of the committee's core conclusions is that "[l]egal regimes should be designed or reformed to convey clearly that heritage identification and safeguarding are not an exclusive prerogative of the state, or of some abstract international community, but instead primarily of affected heritage communities."¹² In this sense, the preoccupation of the committee with the role of the state in cultural heritage governance illustrates its position as departing from a disciplinary perspective informed by public international law; while the role of experts is also critiqued, they are not the sole focus in the same way that they are in the work of other cultural heritage scholars where the politics of expertise often looms large.¹³ By framing the central problem through the lens of the perennial anxieties of international legal scholars about the role of the state in the contemporary international

⁶ *Final Report*, para. 8.

⁷ *Final Report*, para. 26.

⁸ *Final Report*.

⁹ On human rights and heritage governance, see Silverman and Ruggles 2007; Ekern et al. 2012; Durbach and Lixinski 2017; Larsen 2018.

¹⁰ *Final Report*, para. 26.

¹¹ *Final Report*, para. 140(2).

¹² *Final Report*, para. 140(2). To this, the committee adds: "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" (para. 140(4)).

¹³ See Smith 2006.

legal order,¹⁴ the report thus illustrates an additional facet of the broader debate on community participation in heritage governance.

The report adopts a fairly broad approach to the types of legal regimes it examines,¹⁵ focusing not only on the usual suspects within the United Nations Educational, Scientific and Cultural Organization (UNESCO) (such as the 1954 Hague Convention, the 1970 UNESCO Convention, the 1972 World Heritage Convention, the 2001 Underwater Heritage Convention, the 2003 Intangible Cultural Heritage Convention, and the 2005 Cultural Diversity Convention) but also a range of human rights regimes (such as the Human Rights Council, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the reports of the Special Rapporteur in the field of cultural rights), several regional organizations (such as the Organization of Islamic Cooperation; the European Union; the Council of Europe; the Organization of African Unity; the Organization of American States; the Association of Southeast Asian Nations, and the South Asian Association for Regional Cooperation), and specialized organizations (such as the International Labour Organization, the World Trade Organization, and the World Bank).¹⁶

The report clearly illustrates how far the topic of cultural heritage reaches in international law and how many international organizations are engaged with it in one way or another.¹⁷ Thus, the committee notes that “[t]he 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,” drawing attention to the role played by UNESCO in shaping the agendas of bodies such as the United Nations (UN) Security Council with respect to cultural heritage.¹⁸ This not only affirms that heritage law should certainly not be considered a marginal field within the broader study of public international law but also that those seeking to engage with it need to draw upon a multiplicity of legal perspectives.

For each of the international organizations that they analyzed, the committee members were asked to examine the framing of the concept of participation by the organization, being guided by three 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?”¹⁹ The *Final Report* subsequently outlines general practices, shortcomings, and good practices along four axes of participation: the actors granted participation; the access of these actors to participatory mechanisms; the scope of participatory governance; and the effectiveness of these mechanisms.²⁰

At the domestic level, the committee members carried out a comparative analysis of 33 national jurisdictions.²¹ The committee members were each tasked with analyzing a

¹⁴ See Schreuer 1993; McCorquodale 2004; Fassbender 2019.

¹⁵ For a full overview, see *Final Report*, para. 10.

¹⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240; Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231; Convention on the Protection of the Underwater Cultural Heritage, 2 November 2001, 2562 UNTS 3; Convention for the Safeguarding of Intangible Cultural Heritage, 17 October 2003, 2368 UNTS 3; Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, 2440 UNTS 311.

¹⁷ See also *Final Report*, paras. 22–24.

¹⁸ *Final Report*, para. 22.

¹⁹ *Final Report*, para. 13.

²⁰ See *Final Report*, sections IV, VI.

²¹ 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, Switzerland, the United Kingdom, and the United States.

range of factors with respect to each jurisdiction, such as the main domestic legal frameworks that affect cultural heritage at the domestic level; which stakeholders are represented and within which frameworks; and what types of participation are made accessible to these stakeholders with respect to the various aspects of heritage governance, such as inscription decisions, safeguarding processes, or budgetary decisions.²²

The current state of participatory global cultural heritage governance

The fragmentation of international law looms large in the report; as the committee notes, “the regulatory basis for global cultural heritage governance is profoundly compartmentalized into specialized, and methodologically fragmented regimes that often lack harmony.”²³ This particular problem assumes greater proportions when it comes to the question of fostering participation in global governance as the main doctrinal developments in this area have been driven by other international legal regimes. As is noted in the committee’s report, a case in point is international environmental law, where the principle of public participation in environmental decision-making has been firmly entrenched in agreements such as the 1992 Rio Declaration and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).²⁴ As the committee points out, the law of culture has thus far lagged behind in these developments, with public participation in cultural heritage usually being understood in the context of “participatory forms of cultural manifestations, enabling the wider public to more actively participate in cultural activities, to access cultural goods and products”²⁵ rather than participation in heritage governance as such. The chief exception to this trend is the regime established by the Faro Convention of the Council of Europe, which explicitly contemplates a right to benefit from cultural heritage and establishes standards for public participation in heritage matters.²⁶

The fact that the most concrete elaboration of participatory rights in cultural heritage governance thus far has emerged at the regional level is not necessarily coincidental. Indeed, even within international law at large, the majority of developments with respect to the principle of public participation since the adoption of the 1992 Rio Declaration have emerged from regional organizations, such as the aforementioned Aarhus Convention (adopted under the aegis of UN Economic Commission for Europe) and, most recently, the Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters (adopted in 2018 within the UN Economic Commission for Latin America and the Caribbean), although the latter is not mentioned in the committee’s report.²⁷

Numerous commentators have interpreted these developments as an indication that the future of individual and community participation in international law is to be regionally, not globally, determined.²⁸ For its part, the committee considers that “[r]egional organizations can set examples of optimal participation through their own standard-setting activities”; as

²² *Final Report*, para. 15.

