Universiteit
Leiden
The Netherlands

Striking a balance between local and global interests: communities and cultural heritage protection in public international law

Starrenburg, S.H.

Citation
Starrenburg, S. H. (2024, May 2). *Striking a balance between local and global interests: communities and cultural heritage protection in public international law*. *Meijers-reeks*. Retrieved from https://hdl.handle.net/1887/3750283

Version:	Publisher's Version
License:	Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden
Downloaded from:	https://hdl.handle.net/1887/3750283

Note: To cite this publication please use the final published version (if applicable).

6 Cross-fertilisation of concepts aimed at the protection of individuals and communities

This chapter examines whether lessons can be drawn from areas of international law closely allied to cultural heritage law, such as international human rights law and international environmental law. It asks to what extent the elaboration of legal concepts in these regimes could shape efforts to strengthen the position of individuals and local communities in international heritage law. It thus evaluates whether the systems of protection and governance adopted in these areas of international law would also be suitable in the context of addressing the issues previously identified with regards to cultural heritage law.

The chapter will focus in particular on the increasing emphasis in international legal instruments on the importance of public participation as an element of international governance, zooming in on the role of public participation in the implementation of international law, as opposed to participation in the development of new legal norms. In the realm of cultural heritage protection, public participation, and the related concepts of consultation and the requirement to obtain free, prior and informed consent (FPIC), have the potential to bridge the divide between international governance and local lived realities.

The chapter begins by briefly recapping the problems identified in the previous chapter with regard to the shortcomings of the current system of international heritage protection from the perspective of individuals and local communities. It subsequently addresses three core techniques adopted in other international legal regimes: firstly, the principle of public participation, as elaborated upon in particular within international environmental law; secondly, the requirements of consultation of affected communities and free, prior and informed consent, developed *inter alia* in the context of UNDRIP and ILO Convention No. 169; and finally, the use of impact assessments in environmental and human rights law.

6.1 Revisiting the problems faced by individuals and local communities in the context of international heritage protection

As has been outlined in Chapter 5, international heritage treaties sometimes – albeit unintentionally – frustrate their ability to achieve their goal to safeguard living heritage in ways that are problematic from the perspective of

the procedural and substantive human rights of individuals and local communities.

The most obvious example of this trend is a lack of community involvement in the inscription of cultural heritage on international lists of cultural heritage, as well as in the subsequent management of cultural heritage which has been inscribed on such lists. This runs counter to the growing awareness within public international law that such communities must be involved in decision-making with potential impacts upon them.[1] Conceptually speaking, the implementation of cultural heritage treaties often presupposes that the interests of individuals and local communities with regards to the management of cultural heritage sites will be subsumed in universal interests; conversely, if their interests run counter to these universal interests, then they will be conceived of as automatically in opposition, or lower in the hierarchy than such interests.

This dynamic is translated into a range of effects for local communities, particularly limitations on prior uses of the heritage site, such as agriculture, active worship or rituals, or even simply living or working in and around the site. This is sometimes known as the 'freezing' of cultural heritage; once heritage has been officially recognised as such pursuant to domestic or international protection mechanisms, decisions on its management or use are elevated beyond the local realm. As a result, individuals or communities are no longer able to use or modify that which they had traditionally considered as 'their' heritage. When taken to its extreme, individuals or communities might be forcibly removed from the heritage site, for example through eviction procedures.

While evictions are generally problematic in relation to tangible cultural heritage, similar dynamics are also visible in relation to the international protection of intangible cultural heritage. A situation may thus emerge in which a community does not view a given practice as 'heritage', but rather as simply an element of day-to-day life; accordingly, they experience the label of heritage as inappropriate. Along similar lines, international inscription can become a pathway through which interference by the state with the practices of minority groups becomes officially sanctioned. In these situations, inscription becomes a tool for the state to extend its control over the cultural practices of minority groups.

In short, in certain situations cultural heritage law helps to transform places and practices which would have normally been considered part of the private sphere into the public domain,[2] thereby paving the way for intervention by

1 The reasons *why* such participation is desirable will be discussed further below in section 6.2.

2 Although the public/private distinction is admittedly perhaps not the most appropriate to make here, given that what is meant by the 'private sphere' here effectively means the local public domain. However, the distinction is chiefly made here to distinguish between the public domain of the state, and the domain of the individual and the community in which they are situated.

the state in the name of the public – or, in the case of international law, the universal – interest. This trend is particularly problematic from the perspective of individuals and local communities who are impacted, sometimes in far-reaching ways, by the decisions of states to protect cultural heritage pursuant to public international law. This state of affairs raises the question how this problem – that is to say, the representation of the interests of individuals and local communities in international legal decision-making – has been tackled in other areas of international law.

While this question can be addressed from a range of angles, both theoretical and practical, the present chapter focuses on three specific legal techniques: the principle of participation; the joint concepts of consultation and FPIC; and impact assessments. Each of these techniques is centred around the core idea of participation in international law. The choice for these topics was made not only in light of the overarching theoretical framework of the dissertation (the humanisation of international law), but also in light of the fact that these techniques have been proposed in response to similar problems arising in the areas of international human rights law and international environmental law.

The goal here is not to provide an exhaustive overview of the development of these legal norms over time, but instead to focus on their current content – given that the aim of the dissertation is to propose contemporary solutions to the problems faced by cultural heritage law with respect to individuals and communities. There are moreover compelling legal reasons to discuss the content of these participation obligations, namely that they are also binding upon the states involved in cultural heritage law, either by virtue of participation in the legal regimes in which they have been codified, or by virtue of their incorporation into customary international law. Finally, as discussed in Chapter 4, some of these concepts have been incorporated into cultural heritage treaties; their elaboration in other legal regimes could be used to inform their definition and implementation in cultural heritage law.

6.2 THE PRINCIPLE OF PUBLIC PARTICIPATION

As a term, 'public participation' in international law carries a range of meanings. Participation can take place across a broad spectrum of geographic levels, from the local, to the national, the regional, or the international. These geographic levels can similarly be applied to the 'public' seeking to participate: whereas local publics are often easy to identify, the closer one gets to the international level, the more nebulous the definition of the public is likely to become.[3] Participation can also assume a variety of substantive forms, although it is often left unspoken which form of participation a given author is speaking

3 Nonetheless, it is also possible that participation at the *international* level will involve a *local* public, if the decision affects the local level but is taken at the international level.

of. As such, it can be used to refer to participation in the *creation* of international law; the participation of civil society organisations in the drafting of international treaties provides an example of this particular form. Conversely, participation in international law can also relate to participation in the *implementation* of international law, for example in the form of community management of a shared resource, the monitoring of implementation of international norms by states or other actors, and participation in activities such as public education or training programmes.[4]

Finally, public participation can also refer to participation in *decision-making* processes surrounding international legal norms. In this regard, Sherry Arnstein's so-called 'ladder of participation' has proven particularly influential in shaping ideas with regards to the nature of public participation in decision-making processes.[5] Each rung of the 'ladder' refers to a greater delegation of decision-making powers to the public, ranging from simply providing information, to consultation, and to the complete delegation of decision-making to the public.[6] The process of participation in decision-making is often guaranteed as an independent legal norm, through which the participation of individuals and communities is guaranteed in decision-making processes likely to affect them, for example through the right to consultation.[7]

Facilitating public participation is considered to be desirable for a variety of reasons.[8] Some thus see participation as intrinsically valuable, in light of concerns surrounding the legitimacy of decision-making procedures as well

4 Evan Hamman, 'Cultural Perceptions and Natural Protections: A Socio-legal Analysis of Public Participation, Birdlife and Ramsar Wetlands in Japan' (2018) 21 Asia Pacific Journal of Environmental Law 4, 14-15.

