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PARTICIPATION IN GLOBAL CULTURAL HERITAGE GOVERNANCE

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INTERIM REPORT

Participation in Cultural Heritage Governance at the Global Level

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I. PREFACE: THE WORK OF THE COMMITTEE, AND ITS INTERSESSIONAL MEETING, WOLFSON COLLEGE, OXFORD UNIVERSITY (UK), 2-4 JULY 2019

1. This Committee, established in 2017, started its work at the ILA’s Seventy-Eighth Conference in Sydney (Australia). 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 largely 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 domain-specific experts. States often also apportion their engagement across heritage domains to different areas of their machineries, while the existing governance schemes rely excessively on expert knowledge rather than on the involvement of all actors affected by cultural heritage law and its implementation. 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. Having in mind these preliminary considerations, the Committee at its first meeting acknowledged the importance of going beyond simply reaffirming the blind spots in the current law in excluding communities.1

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.2 However, there is still a fair degree of opacity as to how this connection work, 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.3 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 Committee looks more broadly at how a range of regional and universal bodies, in and beyond heritage, engage with affected participants. Accordingly, the Committee at its first meeting, in Sydney, decided to examine the issue of participation across a range of organizations, covering regional organizations, universal human rights bodies, United Nations (UN) specialized

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3 Spence (n 1) 1090-91.
agencies, and organs with a specific focus on heritage (whether under the aegis of UNESCO or non-governmental organizations).

3. During the ILA’s Seventy-Eighth Conference, on 22 August 2018, the Committee also 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 Sydney) a joint roundtable, entitled ‘Reimagining Community in International Legal Governance’. The roundtable, chaired by Professor Ana Filipa Vrdoljak (UTS, Australian Branch) was split into two parts: ‘Intersectionality’, and ‘Tapping into Global Governance Processes’. The first one engaged five experts, each representing a different interest group: indigenous peoples – Professor Dalee Sambo Dorough (University of Alaska Anchorage (USA)), co-chair of the ILA Committee on the Rights of Indigenous Peoples, and the International Chair of the Inuit Circumpolar Council; refugees – Professor Guy Goodwin-Gill (Oxford University, UK); feminism and gender – Associate Professor Beth Goldblatt (UTS); children’s rights – Dr Noam Peleg (UNSW); and disability rights – Ms Rosemary Kayess (UNSW). The speakers of the second part of the roundtable were: Dr Emma Palmer, member of the board of the Women’s Legal Service, New South Wales (Griffith University, Australia); Dr Kirsten Davies (Macquarie University, Australia); and Ms Annamari Laaksonun (UTS). While the debates touched upon various aspects of community participation, it was concluded that ‘[c]ommunities are more likely to work with the state and international bodies if such bodies are sympathetic towards the variety of community structures and governance mechanisms.’ Moreover, ‘the most successful examples of community participation in governance are those which ensure widespread and varied participation, respect for participants, methodological soundness, and the opportunity for them to engage with the final data.’ Therefore it is a key challenge for state and international bodies to ensure that all these aspects are properly addressed in participatory governance mechanisms. Further, community participation might differ in developed and developing countries, and we are also mindful of religious and traditional influences especially with respect to gender justice in cultural heritage, many of which influence the background against which the practices of regional organisations are formed. These themes, while crucial, for the most part inform the background of international practices analysed in this report, and will be in greater evidence in the subsequent work of the Committee, which will focus on national practices.

4. Considering the discussions at the working session and the issues addressed at the roundtable, the Committee members prepared an extensive overview of the practice of international organizations, associations, and specific heritage bodies, following a uniform research questionnaire. The main research question for these reports was: 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?