²³ *Final Report*, para. 6. On the fragmentation of international law, see Koskeniemi and Leino 2002.

²⁴ *Final Report*, para. 40. See further Raustiala 1997; Ebbesson 2021; Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 28 June 1998, 2161 UNTS 447 (Aarhus Convention).

²⁵ *Final Report*, para. 34.

²⁶ Framework Convention on the Value of Cultural Heritage for Society, 27 October 2005, CETS no. 199, arts. 4(a), 12. See Zagato 2015; Lixinski 2018; see also *Final Report*, para. 55.

²⁷ Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters, 27 September 2018, Doc. LC/PUB.2018/8/Rev.1 (Escazú Agreement). See Olmos Giupponi 2019; Stec and Jendroška 2019.

²⁸ See Peters 2018; Stec and Jendroška 2019; Barritt 2020; Gomez Peña and Hunter 2020.

such, “[t]he importance of regionalism is key in opening up the possibilities of imagining participation” in the law of culture.²⁹ While an increased emphasis on regional approaches may very well be able to break the impasse in the development of participatory principles for cultural heritage governance, it also raises further questions. How should scholars and practitioners view such approaches in light of the specter of the fragmentation of international law, for example? And is it possible (and justifiable) to adopt different regional standards of participation within global governance regimes such as the World Heritage Convention, and what place do such procedural standards hold *vis-à-vis* globally mandated substantive human rights such as the right to housing, the right to private and family life, or the right to take part in cultural life? These questions indicate that the committee’s report should be seen as the starting point for a broader discussion on the issue of participation in cultural heritage law.

The fragmentation of the law of culture affects not only the compartmentalization of cultural heritage governance into separate legal regimes but also the diversity of the actors involved within these regimes. The committee’s report explicitly draws attention to the wide range of actors involved in cultural heritage governance: states; international organizations such as UNESCO; experts and non-governmental organizations; and “museums, collectors, possessors, owners, dealers in cultural property, and the community in general.”³⁰ In light of its focus on participation, the committee zooms in on one of these groups in particular: communities. Thus, one of the committee’s core recommendations on the basis of its program of work is that “[l]egal regimes should be designed or reformed to convey clearly that heritage identification and safeguarding are not an exclusive prerogative of the state, or of some abstract international community, but instead primarily of affected heritage communities.”³¹

In framing the question of whose participation in global cultural heritage governance should serve, the report places great stock in the use of the “all-affected principle,”³² which holds that “all those who are affected by a given social structure or institution should have standing as subjects in relation to it.”³³ While the all-affected principle is a concept drawn from the political philosophy of democracy, it nonetheless provides a useful scaffolding from which to examine the question of participation in international legal regimes such as cultural heritage governance.³⁴ In this respect, the committee’s approach will hopefully prompt further debate on the role to be played by communities not only within scholarship on heritage law but also within other scholarship concerned with the position of communities affected by international governance.

The committee argues that “[t]here is a case to be made that international heritage law should be geared primarily at protecting the interests of heritage communities,”³⁵ relationally defined as “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.”³⁶ However, the report is also quick to acknowledge that “it would be impractical (and sometimes inadvisable) to suggest that communities replace the state

²⁹ *Final Report*, para. 138.

³⁰ *Final Report*, para. 47.

³¹ *Final Report*, para. 140(2).

³² Näsström 2011.

³³ *Final Report*, para. 31.

³⁴ See Goodin 2007; Koenig-Archibugi 2017; Sändig, Von Bernstorff, and Hasenclever 2018.

³⁵ *Final Report*, para. 34.

³⁶ *Final Report*, para. 48.

entirely in the governance of cultural heritage and other resources ... the objective is to broaden the field of participants” rather than replacing one participant with another.³⁷ In doing so, the report comes full circle to its original definition of international cultural heritage governance as a form of governance that does not undermine state sovereignty. However, the main question to be answered in this regard is whether the field of participants in global cultural heritage governance can indeed be broadened in such a manner without creating insurmountable impasses in decision-making processes.