5 Sherry R. Arnstein, 'A Ladder Of Citizen Participation' (1969) 35 Journal of the American Institute of Planners 216.

6 Elizabeth A. Kirk, 'The Role of Non-State Actors in Treaty Regimes for the Protection of Marine Biodiversity' in Michael Bowman, Peter Davies and Edward Goodwin (eds), *Research Handbook on Biodiversity and Law* (Elgar 2016) 99. See also Otto Spijkers and Arron Honniball, 'Developing Global Public Participation (1)' (2015) 17 International Community Law Review 222, 233-5.

7 Hamman (n 4) 14-15.

8 On the motivations behind the facilitation of public participation in environmental law, particularly within the context of the tripartite procedural rights guaranteed by the Aarhus Convention, see Emily Barritt, *The Foundations of the Aarhus Convention: Environmental Democracy, Rights and Stewardship* (Hart Publishing 2020). Barritt proposes that the Aarhus Convention is motivated by three core purposes: ensuring environmental democracy, securing environmental rights, and safeguarding environmental stewardship. See also Nicola Sharman, 'Objectives of Public Participation in International Environmental Decision-Making' (2023) 72 International & Comparative Law Quarterly 333. More broadly on the justifications of a potential right to participation under international human rights law drawn from republican theories, see Nicholas McMurry, *Participation and Democratic Innovation under International Human Rights Law* (Routledge 2023) 44-63.

as a broader belief in the value of democratic decision-making.[9] These legitimacy concerns are heightened due to the nature of international law: whereas the legitimacy of international law for domestic publics was traditionally founded on the basis of state consent, with the state deemed to represent the views of its populace; as international law has grown in scope, so too has the role for public participation, in order to ensure the legitimacy of decisions adopted within international organisations with respect to often far-removed publics within the domestic sphere.[10] As such, in the case of common interest regimes such as environmental law, the ability of the public to participate in decision-making is an 'essential [indicator] of public control over public values'.[11] However, participation is also promoted for a range of instrumental goals,[12] such as ensuring that the public will accept the decision once it has been made,[13] or 'to curtail popular unrest … [to] improve the quality of policies and plans',[14] with the idea being that 'including many voices and knowledges in decision-making … [improves] the quality of decisions'.[15] These goals in turn inform who is granted the ability to participate and the extent to which they are allowed to participate.[16]

9 Jonas Ebbesson, 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' (2011) 4 Erasmus Law Review 71, 88. As Ebbesson notes, public participation, 'and the related rights to access to information and justice, are essential indicators of public control over public values' (at 88). See also Kirk (n 6) 96. From practice, see e.g. UNEP, *Putting Rio Principle 10 into Action: An Implementation Guide* (2015 UNEP) 63. This perspective can be traced back to the role of participation in theories on deliberative democracy: Nicholas McMurry, 'Applying Human Rights to Enable Participation' (2019) 23 The International Journal of Human Rights 1049, 1050; Maria Lee, 'The Aarhus Convention 1998 and the Environment Act 2021: Eroding Public Participation' (2023) 86 Modern Law Review 756, 757.

10 Simon Marsden, 'Public Participation in Transboundary Environmental Impact Assessment' in Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (Cambridge University Press 2012) 243.

11 Ebbesson (n 9) 88.

12 Anna Wesselink and others, 'Rationales for Public Participation in Environmental Policy and Governance: Practitioners' Perspectives' (2011) 43 Environment and Planning A: Economy and Space 2688, 2690.

13 Jonas Ebbesson, 'Public Participation' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008) 687.

14 Spijkers and Honniball (n 6) 229-233.

15 Lee (n 9) 757.

16 Kirk (n 6) 99; Gerd Winter, 'Theoretical Foundations of Public Participation in Administrative Decision-Making' in Gyula Bándi (ed), *Environmental Democracy and Law* (Europa Law Publishing 2014) 23-4. However, as Wesselink and others (n 12) point out, the goals of participation may sometimes be conflicting, and as such may call for divergent groups of participants and the types concerns that are included and when (2690); see also Sharman (n 8) 334.

6.2.1 Codification in international environmental law

Within international law, public participation emerged most clearly as a legal principle within the context of international environmental law in the 1990s.[17] While the trend towards emphasising public participation already materialised before this period in the context of domestic law, particularly in the United States, these trends were 'consolidated' with respect to international law through the codification of the principle of public participation in the 1992 Rio Declaration.[18] Principle 10 of the Rio Declaration thus provides that:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[19]

The division within Principle 10 of the principle of public participation into three elements – the right to information, the right to participation, and the right to a judicial remedy – is echoed throughout the majority of international legal instruments which seek to address public participation in environmental law. These rights are also more broadly referred to as 'procedural environmental rights'; procedural in the sense that they do not set out substantive norms for states to follow, but rather steps to be followed in the fulfilment of these substantive norms.[20]

---

17 For earlier international precedents, such as the Stockholm Conference and the World Charter for Nature, see Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1997) 8 Yearbook of International Environmental Law 51, 51-2.

18 Ebbesson, 'Public Participation' (n 13) 684. Furthermore, as noted in Jonas Ebbesson, 'Principle 10' in Jorge Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015), 'Principle 10 was instrumental for changing the substance of global environmental treaties in support of participatory opportunities for members of the public. Whereas essentially *no* global environmental agreement predating UNCED included any provision on Principle 10 issues, just about *all* such treaties adopted at or after UNCED provide for public access to information and/or public participation, albeit with different degrees of ambition' (at 308). On the development of public participation requirements at the domestic level, see *inter alia* Benjamin J. Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-Making' in B.J. Richardson and S. Wood (eds), *Environmental Law for Sustainability* (Hart 2006) 168-9.

19 UN General Assembly, Report of the United Nations Conference on Environment and Development (12 August 1992) UN Doc A/CONF.151/26 (Vol. I), Annex I, Rio Declaration on Environment and Development, Principle 10.

20 Birgit Peters, 'Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention' (2018) 30 Journal of Environmental Law 1, 2.

Following on from 1992, the formulation of the principle of public participation was subsequently refined, *inter alia* in the Rio+20 Declaration[21] and the 2010 UNEP Bali Guidelines; the latter provides a range of guidelines which elaborate further upon the elements of Principle 10.[22] It has also emerged in subsequent soft law developments not directly related to the Rio Declaration which '[express] an emerging global view on an expansive interpretation' of Principle 10,[23] such as the Sustainable Development Goals,[24] the Framework Principles on Human Rights and the Environment formulated by the UN Special Rapporteur on Human Rights and the Environment,[25] and the ILA New Delhi Declaration.[26] These developments underline the general recognition within international environmental law of the importance of ensuring public participation in environmental decision-making processes.