5. The outcome of this research was debated at the intersessional meeting hosted by the Wolfson College, Oxford (UK) on 2-4 July 2019. During the introductory session, Professor James AR

5 ibid 346.
6 ibid.
7 The following members and alternates participated in the meeting: Mr Thomas Adlercreutz (Sweden); Dr Kaare Bangert (Denmark); Dr Janet Blake, Mr Kevin John Chamberlain CMG, Ms Kristin Haulser, and Dr Aïda Tamer Chammam (UK); Professor Clémentine Bories (France); Dr Rodrigo Carlos Céspedes (Chile); Dr Alessandro Chechi (Switzerland); Dr Patricia Conlan (Ireland); Professor Yvonne Donders, and Ms Evelien Campfens (Netherlands); Dr Sebastián Axel Green Martínez (Argentina); Dr Andrzej Jakubowski (Poland); Associate Professor Lucas Lixinski (Brazil); Professor Fernando Loureiro Bastos (Portugal); Professor Elina Moustaira, and Dr Kalliopi Chainoglou (Greece); Professor James AR Nafziger, and Professor Alison Dundes Renteln (USA); Professor Robert Kirkwood Paterson (Canada); Dr Elvira Prado Alegre, and Professor Beatriz Barreiro Carril (Spain); Professor Sabine Irene Freifrau von Schorlemer (Germany); Professor Benedetta Ubertazzi (Nominee of the Chair); Mr Louis J van Wyk, and Mr Alexander C Dinopolous (South Africa); Professor Ana Filipa Vrdoljak, and Mr Nicholas Augustinos (Australia). The proceedings were reported by Mr Rangga Dachlan (Gadjah Mada
Nafziger, Chair of the former ILA Committee on Cultural Heritage Law, underlined the inescapability of clearly delineating participation in cultural heritage management. While referring to the work of the former Committee he noted that ‘participation is a loose end that is in urgent need of tying up, especially when it comes to the rights of indigenous peoples.’ He also added that ‘there was a clear admission that the role of non-expert, non-state “communities” in the governance of cultural heritage has been under-reported, is generally desired, and should be further articulated.’

6. Following the introductory session, debates were divided according to the five leading themes; each of which featured oral presentations by the Committee members based on their written reports regarding specific international organizations and organs: (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) – (Ms Evelien Campfens); UNESCO Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions (Professor Sabine Irene Freifrau von Schorlemer); UNESCO and its governance regime for the safeguarding of intangible cultural heritage (Professor Benedetta Ubertazzi); UNESCO International Code of Ethics for Dealers in Cultural Property (Professor Fernando Loureiro Bastos); and UNESCO World Heritage Committee (Professor Ana Filipa Vrdoljak); (2) ‘The Specificity of Cultural Heritage Governance’ – Economic and Social Council (ECOSOC) (Mr Nicholas Augustinos); Internet Corporation for Assigned Names and Numbers (ICANN) (Professor Alison Dundes Renteln); UN Environment Programme (UNEP) (Dr Aida Tamer Chammas); and the World Health Organization (WHO) (Professor Benedetta Ubertazzi); 3) ‘Participation, Heritage, and Regional Organizations’ – Arctic Council (Dr Kaare Bangert); Organization of Islamic Cooperation (OIC) (Associate Professor Janet Blake); Organization for Security and Co-operation in Europe (OSCE) (Mr Kevin Chamberlain CMG); European Union (EU) (Dr Patricia Conlan); Caribbean Community and Common Market (CARICOM) (Professor Elina Moustaira); African Regional Intellectual Property Organization (ARIPO) (Mr Louis Van Wyck, and Mr Alexander C Dinopoulos); Organization of American States (OAS) (Dr Beatriz Barreiro Carril); Andean Community (Dr Rodrigo Cespedes); (4) ‘Specialized Organizations and International NGOs’ – INTERPOL (Mr Thomas Adlercreutz); International Labour Organization (ILO) (Dr Kalliopi Chainoglou); Southern Common Market (MERCOSUR) (Dr Sebastián Axel Green Martínez); World Trade Organization (WTO) (Professor Robert Kirkwood Paterson); UN World Tourism Organization (UNWTO) (Dr Elvira Prado Alegre); IALA (Professor James AR Nafziger); and Food and Agriculture Organization (FAO) (Mr Louis Van Wyck, and Mr Alexander C Dinopoulos); (5) ‘Human Rights, Heritage, and Participation’ – European Court of Human Rights (ECtHR) (Professor Clémentine Bories, co-authored with Associate Professor Marine They); UN Human Rights Council (HR Council) and Special Rapporteur on Cultural Rights (Ms Kristin Hausler); UN Committee on the Rights of Persons with Disabilities (UNCRPD) (Dr Kalliopi Chainoglou); International Organization for Migration (IOM), and UN High Commissioner for Refugees (UNHCR) (Dr Alessandro Chechi); Committee on Economic, Social and Cultural Rights (CESCR) (Professor Yvonne Donders).