In any event, the result of the committee’s first phase of work with respect to the practice of 43 international governance regimes underlines that “there is a great inconsistency in approaches across various bodies” with regard to the ability of heritage communities to participate in these regimes, with the only constant being the continuing central role of the state.³⁸ Similarly, with regard to the access of these actors to participatory mechanisms, the committee emphasizes that in most cases the final decision on inscription or management at the international level remains with the state; moreover, “[t]he increasing complexity of ... 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.”³⁹

Moving to the scope of the participation modalities granted to heritage communities, the committee concludes that “participation still appears to be primarily consultative only, and to take place early in the process of decision-making,” going so far as to state that “the issue of participation being restricted to observation recurs in nearly all instances of global governance analysed by the Committee.”⁴⁰ Finally, when participation does take place, it is also often ineffective: as the committee notes, “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.”⁴¹ Participation is thus often paternalistic or tokenistic rather than truly transformative.⁴²

The committee does note nonetheless that progress has been made in recent years with respect to fostering participatory cultural heritage governance, pointing toward good practices developed within the context of UNESCO’s World Heritage Convention and the Intangible Cultural Heritage Convention, which “provide for the engagement of local communities in the designation and management of cultural heritage” as a result of the amendment of each convention’s operational guidelines and operational directives, respectively.⁴³ While the report does not provide specific examples in this regard, the past two decades have indeed evinced a gradual shift not only toward the acceptance of Indigenous management systems with respect to World Heritage sites, such as at the Laponian Area site in Sweden and the Chief Roi Mata’s Domain in Vanuatu, but also toward the direct role of

³⁷ *Final Report*, para. 50.

³⁸ *Final Report*, para. 77.

³⁹ *Final Report*, para. 82.

⁴⁰ *Final Report*, para. 84.

⁴¹ *Final Report*, para. 85.

⁴² *Final Report*, paras. 131, 137. In order to achieve this goal, the committee argues that “participation should be direct and unfiltered”; true “[p]articipation both enables and assumes that values other than those for which the specialized agency were created be on the table in decision-making processes” (para. 131).

⁴³ *Final Report*, para. 116. Other good practices cited by the committee include the Economic and Social Council’s Permanent Forum on Indigenous Issues and the work of the International Labour Organization’s (ILO) Committee of Experts on the Application of Conventions and Recommendations with respect to Convention no. 169 Concerning Indigenous and Tribal People in Independent Countries, 26 June 1989, 1650 UNTS 383 paras. 118, 124 (ILO Convention 169).

Indigenous peoples in initiating and preparing World Heritage nominations, such as in the case of Pimachiowin Aki in Canada and Budj Bim Cultural Landscape in Australia.⁴⁴

Simultaneously, recent practice indicates that the guarantees provided by these amendments to the conventions' operational guidelines do not always translate to better outcomes for communities, with the contentious inscription of the Kaeng Krachan Forest Complex on the World Heritage List in 2021 being a case in point.⁴⁵ Similarly, scholars have also expressed concerns about the veracity of the claims made by states with regard to community participation in the nomination of elements on the lists established by the Intangible Cultural Heritage Convention.⁴⁶ A welcome addition to the committee's report would have thus been to reflect further on how these drastically different outcomes remain possible and which steps can be taken to ensure that states respect existing guarantees of participation in international governance.

In its second phase of work, the committee members examined domestic practices and produced reports covering 33 jurisdictions; the report provides a concise summary of these findings, which helps to lift the veil shrouding the boundaries between international and domestic cultural heritage governance.⁴⁷ This is particularly useful, given that the domestic law of the state is usually seen as a 'black box' from the perspective of international lawyers. The results of the committee's work underline the diversity of cultural heritage issues at the domestic level, with cultural heritage being included in a range of legal fields, such as constitutional law, urban or local planning legislation, criminal law, intellectual property law, Indigenous rights, and administrative law. One important finding of the committee with respect to domestic practices of cultural heritage participation is that "[w]hen heritage is framed within areas of law where participation or private agency are more common, participation is strengthened."⁴⁸ In areas of law where state discretion is more common, such as administrative law, the report concludes that this "has a clear effect of limiting participatory governance possibilities, or at the very least relegating them to a mere advisory or consultative status."⁴⁹ This conclusion underlines the importance of considering the interplay between domestic and international law when considering new proposals for the fostering of community participation, whether in relation to global heritage governance or beyond.

Of further interest is the question of the actors granted the ability to participate in heritage governance at the domestic level: here, the report notes that "in most countries the state holds the prerogative on deciding whether to safeguard heritage." Subsequently, "participation of non-state actors only happens after that initial safeguarding decision, meaning it is inevitably a mediated participation."⁵⁰ Further elaboration on this point would have been welcome as the individual reports of committee members no doubt venture further into the question of the abilities of individuals and communities within different jurisdictions to challenge such initial decisions taken by the state – for example, through the vehicle of administrative law. However, as the report acknowledges elsewhere, the state cannot simply be "imagined away" out of the process of heritage safeguarding, whether at the international or the domestic level.⁵¹ Instead, there is a need for the development of additional mechanisms in which the prerogatives of the state can be balanced against those

⁴⁴ UN General Assembly 2022, paras. 60, 63.

⁴⁵ Office of the High Commissioner for Human Rights 2021.

⁴⁶ Bortolotto et al. 2020.

⁴⁷ *Final Report*, paras. 87–114.

⁴⁸ *Final Report*, para. 91.

⁴⁹ *Final Report*, para. 94.

⁵⁰ *Final Report*, paras. 96–97.