21 In the Rio+20 Declaration, the members of the UN General Assembly underscored the importance of 'broad public participation and access to information and judicial and administrative proceedings', and '[agreed] to work more closely with the major groups [defined as 'women, children and youth, workers and trade unions, business and industry, the scientific and technological community, and farmers] and other stakeholders, and encourage their active participation, as appropriate, in processes that contribute to decision-making, planning and implementation of policies and programmes for sustainable development at all levels': UN General Assembly, 'The Future We Want' (11 September 2012) UN Doc A/RES/66/288, para 43.

22 Governing Council of UNEP, Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice (26 February 2010) Decision SS.XI/5 (Bali Guidelines). See Lalanath De Silva, 'Public Participation in Biodiversity Conservation' in Jona Razzaque and Elisa Morgera (eds), *Elgar Encyclopedia of Environmental Law*, vol III (Elgar 2017) 470.

23 Stephen Stec and Jerzy Jendrośka, 'The Escazú Agreement and the Regional Approach to Rio Principle 10: Process, Innovation, and Shortcomings' (2019) 31 Journal of Environmental Law 533, 535.

24 In particular SDG Goal 16.7, which seeks to '[e]nsure response, inclusive, participatory and representative decision-making at all levels'; see also goal 16.3 (on access to justice) and 16.10 (on access to information): UN General Assembly, 'Transforming Our World: the 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1.

25 Human Rights Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles on Human Rights and the Environment (24 January 2018) UN Doc A/HRC/37/59, Annex. Principle 7 thus provides that '[s]tates should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request' (at 11). Principle 9 provides that '[s]tates should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process' (at 12). Finally, principle 10 provides that '[s]tates should provide access to effective remedies for violations of human rights and domestic laws relating to the environment' (at 13).

26 ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development (April 2002), annexed to Letter dated 6 August 2002 from the Permanent Representative of Bangladesh to the United Nations and the Chargé d'affairs a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the Secretary-General of the United Nations (9 August 2002) UN Doc A/57/329, Annex, para 5.1-3.

This trend is underscored by the fact that these procedural rights have also become embedded in numerous multilateral environmental agreements (MEAs),[27] such as the Convention on Biological Diversity (CBD),[28] the UN Framework Convention on Climate Change (UNFCCC)[29] and the Paris Agreement,[30] the UN Convention to Combat Desertification,[31] the International Treaty on Plant Genetic Resources for Food and Agriculture,[32] the Stockholm Convention on Persistent Organic Pollutants,[33] and the Minamata Convention on Mercury.[34] Moreover, two agreements have been adopted which specifically address procedural environmental rights, albeit at the regional level: the Aarhus Convention[35] and the Escazú Agreement.[36] A range of other international (environmental) agreements also provide for the raising of public awareness of environmental issues and making information publicly available about them, such as the Convention on International Trade in Endangered

27 For a discussion of these trends, see inter alia Lara Ognibene and Angela Kariuki, 'Standards in the Procedural Rights of Multilateral Environmental Agreements' in Stephen J. Turner and others (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019).

28 Convention on Biological Diversity (adopted 5 June 1992, entry into force 29 December 1993) 1760 UNTS 79 (CBD) art 14(1)(a); Cartagena Protocol on Biosafety to the Convention on Biological Diversity (adopted 29 January 2000, entered into force 11 September 2003) 2226 UNTS 208 (Cartagena Protocol) art 23; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, entered into force 12 October 2014) UNEP/CBD/COP/DEC/X/1 (Nagoya Protocol) art 12.

29 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entry into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 6.

30 Paris Agreement (adopted 12 December 2015, entry into force 4 November 2016) 3156 UNTS 79 (Paris Agreement) art 12.

31 UN Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (adopted 14 October 1994, entered into force 26 December 1996) 1954 UNTS 3 (UN Convention to Combat Desertification) arts 3, 5, 9, 10.

32 International Treaty on Plant Genetic Resources for Food and Agriculture (adopted 3 November 2001, entered into force 29 June 2004) 2400 UNTS 303, art 9.

33 Stockholm Convention on Persistent Organic Pollutants (adopted 22 May 2001, entered into force 17 May 2004) 2256 UNTS 119 (Stockholm Convention) arts 10(1)(d), 7(2).

34 Minamata Convention on Mercury (adopted 10 October 2013, entered into force 16 August 2017) 3202 UNTS (Minamata Convention) arts 12, 20.

35 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention). While the Aarhus Convention is open to ratification by non-UNECE member states (see art 19(3)), thus far none have done so.

36 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) 3397 UNTS (Escazú Agreement).

Species of Wild Fauna and Flora (CITES)[37] and the Convention on Migratory Species.[38]

While many of these agreements explicitly stipulate duties for the state or rights of the public in terms of access to information, participation in environmental decision-making, and access to justice, in many cases these obligations and rights have been formulated at a highly abstract level. Thus, while the CBD and its protocols call upon states to provide for public participation at the domestic level in a number of specific circumstances,[39] the precise modalities of such participation remain unfixed[40] and the implementation of these obligations accordingly often remains wanting.[41] Similarly, in the area of climate change law, the Paris Agreement has been critiqued for omitting the right to a judicial remedy,[42] and establishing normatively weak obligations with respect to access to information and public participation.[43] As such,

37 Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 (CITES) art VIII.6-8 and XII.2.

38 Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333 (CMS) art V.5, IX.4.

39 See e.g. CBD art 14(1)(a); Cartagena Protocol arts 23(1)(a)-(b), 23(3); Nagoya Protocol art 12(2). On the implementation of the provisions in the Cartagena Protocol, see e.g. COP-MOP Cartagena Protocol, Implementation Plan for the Cartagena Protocol on Biosafety (19 December 2022) CBP/CP/MOP/DEC/10/3, 11.

40 Although in the case of the Nagoya Protocol, guidelines have been formulated in the context of subsequent voluntary guidelines adopted by the CBD COP, such as the Tkarihwaieì:ri Code of Ethical Conduct on Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant for the Conservation and Sustainable Use of Biological Diversity adopted by the CBD COP in 2010, as well as broader human rights obligations and standards: Elisa Morgera, Elsa Tsioumani and Matthias Buck, *Unraveling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity* (Brill 2014) 224.

41 De Silva (n 22) 475. For examples of the implementation of obligations concerning public participation in the context of the Cartagena Protocol, see the contributions in Marie-Claire Cordonier Segger, Frederic Perron-Welch and Christine Frison (eds), *Legal Aspects of Implementing the Cartagena Protocol on Biosafety* (Cambridge University Press 2013). See also COP-MOP Cartagena Protocol, Public Awareness, Education and Participation (17 October 2016) UNEP/CBD/BS/COP-MOP/8/15, 7-8. More broadly on the role of Indigenous and local communities in the CBD, see Louisa Parks, 'Spaces for Local Voices? A Discourse Analysis of the Decisions of the Convention on Biological Diversity' (2018) 9 Journal of Human Rights and the Environment 141; Federica Cittadino, *Incorporating Indigenous Rights in the International Regime on Biodiversity Protection* (Brill Nijhoff 2019).

42 Jelena Bäumler and Thomas Schomerus, 'Article 12: Education and Training' in Geert van Calster and Leonie Reins (eds), *The Paris Agreement on Climate Change: A Commentary* (Elgar 2021) note that this is an 'unfortunate' omission, in light of the rising number of climate change cases being brought before domestic courts (at 296).