7. In addition, five papers were given on current developments in the practice of international and domestic cultural heritage law: ‘State Immunity and Cultural Heritage – Rubin v Iran’ (Professor James AR Nafziger); ‘Export of Cultural Objects and the Protection of National Heritage – Heffel v Attorney-General of Canada’ (Professor Robert Kirkwood Paterson); ‘The Basilica of Nuestra Señora de la Merced Case: Case Note of Siderides, Marcelo and Others Concerning Damage to Cultural Heritage In Argentina’ (Dr Sebastián Axel Green Martínez); ‘US Bill “One Step to Protect Human Heritage in Space Act”’ (Dr Elvira Prado Alegre); ‘Geneva Declaration “Human Rights and Culture Heritage: Committed Cities Working Together”’ (Dr Andrzej Jakubowski).

University (Indonesia), and Oxford University (UK)). For a summary of proceedings see R Dachlan, ‘Intersessional Meeting of the International Law Association Committee on Participation in Global Cultural Heritage Governance Oxford, 2-3 July 2019’ (2019) 5(2) Santander Art and Culture Law Review 277.

8 ibid 278.
8. In light of the reports and papers presented, the Committee firstly debated how the organizations under examination contextualize and approach the theme of cultural heritage and its governance. Secondly, the elusive notion of participation was discussed. The abundance of information amassed made it possible to substantiate the variety of meanings this notion carries on a general level. In this regard, it was decided that the main task of the Committee would now be to understand the modalities in which participation takes place in cultural heritage governance at the global level. Hence the Committee agreed that it would focus on the research concerning national and regional practices vis-à-vis the standards to be achieved at the international level.

9. These events and discussions have formed the views expressed in the remainder of this report, which will also form the basis of further reflection and be advanced in the future phases of the Committee’s work.

II. INTRODUCTION

10. Cultural heritage has today become a global concern, operating ‘at a range of different spatial, temporal and institutional scales’, which can be observed within various layers and areas of international law, mostly at the level of treaty law, but also to some extent 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 in both their individual and collective dimensions as a key component of social development and the empowerment of formerly marginalized groups and communities. 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 cooperation 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, almost ‘self-contained’, methodologically fragmented regimes that often lack harmony between various norm-systems and institutions. These 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, enforcement and reconciliation of various cultural interests and the rights of individuals and groups who have created or enjoyed a given heritage. In addition to these shortcomings, the Committee observes that the current challenges arising from the globally-observed domestic measures directed to tackle pandemical threats may possibly turn against effective cultural heritage governance. 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.

11. This interim report offers an overview of the practice of cultural heritage governance and participation based on the research reports presented in Oxford in 2019 (see paragraph 6, above); the 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) (Mr Piers Davies (New Zealand)); peacekeeping operations and participation (General Massimiliano del Casale and Mr Umberto Montuoro (Italy)); International Council of Museums (ICOM) (Professor Marie Cornu Volatron (France)); International Criminal Court (ICC) and the Trust Fund for Victims of the ICC (Dr Marina Lostal (The Netherlands)); Council of Europe (CoE) (Associate Professor Amy Strecker (Ireland)); Organization of African Unity (Dr Robert Peters (Germany)); South American Union of Nations (UNASUR) (Professor Aziz Tuffi Saliba (Brazil)); UNESCO Committee for the Protection of Cultural Property in the Event of Armed Conflict (Ms Alice Lopes Fabris (Brazil)); Group of Seven (G7) (Professor Manilo Frigo (Italy)); World Bank (Associate Professor Jeanne Huang (Australia)); UN Human Rights Committee (HRC) (Professor Yoshiaki Sato (Japan)); Association

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of South-East Asian Nations (ASEAN) (Dr Hanna Schreiber (Poland)); and South-Asian Association for Regional Co-operation (SAARC) (Ms Nudrat B Majeed (Pakistan)). Descriptively, the report argues that the blame for a lack of genuine participation still tends to fall on the usual suspects: states and experts. Normatively, it postulates that in order for the safeguarding of global public goods (like heritage) to be effective, there is a need for effective engagement of actors beyond those two categories, and that international organs should follow the line of the jurisprudence of international bodies themselves when participation in relation to domestic processes is under scrutiny. A more participatory and inclusive approach would enhance many international legal governance regimes, but we focus for our purposes on global public goods, such as heritage, where the stakes of participation are higher because those are goods that extend beyond the sovereign interests of states, and speak directly to populations. It would also fit better with a model that preaches governance over regulation, and better engage the areas not traditionally covered by international law, while promoting international law’s purported goals.