⁵¹ *Final Report*, para. 50.

of communities. The report provides a number of useful examples in this regard, such as the possibility of direct democracy at the stage of listing or inscription, as can be found in countries such as Switzerland.⁵² Other options proposed within the report drawn from developments at the domestic level involve the removal of boundaries with respect to the ability of communities to acquire legal personality in heritage matters or ensuring that standards for legal standing remain fairly open and, thus, accessible to community actors.⁵³

Committee recommendations and proposals

The report presents several options for reforming global cultural heritage governance, roughly divided into two categories. The first of these is normative reform, which focuses on whether there are certain “international legal requirements that all institutions should follow” with respect to the treatment of individuals and communities as a matter of general international law (with the implication being that such requirements would automatically be binding on all states).⁵⁴ The committee characterizes the normative reform option as *de lege ferenda*, although one might equally be able to argue that the outlining of certain core procedural standards could be considered as an exercise in identifying *lex lata*.⁵⁵ Comparisons can be drawn here with proposals to formulate such standards in the scope of work on global administrative law or human rights law.⁵⁶

The most concrete aspect of the committee’s recommendations in relation to the normative reform of global cultural heritage governance relates to the principle of free, prior, and informed consent (FPIC).⁵⁷ The committee considers that the FPIC of vulnerable communities, such as minorities or Indigenous peoples, should be required “before a community’s heritage is used internationally.”⁵⁸ In doing so, it argues that FPIC should indeed be considered as ultimately requiring the consent of these communities rather than their mere consultation – the latter being the case, for example, under ILO Convention no. 169 – thereby adopting a progressive definition of the principle of FPIC.⁵⁹ The committee justifies this choice by noting that standards focused on consultation rather than consent have historically been “used as a shield to validate decisions made by the stronger actor, which probably would have been made similarly even without consultation.”⁶⁰ Instead, it argues that the role of legal principles such as FPIC should be to “[correct] power imbalances”; providing communities with the ability to withhold consent can thus address the inherent asymmetries between local communities and the state.⁶¹ However, the committee appears to stop short of arguing that this particular interpretation of FPIC can also be construed as a legal obligation generally applicable across all international organizations with respect to participation in global governance.

In any event, the committee’s main recommendations do not relate to normative reform but, rather, to a second category: that of institutional reform, in which mandates for the participation of affected communities are examined from the perspective of each specific

⁵² *Final Report*, para. 97. However, for a critique of the Swiss approach, see also Hertz 2015.

⁵³ *Final Report*, paras. 98, 101.

⁵⁴ *Final Report*, para. 60.

⁵⁵ Particularly in light of the committee’s apparent emphasis that the normative approach it identifies is derived from “general international law.” *Final Report*, para. 60.

⁵⁶ See Kingsbury, Krisch, and Stewart 2005; Benvenisti 2014; Stewart 2014; Cassese and D’Alterio 2016; Peters 2016; von Bogdandy, Goldmann, and Venzke 2017.

⁵⁷ Referred to by the committee as free, prior, informed, and sustained consent.

⁵⁸ *Final Report*, para. 61; see also para. 84.

⁵⁹ Cabrera Ormaza 2018; ILO Convention 169.

⁶⁰ *Final Report*, para. 67.

⁶¹ *Final Report*, para. 67.

international institution. It is this option that the committee focuses on in the majority of its conclusions for stakeholders within the field of heritage governance—albeit still targeting its proposals at the broadest possible level. The committee considers that “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,” which aims toward establishing consent (in situations affecting “historically oppressed and marginalized minorities, including Indigenous groups”)⁶² or consensus (in non-minority contexts).⁶³ As such, “[d]ifferent levels of participation may be accorded when doing so will assist in correcting historical disadvantage and/or ongoing power asymmetries.”⁶⁴ If consensus is not possible, the most affected stakeholder should prevail; if there are multiple stakeholders that are equally affected by a decision but that hold opposing views, then the committee considers that the status quo must be maintained in the interests of protecting the heritage at stake.⁶⁵ At a more practical level, the committee calls for uniformity of modalities and procedures of participation across the UN system, in which participation is transparent and accessible for communities.⁶⁶ This involves “due consideration of language, digital, logistical, and other barriers to participation.”⁶⁷

These points are further concretized in the resolution adopted pursuant to the committee’s report by the ILA’s eightieth conference, which proposes a number of reforms for UNESCO and the organs within the organization that oversee the implementation of international heritage treaties. Some of these proposals are furthermore echoed in a similar set of recommendations to “any other international and regional intergovernmental and non-governmental organisations and authorities with obligations in the area of cultural heritage governance”: the International Institute for the Unification of Private Law (UNIDROIT), in relation to its 1995 Convention on Stolen or Illegally Exported Cultural Objects; the UN human rights treaty bodies; and national and local authorities.⁶⁸ A number of these proposals will be examined here.

First, in relation to reforms for UNESCO and other relevant international organizations, the resolution proposes a number of amendments to the applicable operational guidelines and directives of these organizations, such as the recognition of the right to participate in decision-making about heritage governance. This right has been widely recognized with respect to environmental decision-making, including decision-making within international fora, but has yet to be concretely endorsed by the governing bodies of the cultural heritage conventions such as UNESCO.⁶⁹ A further recommendation made with respect to UNESCO and its organs is to amend the relevant operational guidelines and directives to “include greater participation of non-state actors in the definition, listing, and monitoring of heritage safeguarded by international instruments.”⁷⁰

One shortcoming of the report with regard to this point is that it is not entirely clear whether the proposed amendments should relate to participation safeguards in decision-making processes at the domestic level with respect to heritage that is safeguarded by international law or, conversely, to participation directly within these decision-making

⁶² *Final Report*, para. 140(1).