43 Article 12 of the Paris Agreement thus merely provides that States Parties are obliged to 'cooperate' to ensure access to information and public participation 'as appropriate'; both concepts furthermore remain undefined in the Agreement. See further Jeniffer Hanna Collado, 'Article 12' in Daniel Klein and others (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press 2017) 296-7; Bäumler and Schomerus (n 42) 285.

developments at the international level do not necessarily provide a great deal of guidance for the implementation of public participation within cultural heritage law, beyond underlining the importance of its incorporation in the regime.

6.2.2 Regional application

By comparison, the principle of public participation has been extensively elaborated upon at the regional level under the aegis of two conventions: the Aarhus Convention, formulated in the framework of the UN Economic Commission for Europe (UNECE), and the Escazú Agreement, open to signature to countries in Latin America and the Caribbean and adopted in the context of the UN Economic Commission for Latin America and the Caribbean (ECLAC).[44]

Both the Aarhus Convention and the Escazú Agreement follow the same division as Principle 10 of the Rio Declaration, providing for access to information, public participation in decision-making, and access to justice specifically in relation to environmental matters.[45] The preamble and first article of both the Aarhus Convention and Escazú Agreement draw a direct line between the fulfilment of the environmental procedural rights guaranteed by the agreements, and the protection of the right of individuals – both of present and future generations – to a healthy environment.[46]

Similarly, both conventions are unique in comparison to many other MEAs due to the prominent role they grant to their compliance mechanisms. The Aarhus Convention thus provides for the creation of an independent 'non-confrontational, non-judicial and consultative' body empowered to consider issues related to compliance with the convention by the States Parties:[47] the Compliance Committee.[48] Most notably, the Compliance Committee can not only consider submissions from States Parties, but also individual communications submitted by members of the public and referrals by the Convention's secretariat.[49] The Committee can subsequently gather information of its own

44 These developments have in fact also been mirrored at the regional level with respect to cultural heritage governance, in the form of the Council of Europe Framework Convention on the Value of Cultural Heritage for Society (adopted 27 October 2005, entered into force 1 June 2011) CETS No. 199 (Faro Convention).

45 The Aarhus Convention also explicitly recalls Principle 10 in its preamble. On the emergence of the Aarhus Convention within international law, see UNECE, *The Aarhus Convention: An Implementation Guide* (UNECE 2nd ed, 2014) 16-17. See Escazú Agreement art 1, 2(a).

46 Aarhus Convention art 1; Escazú Agreement art 1.

47 Aarhus Convention art 15.

48 MOP Aarhus Convention, Decision I/7 (2 April 2004) ECE/MP.PP/2/Add.8.

49 Ibid, Addendum, Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance, paras 15-24. In comparison to many other international human rights communications procedures, acceptance of the competence of the Compliance Committee to consider individual communications is effectively compulsory (as States

accord in order to assess the issue of compliance.[50] With the agreement of the State Party concerned, the Committee can make recommendations to the State Party;[51] the Meeting of Parties can take a number of additional steps, such as the issuance of declarations of non-compliance or cautions, the suspension of the State Party's rights and privileges under the Convention, and any 'other non-confrontational, non-judicial and consultative measures as may be appropriate'.[52] Thus far, the majority of the situations of non-compliance considered by the Committee have been the result of communications from the public: as of 2023, the Committee has received 198 such communications.

The Escazú Agreement provides for the establishment of a comparable Committee to Support Implementation and Compliance, a subsidiary body 'of a consultative and transparent nature', which is 'non-adversarial, non-judicial and non-punitive'.[53] Given that the Convention has only just entered into force, the Committee has yet to discuss any situations of non-compliance. However, like the Aarhus Convention's Compliance Committee, it can also consider communications not only from States Parties but also from members of the public. It can subsequently make recommendations to the State Party concerned, and report a case to the Conference of Parties of the Convention if it considers that the State Party has failed to implement its recommendations.[54] In these situations, the Conference of Parties can take any measures which it considers necessary to facilitate compliance, such as formulating declarations of non-compliance, issuing cautions, or suspending the State Party's rights and privileges.[55]

Parties can only delay such acceptance by four years after the entry into force of the Convention for the country in question).

50 Ibid para 25.

51 Ibid para 36.

52 Ibid para 37. On the legal status of the Compliance Committee's findings, which are not legally binding in and of themselves but are generally considered as authoritative interpretations of the Aarhus Convention, see Elena Fasoli and Alistair McGlone, 'The Non-Compliance Mechanism Under the Aarhus Convention as "Soft" Enforcement of International Environmental Law: Not So Soft After All!' (2018) 65 Netherlands International Law Review 27; Áine Ryall, 'The Aarhus Convention: Standards for Access to Justice in Environmental Matters' in Stephen J. Turner and others (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019) 127. However, compare Gor Samvel, 'Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice' (2020) 9 Transnational Environmental Law 211.

53 Escazú Agreement art 18(2).

54 COP Escazú Agreement, Rules Relating to the Structure and Functions of the Committee to Support Implementation and Compliance of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (2022) UN Doc LC/COP-EZ/1/5, art V.

55 Ibid art VIII.

6.2.2.1 *Aarhus Convention*

The Aarhus Convention provides extensive guidance to states on the fulfilment of the procedural rights established under the Convention. With regards to the right to information, public authorities must make environmental information available to the public upon request;[56] in addition, they must ensure the dissemination of information to the 'public who may be affected' if there is an 'imminent threat to human health or the environment', and if the information held by public authorities could help to prevent or mitigate this harm.[57] Information should moreover be accessible to the public; the Convention provides for a range of modalities through which to guarantee this accessibility.[58]

In the case of the right to public participation, the right is divided into three categories within the Convention: firstly in the case of a number of specific activities outlined in the annex of the Convention,[59] as well as activities for which an EIA is required under domestic law or more broadly any activities which 'may have a significant effect on the environment';[60] secondly with respect to participation in plans, programmes and policies relating to the environment; and finally with respect to participation in the preparation of generally applicable regulations and normative instruments. The degree to which the public must be allowed to participate in decision-making relating to each of these three categories effectively becomes less intense – and the provisions of the Convention less strictly stipulated – the more abstract the level of decision-making.[61] In doing so, the Convention draws a distinction between the 'public' and the 'public concerned' in relation to a number of obligations which set out more stringent obligations with respect to participation in decisions on specific activities;[62] the latter is defined as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making';[63] this definition includes environmental NGOs, provided

56 Aarhus Convention art 4.
57 Ibid art 5(1).
58 For example through establishing '[p]ublicly accessible lists, registers or files' or by creating contact points for the public: Aarhus Convention art 5(2).
59 These include, for example, activities in the energy sector (such as those relating to nuclear reactors), those relating to the production and processing of metals (such as steel mills), in waste management (such as incineration installations), or activities relating to dam or gas or oil pipelines.
60 Aarhus Convention art 6(1)(b).
61 Ebbesson, 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' (n 9) 75-6.
62 Specifically in relation to article 6 (concerning public participation in decisions on specific activities) and article 9(2) (concerning access to justice for review procedures challenging the 'legality of any decision, act or omission' relating to public participation in decisions on specific activities, in particular).
63 Aarhus Convention art 2(5).