12. Methodologically, this interim 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. It is based on the overview of legal sources, official reports, and related scholarship. The analysis is largely founded on the original research questionnaire followed by the Committee (see paragraph 4, above). Accordingly, the structure of the report is built on five general sections. First, it unpacks 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, it lists the weaknesses in the existing governance frameworks on the one hand, and describes the best practices observed on the other. Finally, this interim report offers 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. They will also form the basis for the further work of the Committee in relation to domestic regulatory regimes and practices of participation in cultural heritage governance. A special effort has been made to make this report accessible and clear to non-specialized audiences as well.

III. GLOBAL GOVERNANCE OF CULTURAL HERITAGE

13. While the central issue for this interim 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’ that address problems affecting various actors on the international plane. According to its original conceptualization, fostered by a report of the Commission on Global Governance (1995), it covers ‘the sum of many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action taken.’ Accordingly, global governance would involve ‘formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have

\[11\] This interim report has also benefited from the comments by Dr Victoria Nalule (Nigerian Branch), and language revision by Mr James F Hartzell, JD.
\[12\] For more on how expert governance is a trend in general international law, see generally D Kennedy, A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy (PUP 2016).
\[13\] The terminology of global public goods is drawn from economics, but (international) legal scholars use it to mean essentially shared safeguarding objectives of global import, like the environment, human rights, Antarctica, outer space, and heritage.
agreed to or perceive to be in their interest.'

Pursuant to the above definition, the main objective of global governance is to search for a common agreement in the form of cooperation at the international level. Moreover, it entails that 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.’

A. The features of global governance of cultural heritage

14. Cultural heritage, being an important resource for present-day and future generations, constitutes one of the major areas of the system of global governance. 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

15. Global governance is founded on the presumption of the existence of certain interests, values and goods common to all humankind. These may comprise, inter alia, peace, security, environment, welfare, global development, and cultural heritage. Indeed, cultural heritage has increasingly been associated with global common goods or global public goods. Importantly, this concept is explicitly addressed in Preamble to UNESCO’s World Heritage Convention, and has been referred to by the UN Development Programme on various occasions. 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. 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’. Cultural diversity has been recognized and promoted as a global common good for a number of reasons and purposes, including its importance to peace and stability, progress and development, and the full realization of all human rights. Moreover, the protection of cultural heritage in its diversity has been considered as a crucial element for

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17 ibid.
20 Convention Concerning the Protection of World Natural and Cultural Heritage (adopted 16 November 1972, in 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’ (2nd recital). For more on the conceptualisation of world heritage as a global common good, see, e.g. A Jakubowski, ‘A Constitutionalised Legal Order. Exploring the Role of the World Heritage Convention (1972)’ in A Jakubowski and K Wierczyńska (eds), Fragmentation vs the Constitutionalisation of International Law A Practical Inquiry (Routledge 2016) 197-201.
maintaining global peace and security\(^{24}\) and sustainable development.\(^{25}\) Hence the mainstreaming of culture and cultural heritage is increasingly seen as both a global good and a pillar of the international order.\(^{26}\)

2) Diversity of law-making processes

16. 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.\(^{27}\) 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 intertwined with the growing regulatory framework in this area. In fact, international cultural heritage regulation has expanded beyond the realm of culture-oriented instruments.\(^{28}\) 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 cultural aspects of human existence ‘of fundamental importance to people around the world.’\(^{29}\) 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,\(^{30}\) adopted by the International Council of Museums (ICOM).