⁶³ *Final Report*, paras. 132, 140(5).

⁶⁴ *Final Report*, para. 140(1); see also para. 140(3).

⁶⁵ *Final Report*, paras. 132, 140(1).

⁶⁶ *Final Report*, paras. 131, 135.

⁶⁷ *Final Report*, para. 140(6).

⁶⁸ Resolution 01/2022; Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457.

⁶⁹ For example, in the 1992 Rio Declaration on Environment and Development, 12 August 1992, 31 ILM 874 (1992), the Aarhus Convention, and the Escazú Agreement, as discussed above; see also Ebbesson 2021, 364. Beyond the context of specific treaty regimes, see Human Rights Council 2013, paras. 29, 36–40; 2015, para. 42; 2018, 12.

⁷⁰ Resolution 01/2022.

processes at the international level. Both levels of participation have a role to play in securing a stronger position of communities *vis-à-vis* states in global heritage governance, yet, at present, most operational guidelines and directives do not establish safeguards for participation within international fora; in this respect, developments within international environmental law could lead the way.⁷¹ By contrast, a great deal of progress has been made in recent years in the operational directives and guidelines of UNESCO's cultural conventions with respect to guarantees for participation at the domestic level.⁷² Since the committee's report does not explicitly distinguish between participation at the domestic, regional, or international level, the importance of these developments (and, conversely, the lack of progress with regard to the elaboration of truly international participation standards) is somewhat obscured.

The committee's resolution also calls upon the UN human rights treaty bodies to recognize the right to participate in decision-making as extending to matters relating to cultural heritage. As discussed in the report, the existence of such a right has previously been endorsed by the Special Rapporteur on cultural rights.⁷³ The Special Rapporteur has thus noted that the right to take part in cultural life guaranteed by Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights "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,"⁷⁴ calling upon states to establish procedures that can guarantee such participation.⁷⁵ However, it is important to note that the existence of such a right has yet to be clearly endorsed outside the setting of the work of the Special Rapporteur.

The resolution moreover proposes that organizations should adopt "measures that acknowledge the special importance of heritage to minority and Indigenous groups, and attribute considerable weight to minority and Indigenous views over those of states when minority and Indigenous heritage is under consideration." This statement is unfortunately less ambitious than the approach of the committee in its report with respect to the principle of FPIC. By merely insisting that organizations should "attribute considerable weight" to the views of minorities and Indigenous peoples, as opposed to requiring their consent, this proposal is, furthermore, somewhat out of step with doctrinal developments with respect to the principle of FPIC in which consent is considered to be required "if the decision could result in a substantial impact on a people's fundamental rights."⁷⁶ That being said, some commentators remain doubtful whether this interpretation of FPIC could be considered customary international law;⁷⁷ in any event, such an obligation would mainly be directed at states and not necessarily at international organizations. Further clarification by the committee on this point would have been welcome, particularly as the operational guidelines of several cultural heritage treaties establish FPIC requirements yet provide no further

⁷¹ Aarhus Convention, art. 3(7); Economic Commission for Europe, *Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums*, UN Doc. ECE/MP.PP/2005/2/Add.5, 20 June 2005, annex; Escazú Agreement, art. 7(12).

⁷² In relation to the World Heritage Convention, see, e.g., Operational Guidelines of the Convention, 2021, paras. 12, 64, 111, 123 (which were amended at the forty-third session of the World Heritage Committee in 2019 to include additional references to rights-based and participatory approaches to heritage management as well as the free, prior, and informed consent of Indigenous peoples).

⁷³ *Final Report*, paras. 53–54.

⁷⁴ Human Rights Council 2011, para. 78; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3.

⁷⁵ See also *Final Report*, para. 81.

⁷⁶ Jones 2020, 141–42; see also Barelli 2018, 269. However, compare Rombouts 2014, 220, who views FPIC as a "process of negotiation and consultation."

⁷⁷ De Moerloose 2020, 229–30.

guidance on what these requirements substantively entail in the context of international heritage governance.

Finally, the resolution makes several significant recommendations to national and local authorities, including the “expansion of options that allow for communities to have a greater say in how budgets are allocated to, and spent on, cultural heritage governance and safeguarding,” enhancing the presence of community stakeholders in cultural policy fora, including those that take “financial and procedural decisions affecting cultural heritage”; the “removal of procedural obstacles that impinge upon the ability of non-state actors to try and influence, politically or judicially, the governance of cultural heritage”; and, finally, the “facilitation of procedural ways and means, including via access to justice, to enable non-state actors to exercise control over their heritage and its governance.”