that they meet requirements established under national law. By contrast, 'the concept of the "public" … is constructed with a view to covering almost everyone and with a very limited room for discretion left for the Parties'.[64]

As such, in the case of specific activities with a (likely) significant effect on the environment, the 'public concerned' must be informed, 'either by public notice or individually as appropriate', of the proposed activity and the decisions relating to it.[65] Such notice must be 'effective',[66] meaning that 'all those who potentially could be concerned have a reasonable chance to learn about proposed activities and their possibilities to participate'.[67] Most important in this regard is that public participation should be made possible at an early stage,[68] 'when all options are open and effective public participation can take place' (also known as the 'zero option').[69] The public must be allowed to submit comments; in return, the state must 'ensure that in the decision due account is taken of the outcome of the public participation',[70] and that once a decision has been made that the public is informed and provided with the reasons upon which the decision has been based. While the obligation for the state to take 'due account' of the outcome of the participation processes does not entail that the public is granted a 'veto' over the decision,[71] public author-

64 Jerzy Jendrośka, 'Public Participation in Environmental Decision-Making: Interactions Between the Convention and EU Law and Other Key Legal Issues in its Implementation in the Light of the Opinions of the Aarhus Convention Compliance Committee', in Marc Pallemaerts (ed) *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011) 125.

65 Aarhus Convention art 6(2). The Implementation Guide provides a number of examples of possible means of public participation, such as 'mass media (TV, radio), through electronic means or posting of notices in areas with heavy traffic or places frequented by the local population (e.g. bus stations, churches, shops, etc.)', noting that it is most effective to rely upon several means of communication simultaneously. In the case of individual notice, the Guide notes that this is 'especially important where individual interests might be affected by the decision': UNECE (n 45) 134-5.

66 Aarhus Convention art 6(2).

67 Aarhus Convention Compliance Committee, Findings and Recommendations with Regard to Communication ACCC/C/2006/16 concerning compliance by Lithuania (4 April 2008) ECE/MP.PP/2008/5/Add.6, para 67. Here the Implementation Guide once again notes that, as a result, 'a small announcement in a newspaper among hundreds of advertisements would perhaps not be considered effective. Local television broadcasting at a time when most people are at work might also be ineffective': UNECE (n 45) 135-6.

68 Aarhus Convention art 6(4).

69 Ibid. UNECE, Maastricht Recommendations on Promoting Effective Public Participation in Decision-Making in Environmental Matters prepared under the Aarhus Convention (UN 2015) 16.

70 Aarhus Convention art 6(8).

71 Aarhus Convention Compliance Committee, Findings and Recommendations with Regard to Communication ACCC/C/2008/24 Concerning Compliance by Spain (8 February 2011) ECE/MP.PP/C.1/2009/8/Add.1, para 98; Aarhus Convention Compliance Committee, Findings and Recommendations with Regard to Communication ACCC/C/2012/68 concerning Compliance by the European Union and the United Kingdom of Great Britain and Northern Ireland (13 January 2014) ECE/MP.PP/C.1/2014/5, para 93.

ities 'should be able to show why a particular comment was rejected on substantive grounds', and 'any failure to take due account of the outcome of public participation is a procedural violation that may invalidate the decision'.[72]

While less stringent criteria are laid down with respect to plans and programmes concerning the environment,[73] the state must still ensure that participation takes place at a time when all options are open, and that the outcome of the participation is taken account of in the making of the decision, incorporating the obligations established in relation to activities.[74] An even looser framework is laid out for environmental policies, for which each State Party shall merely 'endeavour to provide opportunities for public participation in the preparation of policies'.[75] Finally, a separate regime is also established for participation in the preparation of 'regulations and generally applicable legally binding normative instruments',[76] where the parties to the Convention simply are expected to 'strive to promote effective public participation', *inter alia* by making drafts of the proposed rules available to the public, and allowing the public to comment 'directly or through representative consultative bodies'.[77] In this situation, 'the result of the public participation shall be taken into account as far as possible', thereby clearly establishing a lower standard than in relation to activities, plans and programmes (and simultaneously indicating that the abovementioned requirement to take 'due account' of the outcome of public participation must be strictly construed).[78]

The third set of substantive obligations in the Aarhus Convention relates to the right of access to justice;[79] here the Convention provides that the public should have access to review procedures for decisions denying requests for information, either by a court or another independent impartial body.[80] Similarly, with regards to the right to participate in decision-making procedures with respect to activities with a significant effect on the environment, the Convention provides that members of the public concerned should be able

72 UNECE (n 45) 155-6. See also ECE/MP.PP/C.1/2014/5 (n 71), which notes that 'the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account': para 93.

73 Aarhus Convention art 7.

74 See Aarhus Convention Compliance Committee, Findings and Recommendations with Regard to Communication ACCC/C/2012/70 concerning Compliance by the Czech Republic (4 June 2014) ECE/MP.PP/C.1/2014/9, paras 60-3.

75 Aarhus Convention art 7.

76 Ibid art 8. Ebbesson, 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' (n 9) notes at 75-6 that this category is 'not to be mixed with legislation'.

77 Aarhus Convention art 8(c).

78 Ibid art 8. See UNECE (n 45) 155-6.

79 Aarhus Convention art 9.

80 Ibid art 9(1).

to challenge the 'substantive and procedural legality of any decision, act or omission' relating to public participation in decision-making procedures concerning specific activities (or 'other relevant provisions' of the Convention).[81] In order to do so, the members of the public concerned must be able to demonstrate a 'sufficient interest' or the impairment of their rights, in the case that the latter is required by domestic administrative procedural law in order to access a review procedure.[82] Furthermore, such procedures 'shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive'.[83]

6.2.2.2 Escazú Agreement

The Escazú Agreement contains a number of adaptations of the rights outlined in Aarhus,[84] although the focus in the present chapter will be on its elaboration of procedural environmental rights insofar as this is relevant for the potential application of similar concepts in the context of cultural heritage law. The Agreement thus specifically guarantees the right of access to environmental information for 'persons or groups in vulnerable situations':[85] for these groups, the State Party must facilitate their access to information by 'establishing procedures for the provision of assistance, from the formulation of requests through to the delivery of the information, taking into account their conditions and specificities, for the purpose of promoting access and participation under equal conditions.'[86] More broadly, the Agreement provides a number of specific guarantees for vulnerable groups and environmental defenders.[87]

With regards to public participation in environmental decision-making, the Agreement requires states to '[commit] to implement open and inclusive participation … based on domestic and international normative frameworks'.[88] The Escazú Agreement differs from the Aarhus Convention in that it in principle only differentiates between projects, activities, and processes granting environmental permits which (may) have a significant environmental impact,

81 Ibid art 9(2).

82 Article 9(2) provides that '[w]hat constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of [the] Convention'.

83 Ibid art 9(4).

84 Contrary to the Aarhus Convention, the Escazú Agreement also provides for a number of substantive principles which the Agreement must be implemented in light of (art 3), and also pays specific attention to the rights of vulnerable persons and groups and environmental defenders (e.g. arts 4(5), 5(3), 5(4), 6(6), 7(14), 8(5)).

85 Escazú Agreement art 5(3).

86 Ibid.

87 E.g. ibid art 9. See also Stec and Jendrośka (n 23), who consider this one of the main innovations of the Agreement as compared to the Aarhus Convention.