3) The institutional matrix of global cultural heritage governance

17. 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 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 6, above). Generally speaking, the key functions and powers of these bodies regard listing procedures, financial and expert assistance, and awareness and capacity 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

\(^{25}\) Transforming Our World: the 2030 Agenda for Sustainable Development (25 September 2015) UN Doc A/RES/70/1, paras 4.7, and 11.4.
\(^{29}\) JAR Nafziger, RK Paterson, and AD Renteln (eds), Cultural Law: International, Comparative and Indigenous (CUP 2010) intro.
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. 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); the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (‘1970 UNESCO Convention’); the World Heritage Convention; and the Convention for Safeguarding of the Intangible Cultural Heritage (ICH). #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 situation, 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. 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 will highlight some of these best practices.  

18. The work of the Committee 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, 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. 

19. 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’. 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.

20. 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. 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, 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. 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 criminal courts and tribunals, as evidenced in the ICC judgment in *Al-Mahdi* (2016), and subsequent reparations order (2017). The implementation of this reparations order involves the victims’ participation in cultural heritage rehabilitation and management programmes.

4) The expanding role of non-state actors

21. In addition to the diversity of law-making and the growing complexity of the institutional international framework, the recognition of non-state actors, comprising communities, groups, and individuals, is another critical element of the global governance system. This is particularly true in the case of cultural heritage governance. 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.’ While the status of individuals and groups will be discussed in further sections of this interim 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

43 *Prosecutor v Al Mahdi* (Reparation Order) ICC-01/12-01/15-236 (17 August 2017).
44 *Prosecutor v Al Mahdi* (Decision on the Updated Implementation Plan from the Trust Fund for Victims) ICC-01/12/01/15 (4 March 2019) para 66.
45 Zürn (n 14) 249; also see Joyner (n 15) 27-35.
B. The notion of global cultural heritage governance

22. 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 interim report, global cultural heritage governance should be understood as the system of management of cultural heritage issues at the international level pursuant to the variety of regulatory and institutional frameworks. 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 principles of good governance and the rule of law.

IV. PARTICIPATION AND GLOBAL GOVERNANCE

A. Participation and governance

23. 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 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

24. The participation paradigm, inherently linked to both cultural life and global governance, has gained much attention in the most recent decade. It is broadly employed as a policy principle of sustainable development, environmental governance, global constitutionalism, and global administrative law (GAL). 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.

25. 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. 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

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50 S Wheatley, ‘A Democratic Rule of International Law’ (2011) 22(2) EJIL 525, 548.
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.

26. Another key element of good governance, as alluded to in paragraph 23 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 human rights approaches. These are further discussed below. Second, an unintended 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, and while there is some leeway for accommodating cultural relativism in heritage processes in practice, 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’

27. 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’. 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 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.

28. 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. 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.

29. 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

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54 See, e.g. S Näström, ‘The Challenge of the All-Affected Principle’ (2011) 51(1) Political Studies 116


more sustainable engagement in the long term. It also allows us to more pragmatically discuss 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. And 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.

30. There is a case to be made that international heritage law should be geared primarily at protecting the interests of heritage holders, i.e., communities that live in, with, or around heritage. But 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

31. 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 undergirding participation, as well as modes of participation in international legal processes.

1) Participation and legal process: general concepts

32. 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 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’, also including ‘new minorities’ – migrants and refugees – as well as recognition of and respect for ethno-cultural differences. In relation to new minorities, it is important to underscore that the enjoyment of heritage and effective participation in cultural activities are important for inter alia 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 under-equipped to accommodate concepts like the ‘all-affected’ and ‘all-subjected’ principles.

33. 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’. 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 empowering formerly 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.

34. Similarly, the predominant orientation of existing works 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.

35. Law’s focus (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 of the law 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

36. 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 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. Already in 1992 the United Nations Rio Declaration on Environment and Development (1992 Rio Declaration)63 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. 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),65 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 the right is often amplified

61 The Committee is grateful to Dr Nalule (Nigerian Branch) for this insight.
64 ibid, Principle 10.
to include access to information in environmental matters by direct reference to instruments like the Aarhus Convention.