The future of participation in cultural heritage governance

Ultimately, the answer to the question that the committee set out to examine – whether global cultural heritage governance is inclusive and participatory – is clear on the basis of its analysis of international and domestic practice: in its current form, global cultural heritage governance is not inclusive as it is often limited to states or a select group of expert actors.⁷⁸ Even when other actors beyond this select circle are included within global heritage governance, they are often not given the tools to participate in ways that can meaningfully influence decision-making processes: as such, “[t]he 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.”⁷⁹

Although the report acknowledges that the state has a legitimate role to play in ordering global heritage governance and implementing heritage law within the individual sovereign sphere, it simultaneously recognizes that affected communities need to have a seat at the table, particularly in light of the growing influence of human rights within global debates on international governance.⁸⁰ In doing so, one comes full circle in the delicate balancing act between respect for human rights and state sovereignty that the committee posited in its introductory definition of global heritage governance. The report raises several fundamental questions in this regard: what kind of change is necessary to unsettle this status quo, and how can it be achieved? Furthermore, to what extent can procedural reforms facilitate radical change in existing relationships between states and affected communities and thereby rectify historical inequalities?

The committee primarily focuses on individualized institutional reforms but acknowledges that it does so at the risk of further encouraging “institutional fragmentation and regime diversity.”⁸¹ Indeed, the problem of such a case-by-case approach to the issue of participation in global cultural heritage governance is that it can lead to different responses to similar problems, depending on the geographical location of an affected community or the legal framework within which heritage safeguarding activities are taking place. This carries an inherent risk of arbitrariness and could ultimately undermine the legitimacy of the broader project of global heritage governance.

Achieving such institutional reforms also requires wading through an additional layer of state consent in order to amend the operational guidelines or directives of the cultural treaties at stake. It is for this reason that the report’s broader focus on the right to

⁷⁸ *Final Report*, para. 131.

⁷⁹ *Final Report*, paras. 131, 135.

⁸⁰ *Final Report*, para. 140(3).

⁸¹ *Final Report*, para. 60.

participate in decision-making is particularly welcome as it underlines the need for cross-sectoral initiatives that can facilitate the harmonization of international heritage law with other areas of international law.⁸² Human rights developments within the UN appear particularly promising in this regard, such as the work of the Special Rapporteur in the field of cultural rights highlighted within the committee's report. More recent developments not discussed in the report also hold promise, such as the broader mobilization of several Special Rapporteurs to highlight the impact of the World Heritage inscription of Kaeng Krachan National Park in Thailand on the Karen people⁸³ or the decision of the Special Rapporteur on the rights of Indigenous peoples to dedicate his annual report to the UN General Assembly to the issue of protected areas and the rights of Indigenous peoples.⁸⁴ Such cross-fertilization of heritage issues to organizations beyond UNESCO is particularly relevant in light of the relative weakness of enforcement mechanisms within international heritage law. Indeed, the committee's report specifically argues in favor of expanding the mandate of the UN Special Rapporteurs "to investigate modalities of participation across other human rights mechanisms and beyond in the UN system,"⁸⁵ an approach that could potentially help to bridge the enforcement gap with respect to participatory standards in UNESCO's cultural conventions.

Fruitful work has also been carried out on similar issues in neighboring fields of international law such as international environmental law; heritage lawyers and scholars should pay heed to these broader debates in order to strengthen synergies between these areas of study and practice.⁸⁶ While the committee's report elides the question as to whether there are certain global procedural or substantive standards that should be met with regard to participation in global governance, it nonetheless underlines the relevance of adopting a holistic approach by virtue of its wide-ranging analysis of numerous international regimes both within and beyond international heritage law. When viewed from this perspective, the fragmentation of international law also presents opportunities for those seeking to reform international heritage law: the ability to draw upon developments in neighboring fields of international law by utilizing approaches such as systemic integration.⁸⁷

It is for this reason that the committee's report is of interest not only to those working on issues related to cultural heritage who are keen to see the issue of participation in cultural heritage governance framed through a legal lens but also for international legal scholars and practitioners working on issues of participation more broadly. Given that the purpose of the committees of the ILA is to not only clarify the current status of international law but also to outline its future development, the committee's recommendations will hopefully form a useful point of reference, not only for academics but also for members of civil society and the representatives of the communities affected by global heritage governance.

Bibliography

Adell, Nicolas, Regina F. Bendix, Chiara Bortolotto, and Markus Tauschek, eds. 2015. *Between Imagined Communities and Communities of Practice: Participation, Territory and the Making of Heritage*. Göttingen: Universitätsverlag Göttingen.

⁸² *Final Report*, para. 132.

⁸³ Office of the High Commissioner for Human Rights 2021.

⁸⁴ UN General Assembly 2022; see also Office of the High Commissioner for Human Rights 2022.

⁸⁵ *Final Report*, para. 134.

⁸⁶ Cittadino 2019; Dehm 2021; Petersmann 2022.

⁸⁷ As established by the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 31(3)(c). See McLachlan 2005.