88 Escazú Agreement art 7(1).

on the one hand, and all other environmental matters of public interest, including policies, plans, programmes, rules and regulations, on the other hand. In relation to the first category, the Agreement establishes that states must 'guarantee' participation mechanisms for the public.[89] The Agreement moreover contains a number of specific provisions with regards to what type of information must be provided to the public, as well as guarantees that the state should make summaries available that are comprehensible to a non-expert audience.[90] In the case of the second category – that of policies, plans, programmes, rules and regulations which have or may have a significant environmental impact – the state must merely 'promote', rather than guarantee, public participation, thereby setting a lower standard than in the Aarhus Convention.[91]

However, the Agreement does simultaneously establish a broad general framework in relation to public participation in environmental decision-making processes (including both of the above categories).[92] In line with this general framework, the state must ensure that public participation can take place in the early stages of the decision-making process, so that the contributions of the public can actually be considered.[93] The conditions for public participation shall moreover be 'adapted to the social, economic, cultural, geographical and gender characteristics of the public',[94] with specific consideration for languages,[95] and the elimination of barriers for those in vulnerable situations.[96] Moreover, the right of the public to participate 'shall include the opportunity to present observations through appropriate means available, according to the circumstances of the process'.[97] The state must inform the public once the decision has been made, providing the grounds for the decision

89 Ibid art 7(2).

90 This includes '(a) a description of the area of influence and physical and technical characteristics of the proposed project or activity; (b) a description of the main environmental impacts of the project or activity and, as appropriate, the cumulative environmental impact; (c) a description of the measures foreseen with respect to those impacts; (d) a summary of (a), (b) and (c) of the present paragraph in comprehensible, non-technical language; (e) the public reports and opinions of the involved entities addressed to the public authority related to the project or activity under consideration; (f) a description of the available technologies to be used and alternative locations for executing the project or activity subject to assessment, when the information is available; and (g) actions taken to monitor the implementation and results of environmental impact assessment measures': ibid art 7(17).

91 Ibid art 7(3).

92 ECLAC, *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean: Implementation Guide* (UN 2023) LC/TS.2021/221/Rev.2, 101.

93 Escazú Agreement art 7(4).

94 Ibid art 7(10).

95 Ibid art 7(11).

96 Ibid art 7(14).

97 Ibid art 7(7).

and an explanation of how the public participation has been considered in the making of the decision.[98]

As can be seen from the framework established by the Agreement with respect to public participation, the Agreement does not distinguish between the 'public' and the 'public concerned' with respect to establishing the requisite standard of public participation, unlike the Aarhus Convention. Instead, the majority of the Agreement's provisions simply apply to the 'public',[99] establishing additional safeguards for 'persons and groups in vulnerable situations',[100] as already noted above. The Agreement thereby casts a wider net with respect to potential rights-holders than the Aarhus Convention.

Nonetheless, the Agreement does distinguish between the broader public and the 'directly affected' public on two occasions in relation to the right to public participation in the environmental decision-making process.[101] Of particular interest for the present discussion is the use of this concept in relation to 'projects or activities that have or may have a significant impact on the environment'; in such situations, the public authority 'shall make efforts to identify the public directly affected … and shall promote specific actions to facilitate their participation'.[102] In doing so it approximates the more stringent standards established with respect to the rights of the 'public concerned' under the Aarhus Convention in relation to specific activities. However, no further guidance is provided as to when members of the public may be considered 'directly affected'.

---

98 Ibid art 7(8). Similarly to the Aarhus Convention, the state is required to 'give due consideration to the outcome of the participation process' (art 7(7)); however, as the Implementation Guide notes, this 'does not grant the public veto power nor does it shift the responsibility for taking the decision from the public authority to the public. Furthermore, the Agreement does not establish that the result of the public participation process is binding on the public authority and thus, the decision maker retains its full competence, power and authority, in accordance with applicable law, to make the final decision as it considers appropriate … In this sense, public participation as recognized in the Escazú Agreement does not entitle the public to have the final say or enable it to accept or reject a decision': LC/TS.2021/221/Rev.2 (n 92) 145.

99 Defined as 'one or more natural or legal persons and the associations, organizations or groups established by those persons, that are nationals or that are subject to the national jurisdiction of the State Party': Escazú Agreement art 2(d).

100 Defined as 'those persons or groups that face particular difficulties in fully exercising the access rights recognized in the present Agreement, because of circumstances or conditions identified within each Party's national context and in accordance with its international obligations': ibid art 2(e).

101 Ibid arts 7(11), (16). In addition to this, the Agreement also establishes an additional category of 'particularly affected' members of persons or groups in vulnerable situations in the context of the right of access to information, providing that the state 'shall endeavour, where applicable, to ensure that the competent authorities disseminate environmental information in the various languages used in the country, and prepare alternative formats that are comprehensible to those groups': ibid art 6(6).

102 Ibid art 7(16).

The Agreement also provides for access to justice in environmental matters, requiring states to ensure 'access to judicial and administrative mechanisms to challenge and appeal' decisions, actions or omissions relating to access to information,[103] participation in decision-making,[104] and any decisions, actions or omissions that '[affect] or could [affect] the environment adversely or violate laws and regulations related to the environment.[105] In doing so, States Parties must guarantee due process and are required to have *inter alia* 'broad active legal standing in defence of the environment, in accordance with domestic legislation'.[106] In comparison to the Aarhus Convention, the Agreement does not provide guidance on whether those seeking to avail themselves of their right of access to justice pursuant to the Agreement need to demonstrate a sufficient interest.

6.2.2.3 Public participation in international forums

A final noteworthy point in light of the current inquiry is that both the Aarhus Convention and the Escazú Agreement provide for modalities of public participation in environmental decision-making in international forums. Thus the Aarhus Convention provides in article 3(7) that each state 'shall promote the application of the principles of [the] Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment';[107] this provision has been elaborated upon in the 2005 Almaty Guidelines adopted by the Meeting of the Parties, which reaffirm the importance of the rights guaranteed by the Convention at the international level.[108]

The Almaty Guidelines note that public participation in decision-making at the international level 'should be allowed at all relevant stages of the decision-making process',[109] that it 'should be as broad as possible', drawing attention to the position of members of the public likely to be 'most directly affected' by the decision-making processes.[110] Possible points at which such public participation would be desirable include both 'the negotiation and application of conventions' and 'the preparation, formulation and implementation of decisions'.[111] A range of modalities for participation are suggested,

103 Ibid art 8(2)(a).
104 Ibid art 8(2)(b).
105 Ibid art 8(2)(c).
106 Ibid art 8(3)(c).
107 Aarhus Convention art 3(7).
108 MOP Aarhus Convention, Decision II/4: Promoting the Application of the Principles of the Aarhus Convention in International forums (20 June 2005) ECE/MP.PP/2005/2/Add.5, Annex, para 11.
109 Ibid para 29.
110 Ibid para 30.
111 Ibid para 32.