37. Indeed, the participation paradigm lies today at the core of environmental justice\textsuperscript{66} and global governance of the environment and sustainable development,\textsuperscript{67} although its practical operationalization faces a number of challenges stemming from persistently ineffective or flawed procedural mechanisms of participation.\textsuperscript{68} Significantly, because of these developments, environmental regimes hold great promise for addressing claims by historically disadvantaged groups like indigenous peoples.\textsuperscript{69}

38. 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,\textsuperscript{70} and to prevent social cultural exclusion.\textsuperscript{71} 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.\textsuperscript{72}

39. 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).\textsuperscript{73} 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. This debate has attracted growing recognition, sometimes even explicitly framed against Merryman’s dichotomy,\textsuperscript{74} 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 UNESCO treaties.

40. 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, UNESCO is an intergovernmental organization that is not above being co-opted by political interests of states.\textsuperscript{75} Yet there is also a dedicated class of international civil servants at UNESCO, committed to safeguarding cultural heritage.

41. A small part of this class 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.

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\textsuperscript{66} See A Harding (ed), \textit{Access to Environmental Justice: A Comparative Study} (Nijhoff 2007).
\textsuperscript{70} See, e.g. K Van Balen and A Vandesande (eds), \textit{Community Involvement in Heritage} (Garant 2015).
\textsuperscript{71} 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.
\textsuperscript{72} See P Monaco, ‘Measuring Culture and Development: Unlocking the UNESCO Indicators’ Potential’ (2016) 2 Italian Journal of Public Law 328.
\textsuperscript{73} JH Merryman, ‘Two Ways of Thinking About Cultural Property’ (1986) 80(4) AJIL 831.
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’.76

42. It is beyond the scope of this work to fully discuss the role and extent of ‘expert rule’ in this area,77 but suffice it to say that experts are a prominent and powerful stakeholder, 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.’78 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.

43. Other groups with a stake in cultural heritage and its management include museums, collectors, and the community in general. The ‘community’ is an elusive concept, but much hinges on it, as it is at the centre of who cultural property law should serve. The promise of community involvement in heritage is to ‘realign’ the very concept of heritage, and to suggest that everyone is a heritage expert.79 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.80 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.

44. 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,81 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.

76 LJ Smith, uses of Heritage (Routledge 2006) 11.
78 Watkins (n 74).
80 JD Kelly and M Kaplan, Represented Communities: Fiji and World Decolonization (ChUP 2001) 5.
81 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 M Jacobs, ‘Article 15: Participation of Communities, Groups, and Individuals – CGIs, not Just ‘the Community’’, in J Blake and L Lixinski (eds), The 2003 UNESCO Intangible Heritage Convention: A Commentary (OUP 2020) 273-289.
45. 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. 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.

46. 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. 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.

47. 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. The same happens with respect to heritage and in other resource contexts, particularly environmental governance.

48. 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.

49. 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) and Article 15(a) of the International Covenant of Economic, Social and Cultural Rights (ICESCR), as well as enshrined in a vast number of international human rights law instruments. This right is conceived as

82 As discussed in L Lixinski, ‘Selecting Heritage: The Interplay of Art, Politics and Identity’ (2011) 22(1) EJIL 81.
86 (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.
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.’ It is also recognized that this right presupposes equal and free access for all to a variety of cultural resources. Yet this right has long been seen as a mere political commitment or policy objective rather than a substantive (enforceable) right. Part of the challenge is that it is hard for an individual to clear the threshold for standing and to be able to speak individually on behalf of culture, which is fundamentally a collective endeavour.

50. As a result, there is an increasing push for the recognition of collective rights in international human rights law, 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 groups 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, to participate in the decision-making processes, consultation, governance, and information sharing. 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.

51. At the treaty law level, participation in cultural heritage governance has perhaps been best substantiated by the 2005 Faro Convention 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


88 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.


90 We note that regional bodies have usually gone further towards this recognition than universal ones, particularly the African and Inter-American bodies.


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 Convention declares the human right to heritage to be non-enforceable.

52. 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) 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.

53. Beyond human rights entitlements to participation, which seek to ultimately 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 non-governmental organizations (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.

54. 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. 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. 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.

55. 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

56. A recurring theme in the committee’s work thus far 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.

57. 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, and informed consent (FPIC) 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, 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. FPIC, 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 and by other heritage organisations, but are still largely restricted to only consultative status, with limited input in actual decision-making.

58. 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 FPIC is carried out.