- Barelli, Mauro. 2018. "Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)." In *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, edited by Jessie Hohmann and Marc Weller, 247–70. Oxford: Oxford University Press.
- Barritt, Emily. 2020. "Global Values, Transnational Expression: From Aarhus to Escazú." In *Research Handbook on Transnational Environmental Law*, edited by Veerle Heyvaert and Leslie-Anne Duvic-Paoli, 198–214. Cheltenham, UK: Edward Elgar.
- Benvenisti, Eyal. 2014. *The Law of Global Governance*. Leiden: Brill Nijhoff.
- Blake, Janet. 2019. "Engaging 'Communities, Groups and Individuals' in the International Mechanisms of the 2003 Intangible Heritage Convention." *International Journal of Cultural Property* 26, no. 2: 113–37.
- Bortolotto, Chiara, Philipp Demgenski, Panas Karampampas, and Simone Toji. 2020. "Proving Participation: Vocational Bureaucrats and Bureaucratic Activity in the Implementation of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage." *Social Anthropology* 28, no. 1: 66–82.
- Cabrera Ormaza, María Victoria. 2018. *The Requirement of Consultation with Indigenous Peoples in the ILO*. Leiden: Brill Nijhoff.
- Cassese, Sabino, and Elisa D'Alterio. 2016. "Introduction: The Development of Global Administrative Law." In *Research Handbook on Global Administrative Law*, edited by Sabino Cassese, 1–21. Cheltenham, UK: Edward Elgar.
- Chitty, Gill, ed. 2017. *Heritage, Conservation and Communities: Engagement, Participation and Capacity Building*. Abingdon, UK: Routledge.
- Cittadino, Federica. 2019. *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection*. Leiden: Brill Nijhoff.
- Dachlan, Rangga. 2019. "Intersessional Meeting of the International Law Association Committee on Participation in Global Cultural Heritage Governance, Oxford, 2–3 July 2019." *Santander Art and Culture Law Review* 5, no. 2: 277–80.
- De Moerloose, Stéphanie. 2020. "Indigenous Peoples' Free, Prior and Informed Consent (FPIC) and the World Bank Safeguards: Between Norm Emergence and Concept Appropriation." *Verfassung in Recht und Übersee* 53, no. 3: 223–44.
- Deacon, Harriet, and Riëks Smeets. 2013. "Authenticity, Value and Community Involvement in Heritage Management under the World Heritage and Intangible Heritage Conventions." *Heritage & Society* 6, no. 2: 129–43.
- Dehm, Julia. 2021. *Reconsidering REDD+: Authority, Power and Law in the Green Economy*. Cambridge, UK: Cambridge University Press.
- Durbach, Andrea, and Lucas Lixinski, eds. 2017. *Heritage, Culture and Rights: Challenging Legal Discourses*. Oxford: Hart Publishing.
- Ebbesson, Jonas. 2021. "Public Participation." In *The Oxford Handbook of International Environmental Law*, edited by Lavanya Rajamani and Jacqueline Peel, 350–67. Oxford: Oxford University Press.
- Ekern, Stener, William Logan, Birgitte Sauge, and Amund Sinding-Larsen. 2012. "Human Rights and World Heritage: Preserving Our Common Dignity through Rights-based Approaches to Site Management." *International Journal of Heritage Studies* 18, no. 3: 213–25.
- Fassbender, Bardo. 2019. "The State's Unabandoned Claim to be the Center of the Legal Universe." *International Journal of Constitutional Law* 16, no. 4: 1207–14.
- Gomez Peña, Natalia, and David B. Hunter. 2020. "The Hard Choices in Promoting Environmental Access Rights." In *Advocating Social Change through International Law: Exploring the Choice between Hard and Soft International Law*, edited by Daniel Bradlow and Daniel Hunter, 110–37. Leiden: Brill Nijhoff.
- Goodin, Robert E. 2007. "Enfranchising All Affected Interests, and Its Alternatives." *Philosophy & Public Affairs* 35, no. 1: 40–68.
- Hausler, Kristin. 2020. "The Participation of Non-State Actors in the Implementation of Cultural Heritage Law." In *The Oxford Handbook of International Cultural Heritage Law*, edited by Francesco Francioni and Ana Filipa Vrdoljak, 761–86. Oxford: Oxford University Press.
- Hertz, Ellen. 2015. "Bottoms, Genuine and Spurious." In *Between Imagined Communities and Communities of Practice*, edited by Nicolas Adell, Regina Bendix, Chiara Bortolotto, and Markus Tauschek, 25–57. Göttingen: Universitätsverlag Göttingen.
- Human Rights Council. 2011. *Report of the Independent Expert in the Field of Cultural Rights, Farida Shaheed: Access to Cultural Heritage*. UN Doc. A/HRC/17/38.
- Human Rights Council. 2013. *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*. UN Doc. A/HRC/25/53.
- Human Rights Council. 2015. *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*. UN Doc. A/HRC/28/61.
- Human Rights Council. 2018. *Framework Principles on Human Rights and the Environment*. Doc. A/HRC/37/59.
- Jones, Natalie. 2020. "Towards a Right of Peoples to Participation in Global Governance." PhD diss., University of Cambridge.