including the granting of observer status, the creation of advisory committees for particular groups of stakeholders, and calls for comments from members of the public.[112] However, at minimum the public should 'have access to all documents relevant to the decision-making process produced for the meetings, to circulate written statements and to speak at meetings';[113] the public should also be granted the opportunity to participate at a moment in the decision-making process when all the options are still open and their participation has the potential to change the outcome of these processes.[114] Finally, 'due account should be taken of the outcome of public participation' in the making of decisions within international forums; the Guidelines call for transparency with regards to the impact of public participation on these outcomes, which 'should be promoted through, inter alia, facilitating the public availability of documents submitted by the public'.[115]

Similarly, the Escazú Agreement explicitly stipulates in article 7(12) that:

> Each Party shall promote, where appropriate and in accordance with domestic legislation, public participation in international forums and negotiations on environmental matters or with an environmental impact, in accordance with the procedural rules on participation of each forum. The participation of the public at the national level on matters of international environmental forums shall also be promoted, where appropriate.[116]

Article 7(12) has subsequently been put into practice with respect to the Agreement's own Conference of Parties: in the recently adopted rules of procedure of the COP, a provision has been included which provides that '[t]he public shall participate meaningfully in the Conference of the Parties and the subsidiary bodies established'.[117] According to the rules of procedure, the public may not only attend the meetings of the COP, but also 'make statements', 'circulate documents and make oral and written contributions', and 'make written text proposals' which can be 'formally collected and submitted by at least one Party for consideration in the negotiation of an official text of the

112 The guidelines thus note that '[e]ffective participation of the public concerned may be ensured through a variety of forms, depending on different factors, such as the type of international forum concerned and the nature and phase of the decision-making process. Such forms could include, at meetings in international forums, observer status, advisory committees open to relevant stakeholders, forums and dialogues open to members of the public and webcasting of events, as well as general calls for comments': ibid para 33.

113 Ibid para 34.

114 Ibid para 35.

115 Ibid para 37.

116 Escazú Agreement art 7(12). The Implementation Guide notes: 'The verb "promote" and the qualifiers used throughout the paragraph clearly point to its guiding and flexible character and limit the scope of the obligation': LC/TS.2021/221/Rev.2 (n 92) 115.

117 COP Escazú Agreement, Rules of Procedure of the Conference of the Parties to the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (2022) LC/COP-EZ.1/4, art XIV(1).

Conference of the Parties or its subsidiary bodies'.[118] In doing so, the Rules of Procedure of the Escazú COP go much further in establishing modalities for public participation than most other intergovernmental bodies.

However, it is important to underline that the scope of these provisions remains limited.[119] In the case of the Escazú Agreement, the application of article 7(12) remains hortatory, as states merely need to 'promote' public participation 'where appropriate', and only 'in accordance with the procedural rules on participation of each forum': states are thus not expected to go above and beyond the limits on public participation which frequently exist in international forums, such as limits on how long non-state actors are permitted to take the floor, their ability to circulate statements to States Parties, or their ability to table proposals to be voted upon. Article 7(12) thus largely has a 'guiding and flexible character'.[120] That being said, the Escazú COP has nonetheless taken significant steps in order to fulfil the spirit of the Agreement within its own decision-making procedures, as is evident in the recently adopted rules of procedure described above.

Similarly to Escazú, the applicability of the Aarhus Convention's Almaty Guidelines is limited by the important caveat that parties to the Aarhus Convention are merely expected to 'seek to apply [them] to the extent appropriate in light of reasonable considerations such as the institutional integrity and particular characteristics of each international forum concerned, its procedures and decision-making processes, and the nature and availability of its resources'.[121] In addition, the Meeting of Parties to the Aarhus Convention have noted that while some important progress has been made in facilitating the implementation of the Almaty Principles in practice, 'considerable challenges' still remain.[122] Moreover, the Aarhus Convention Compliance Committee has yet to issue substantive conclusions on any communications relating to article 3(7) of the Convention or the Almaty Guidelines.[123]

118 Ibid art XIV(2).

119 Sharman (n 8).

120 LC/TS.2021/221/Rev.2 (n 92) 115.

121 ECE/MP.PP/2005/2/Add.5 (n 108) Annex, para 1.

122 MOP Aarhus Convention, Decision VII/4, Promoting the Application of the Principles of the Convention in International Forums (18-20 October 2021) ECE/MP.PP/2021/2/Add. 1.

123 As of 2023, the Compliance Committee has only received three communications (out of a total of 198) relating to article 3(7) of the Convention: ACCC/C/2014/117 (alleging violations by Belgium, Luxembourg and the Netherlands flowing from the transfer of certain competences concerning environmental matters to the Benelux Union), ACCC/C/2019 /163 (alleging violations by Austria concerning the exclusion of foreign citizens from p articipation in a transboundary EIA procedure), and ACCC/C/2022/194 (alleging violations by the United Kingdom with regards to the inability of the public to participate in the negotiation and ratification procedures of free trade agreements). Of these, one complaint has been considered inadmissible (ACCC/C/2014/117); while the other two complaints have been considered admissible by the Committee, their outcome is still pending. Of t hese, only the most recent complaint (ACCC/C/2022/194, filed in 2022) directly addresses issues relating

Finally, both the Almaty Guidelines and the Escazú Agreement neglect to provide any guidance on the content of the right of access to justice in the context of international organisations,[124] thereby omitting an important limb of the tripartite procedural rights guaranteed by both conventions. As such, despite the inclusion of provisions on participation in international forums in Escazú and Aarhus and a broader shift within international law towards the promotion of public participation,[125] developments have thus far not been forthcoming on the promotion of public participation within intergovernmental bodies, as opposed to at the domestic level.[126] There are nonetheless indications that it is likely that the law will continue to develop in this regard in order to facilitate a right of public participation in international organisations,[127] particularly for groups with a recognised right to self-determination, such as Indigenous peoples, as decision-making at the international level has an undeniable ability to impact upon their enjoyment of this right.[128]

---

to participation in international decision-making processes as envisaged by article 3(7) and the Almaty Guidelines.

124 Although the Almaty Guidelines do note that: 'Each Party should encourage the consideration in international forums of measures to facilitate public access to review procedures relating to any application of the rules and standards of each forum regarding access to information and public participation within the scope of these guidelines': ECE/MP.PP/2005/2/Add.5 (n 108) Annex, para 40.

125 Jones thus argues that 'peoples are entitled, by virtue of the right to self-determination, to participate in matters concerning them at the global level', although '[w]hile there [is] a widespread – albeit not universal nor uniform – practice, found in the conduct and policies of IOs and states, there [is] little to indicate that such practice was carried out in the belief that it was required by law … Notwithstanding the lack of CIL … the consistent pattern of practice whereby IOs and states enable peoples to participate in matters affecting them at the international level evidences a standard of conduct which is widely adhered to by IOs and states', and that as a result 'peoples have a legitimate expectation to participate in global governance processes concerning them': Natalie Jones, 'Towards a Right of Peoples to Participation in Global Governance' (DPhil thesis, University of Cambridge 2020) 225-6.

126 Jonas Ebbesson, 'Public Participation' in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2021) 364. However, see Henry G. Schermers and Niels M. Blokker, *International Institutional Law* (6th rev edn, Brill Nijhoff 2018) paras 188-197A, noting the increasing involvement of civil society actors in decision-making processes within international organisations (and at the same time the relative paucity of the involvement of non-expert actors such as individuals within these processes).