59. 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), 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 68, below). Here, like with other community-based initiatives, failures stemmed from colonial legacies and state sovereignty.

60. 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.’ 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

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97 For a recent overview and review of the literature, see DF Robinson, *Biodiversity, Access and Benefit-Sharing: Global Case Studies* (Routledge 2015) 29-44.
98 ibid, 176-77.
101 ibid, 156.
102 ibid, 164.
strategic problems with promoting more community-based forms of governance over heritage, and needs to be combatted.103

61. 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).104 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. 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 communities directly in international decision-making.105

62. 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 groups’ or peoples’ rights. This reluctance can be partially explained since groups, far more than individuals, can pose an actual challenge to state sovereignty. 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.

63. 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. And, 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.

64. 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 essentialism106 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 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 plural voices within a

103 For more on strategic choices of the indigenous rights movement in general, see Engle (n 51).
104 Al Attar Ahmed, Aylwin and Coombe (n 99) 315.
106 See Engle (n 51).
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 human rights’ 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. Brining communities to the international table brings about a realization of pluralism and intersectionality that contains the possibility to become deeply destabilizing.

65. In sum, the potential and promise of participation and governance in international heritage law are high, but also mired with the potential of exacerbating already-existing obstacles. 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.

V. PARTICIPATORY GOVERNANCE OF CULTURAL HERITAGE IN PRACTICE: ITS NATURE AND MAJOR SHORTCOMINGS

66. Considering these challenges, 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 6 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

67. 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). Indeed, states appear to still 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 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’.

68. 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 Intergovernmental Committee for

107 See Jacobs, cit.
109 See Fiorentini and Jakubowski (n 57) 213.
Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (ICPRCP). This body, created in 1978, has been equipped since 2010 with a new system of mediation and conciliation. 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. Perhaps the sole mechanism within UNESCO’s organizational framework in which a person, group of persons, or organization may act directly on 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. While UNESCO does not play the role of an international judicial body, this procedure mainly serves as a consultative modality to prevent and stop violations of human rights and fundamental freedoms within the competence of the organization. Another example regards 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. The WHC had accepted the findings and recommendations of its expert report, 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. 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 (IIPFWH), which has observer status only and all the restrictions that entails with respect to participation.

69. 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, AR IPO) 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, culture

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111 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).
112 UNESCO Doc 104 EX/3 (1978); see UNESCO Doc 204 EX/BROCHURE CR (2018); also see L 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).
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 judicial 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.

70. 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,118 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, Inter-American Commission on and Court of Human Rights).119 In fact, participation in dispute settlement mechanisms is still constrained by procedural rules, particularly jurisdiction and representation rules.

B. Access to participatory mechanisms

71. 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.120 Since 2009, the two UN Special Rapporteurs in the field of cultural rights (Farida Shaheed (2009-2015), and Karima Bennoune (since October 2015)), have often addressed these issues in their thematic reports. In particular, the already-cited (paragraph 50, above) Report on ‘Access to cultural heritage’ observed that in most cases the final decision for identification and/or classification of cultural heritage lies with state institutions, that definitions of ‘stakeholders’ or ‘interested persons’ are generally lacking, and that the need to ensure the participation (and consent) of source or local communities is not always clearly stated.121 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’.122 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.’123 It was also noted that ‘participation, access and enjoyment are closely interrelated’.124 Furthermore, while recalling the UNESCO Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to It (1976),125 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

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120 HR Council, Resolution 10/23 (n 39).
121 HR Council, ‘Access to cultural heritage’ (n 93) para 53.
122 ibid para 61.
123 ibid para 63.
124 ibid para 22.
125 (Adopted 26 November 1976) UNESCO Doc 19 C/Resolutions + CORR. 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’ (para 2(a)).
concepts’. It was, therefore, concluded that states have the obligation to establish ‘procedures ensuring the full participation of concerned individuals and communities’, 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’.

72. In light of these observations, the Committee considers, as noted in paragraph 70 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 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, 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. 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

73. Within the examined organizational framework, participation still appears to be primarily consultative only. 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 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

126 HR Council, ‘Access to cultural heritage’ (n 93) para 58.
127 ibid para 70.
128 ibid para 80(n).
129 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.
74. The fundamental problem addressed by the Committee as to effective modalities of participation regards 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 charged is based in part on the failure to properly apply the principle of subsidiarity.