- Kingsbury, Benedict, Nico Krisch, and Richard B. Stewart. 2005. "The Emergence of Global Administrative Law." *Law and Contemporary Problems* 68, no. 3–4: 15–61.
- Koenig-Archibugi, Mathias. 2017. "How to Diagnose Democratic Deficits in Global Politics: The Use of the 'All-affected Principle.'" *International Theory* 9, no. 2: 171–202.
- Koskeniemi, Martti, and Päivi Leino. 2002. "Fragmentation of International Law? Postmodern Anxieties." *Leiden Journal of International Law* 15, no. 3: 553–79.
- Larsen, Peter Bille, ed. 2018. *World Heritage and Human Rights: Lessons from the Asia-Pacific and Global Arena*. Abingdon, UK: Routledge.
- Lixinski, Lucas. 2018. "Regional and International Treaties on Intangible Cultural Heritage: Between Tradition and Contemporary Culture." In *Research Handbook on Contemporary Intangible Cultural Heritage: Law and Heritage*, edited by Charlotte Waelde, Catherine Cummings, and Mathilde Pavis, 15–34. Cheltenham, UK: Edward Elgar.
- Lixinski, Lucas. 2019. *International Heritage Law for Communities: Exclusion and Re-Imagination*. Oxford: Oxford University Press.
- McCorquodale, Robert. 2004. "An Inclusive International Legal System." *Leiden Journal of International Law* 17, no. 3: 477–504.
- McLachlan, Campbell. 2005. "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention." *International and Comparative Law Quarterly* 54, no. 2: 279–320.
- Nafziger, James A.R. 2021. *Frontiers of Cultural Heritage Law*. Leiden: Brill Nijhoff.
- Näsström, Sofia. 2011. "The Challenge of the All-Affected Principle." *Political Studies* 59, no. 1: 116–34.
- Office of the High Commissioner for Human Rights. 2021. *Thailand: UN Experts Warn against Heritage Status for Kaeng Krachan National Park*. <https://www.ohchr.org/en/press-releases/2021/07/thailand-un-experts-warn-against-heritage-status-kaeng-krachan-national-park> (accessed 11 October 2022).
- Office of the High Commissioner for Human Rights. 2022. *Call for Submissions "Protected Areas and Indigenous Peoples' Rights: the Obligations of States and International Organizations"*. <https://www.ohchr.org/en/calls-for-input/2022/call-submissions-protected-areas-and-indigenous-peoples-rights-obligations> (accessed 11 October 2022).
- Olmos Giupponi, Belén. 2019. "Fostering Environmental Democracy in Latin America and the Caribbean: An Analysis of the Regional Agreement on Environmental Access Rights." *Review of European, Comparative and International Environmental Law* 28, no. 2: 136–51.
- Peters, Anne. 2016. *Beyond Human Rights: The Legal Status of the Individual in International Law*. Cambridge, UK: Cambridge University Press.
- Peters, Birgit. 2018. "Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention." *Journal of Environmental Law* 30, no. 1: 1–27.
- Petersmann, Marie-Catherine. 2022. *When Environmental Protection and Human Rights Collide*. Cambridge, UK: Cambridge University Press.
- Raustiala, Kal. 1997. "The Participatory Revolution in International Environmental Law." *Harvard Environmental Law Review* 21, no. 2: 537–86.
- Rombouts, S.J. 2014. *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent*. Oisterwijk, Netherlands: Wolf Legal Publishers.
- Sändig, Jan, Jochen Von Bernstorff, and Andreas Hasenclever. 2018. "Affectedness in International Institutions: Promises and Pitfalls of Involving the Most Affected." *Third World Thematics* 3, nos. 5–6: 587–604.
- Schreuer, Christoph. 1993. "The Waning of the Sovereign State: Towards a New Paradigm for International Law?" *European Journal of International Law* 4, no. 4: 447–71.
- Silverman, Helaine, and D. Fairchild Ruggles, eds. 2007. *Cultural Heritage and Human Rights*. New York: Springer.
- Smith, Laurajane. 2006. *The Uses of Heritage*. Abingdon, UK: Routledge.
- Spence, Annabelle. 2018. "Committee on Participation in Global Heritage Governance, Working Session and Roundtable. Sydney, 22 August 2018." *Santander Art and Culture Law Review* 4, no. 2: 341–46.
- Stec, Stephen, and Jerzy Jendrośka. 2019. "The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings." *Journal of Environmental Law* 31, no. 3: 533–45.
- Stewart, Richard B. 2014. "Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness." *American Journal of International Law* 108, no. 2: 211–70.
- UN General Assembly. 2022. *Report of the Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay – Protected Areas and Indigenous Peoples' Rights: The Obligations of States and International Organizations*, UN Doc. A/77/238.
- Von Bogdandy, Armin, Matthias Goldmann, and Ingo Venzke. 2017. "From Public International to International Public Law: Translating World Public Opinion into International Public Authority." *European Journal of International Law* 28, no. 1: 115–45.

- Vrdoljak, Ana Filipa. 2018. "Indigenous Peoples, Intangible Cultural Heritage and Participation in the United Nations." In *Intellectual Property, Cultural Property and Intangible Heritage*, edited by Christoph Antons and William Logan, 50–66. Abingdon, UK: Routledge.
- Waterton, Emma, and Laurajane Smith. 2010. "The Recognition and Misrecognition of Community Heritage." *International Journal of Heritage Studies* 16, no. 1–2: 4–15.
- Zagato, Lauso. 2015. "The Notion of 'Heritage Community' in the Council of Europe's Faro Convention: Its Impact on the European Legal Framework." In *Between Imagined Communiites and Communities of Practice: Participation, Territory and the Making of Heritage*, edited by Nicolas Adell, Regina Bendix, Chiara Bortolotto, and Markus Tauschek, 141–68. Göttingen: Universitätsverslag Göttingen.

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