75. 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. 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. Finally, as already alluded to in paragraph 72 above, 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.

VI. GOOD PRACTICES OF PARTICIPATORY GOVERNANCE

76. 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 87, below).

A. Actors of participation

77. 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. 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 peoples has been obtained. 133 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 68 above). 134 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 135 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 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. 136

78. 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). 137 As regards the armed conflict regime, 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. 138 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. 139 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. 140 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.’ 141 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

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133 Operational Guidelines (n 117) para 123.
134 See Vrdoljak (n 119).
136 See Soggetti (n 108) 296.
140 (Adopted by the UNESCO intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation at its Tenth Session, January 1999) UNESCO Doc CLT/CH/INS-06/25 rev.
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.142

79. 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,143 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).144

80. 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’).145 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,146 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.

81. 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).

82. 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.147 In a similar vein, civil society regularly engages with the CRPD,148 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

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142 Also see UNESCO Docs 7SCC70/19/7.SC/8a (2019) and C70/19/7.SC/8b (n 139).
148 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.
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 (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

83. 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).

84. 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.

C. Scope

85. 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.

86. 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 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 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. Moreover, while referring to the situation in Guatemala, the CEACR referred to Article 6 of Convention No. 169 and recalled that:

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\text{[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}
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151 CESCR, ‘NGO participation in the activities’ (n 147).
must be undertaken in good 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 peoples must be given sufficient time to organize their own internal decision-making processes and to participate effectively in the decisions adopted.\(^{154}\) (emphasis added).

87. 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.’\(^{155}\) Moreover, in the CoE policy goals participatory governance of cultural heritage also became an explicit element of the concept of ‘good governance’.\(^{156}\) 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.’\(^{1157}\) 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,\(^{158}\) and substantiated in the Council’s conclusions of 25 November 2014 on participatory governance of cultural heritage.\(^{159}\) 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.’\(^{160}\) In this regard, the agenda of the European Year of Cultural Heritage (EYCH 2018) stands out. The decision establishing this programme\(^{161}\) 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 heritage reinforces the need to foster wider access to cultural heritage’ (Preamble, 13th recital). In other words, it linked the human right to access cultural

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\(^{156}\) See, e.g. art 5(c) of the European Landscape Convention (open for signature 20 October 2000, entered into force 1 March 2004) ETS No 176.


\(^{159}\) [2014] OJ C 463/1.

\(^{160}\) ibid para 9.

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

88. Effective 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 UNESCO162 and World Bank programmes.163 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’.164 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’.165 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.’166

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

90. 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

162 For more on capacity-building in the realm of intangible cultural heritage, see A Jakubowski, ‘Art.25–28 Intangible Cultural Heritage Fund’ in Blake and Lixinski (n 53) 392
166 ‘Europe for Citizens’ (n 164) 20.
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

91. From among the vast practice of global governance, undoubtedly the experience of environmental law and policy needs to be recalled. As already described (paragraph 36 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. 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. PRELIMINARY CONCLUSIONS AND FURTHER WORK

92. On the basis of the Committee’s work in the first two years of its mandate, a number of conclusions can be drawn from its extensive mapping of participation in international legal governance, both within and beyond the heritage field.

93. First of all, there is 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. 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.

94. 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 participation, and 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.

95. Environmentalism offers elements to think about in terms of consultation, but tends 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.

96. In relation to human rights, intersectionality should also be used to give the UN Special Rapporteur on Cultural Rights the mandate to investigate modalities of participation across other human rights mechanisms and beyond in the UN system.

97. 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.

98. Modalities and rules of participation should be drafted in accessible and inclusive language and provide specific guidance towards achieving the stewardship of global public good. 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.

99. Overall thus, participation 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 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.

100. 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.

101. The experience of regional entities and the importance of subsidiarity therefore align with the proposed further work of the Committee: 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 (which is the trend in international law), and give us a glimpse 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, as indicated in paragraph 3, above, insight into national legal systems allows us 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. We therefore propose as a Committee to map domestic modalities that can inform international experiences and offer ways to overcome many of the obstacles identified in the international mapping, as well as confirm the trends in best practices.