127 Sharman (n 8)

128 Natalie Jones, 'Self-Determination and the Right of Peoples to Participate in International Law-Making' (forthcoming) British Yearbook of International Law, doi: 10.1093/bybil/brab004, 30.

6.2.3 Towards a global right of public participation in environmental decision-making?

With the recent adoption of the Escazú Agreement in 2018, it seems unlikely that a global convention on public participation in (environmental) decision-making will follow in the near future, as it appears that '[t]he international community has settled upon the regional level as the appropriate means' for achieving the goal of facilitating procedural environmental rights.[129] Indeed, the creation of the Agreement partly stemmed from the rejection by states of the possibility of such a global convention at the Rio+20 Conference in 2012.[130] The Escazú Agreement also provides a greater amount of discretion to States Parties in a number of areas,[131] drawing into question to what extent it is possible to define global standards in relation to the principle of public participation. That the approach towards the continuing codification of the principle of public participation should be primarily tackled at the regional level is perhaps not so strange, given that regional approaches are also widely adopted in the scope of human rights agreements – which both Aarhus and Escazú profile themselves as.[132]

Moreover, the fact that issues relating to environmental democracy are often largely internal rather than transboundary in nature – unlike the subject-matter of many other multilateral environmental agreements – means that the codification of global principles on public participation in environmental decision-making remains a sensitive topic for many states.[133] Some commentators thus consider that a regional approach is inherently suited to the codification of environmental procedural rights, given that regional agreements allow for innovations specific to each region which might not have been adopted if the drafters had sought to make the agreement in question global in scope.[134] In the case of the Escazú Agreement, authors have moreover argued that the Agreement provides an effective counterweight to the Aarhus Convention's focus on environmental democracy, which many developing countries

129 Stec and Jendrośka (n 23); see also Ebbesson, 'Public Participation' (n 13) 685-6; Karl-Peter Sommermann, 'Transformative Effects of the Aarhus Convention in Europe' (2017) 77 ZaöRV 321, 337.

130 Stec and Jendrośka (n 23) 534. For further discussion of the development of the Agreement, see LC/TS.2021/221Rev.2 (n 92) 9-14; and Lalanath De Silva, 'Escazú Agreement 2018: A Landmark for the LAC Region' (2018) 2 Chinese Journal of Environmental Law 93, 94-5.

131 Such as the ability of states to refuse to provide access to information on the basis of domestic legislation: Escazú Agreement art 5(6). See De Silva (n 130), 97.

132 Sommermann (n 129) 325.

133 Natalia Gomez Peña and David B. Hunter, 'The Hard Choices in Promoting Environmental Access Rights' in Daniel Bradlow and Daniel Hunter (eds), *Advocating Social Change through International Law: Exploring the Choice between Hard and Soft International Law* (Brill 2020) 117-8.

134 Stec and Jendrośka (n 23).

viewed as overly Eurocentric – thereby constituting a barrier to global ratification.[135]

The diversity of legal frameworks which seek to establish procedural environmental rights raises the question whether it is possible to identify any global minimum standards with regards to procedural environmental rights, and more particularly the right to participate in decision-making. The fact that states have thus far eschewed the adoption of a global instrument on procedural environmental rights makes it difficult to identify a common approach within public international law on these issues.[136] It should also be reason for caution for assuming that the standards set out in the Aarhus Convention or the Escazú Agreement are automatically globally applicable; while there are a wealth of international environmental instruments which provide for procedural environmental rights, they 'often differ in content, scope and objective'.[137]

Yet this does not mean that one should completely discard the relevance of developments which have occurred over the course of the past thirty years. The principle of public participation can thus be seen as 'one of the foundational building blocks of international environmental law'.[138] In this regard, Principle 10 of the Rio Declaration assumes pivotal importance, as almost all environmental agreements adopted after the Rio Declaration in 1992 contain at least some provision on procedural environmental rights, 'revealing broad support', albeit 'at a rather abstract level'.[139] Further support for this argument can be found in developments such as the adoption of the 2010 UNEP Bali Guidelines mentioned above, which, while framed as voluntary, provide global guidance on the implementation of Principle 10 within national legislation.[140]

---

135 De Silva, 'Escazú Agreement 2018: A Landmark for the LAC Region' (n 130) 94; Emily Barritt, 'Global Values, Transnational Expression: from Aarhus to Escazú' in Veerle Heyvaert and Leslie-Anne Duvic-Paoli (eds), *Research Handbook on Transnational Environmental Law* (Elgar 2020) 205.

136 Peters (n 20) 7. See also Gomez Peña and Hunter (n 133) 121-2 for a discussion on why adoption of a global instrument proved difficult at Rio+20.

137 Peters (n 20) 4-5.

138 Avidan Kent, 'The Evolving Concept of Public Participation: from Rio to Mauritius' in Eric De Brabandere, Tarcisio Gazzini and Avidan Kent (eds), *Public Participation and Foreign Investment Law* (Brill 2021) 58.

139 Ebbesson, 'Principle 10' (n 18) 308.

140 UNEP, Report of the Governing Council/Global Ministerial Environment Forum on the Work of its Eleventh Special Session (February 2010) UN Doc A/65/25, Decision SS.XI/5, Annex. However, as Gomez Peña and Hunter (n 133) note, 'limited financial resources and a lack of political will has hurt implementation of the Bali Guidelines. For example, it was not until 2015 that UNEP was able to publish the implementation handbook for the Bali Guidelines. The lack of knowledge about the existence of the Guidelines and the lack of training for government officials on how to use them have significantly decreased their potential impact' (at 121).

The Bali Guidelines in part mirror similar provisions which have been codified at the regional level in the Aarhus Convention and Escazú Agreement. The Guidelines thus adopt the same definition of who should be considered part of the 'public concerned' with respect to the right to public participation;[141] note that this public should be able to 'participate at an early stage in the decision-making process'; and that they should be informed of this opportunity.[142] Similarly, states are also expected to take 'due account' of the outcome of the public participation, and to ensure that the decision – once taken – is made public.[143] The Guidelines furthermore set out standards with respect to access to justice, providing that 'States should ensure that the members of the public concerned have access to a court of law or other independent and impartial body to challenge the substantive and procedural legality of any decision, act or omission relating to public participation in decision-making in environmental matters'.[144] As such, the adoption of the Bali Guidelines and the uptake of environmental procedural rights across a range of MEAs indicate that it is possible to identify a minimum core content of the principle of public participation in environmental law which could potentially be taken as a starting point for the incorporation of principles of public participation within cultural heritage law, as will be elaborated upon in Section 6.2.5 below.

6.2.4 The right to public participation in decision-making in human rights instruments

Adding strength to this argument is the fact that the right to public participation in the context of environmental decision-making has also increasingly been developed in the context of human rights instruments,[145] further underlining the argument in favour of a very strong trend towards recognition of

141 Namely as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making'.

142 Bali Guidelines (n 22) Guideline 8.

143 Ibid Guideline 11. UNEP (n 9) states, along similar lines to the Aarhus Convention Implementation Guide, that the phrase 'due account' in Guideline 11 does not amount to a veto for the public, but does entail that 'the relevant authority is ultimately responsible for the decision based on all the information available to it, including all comments received, and should be able to show why a particular comment was accepted or rejected on substantive grounds' (at 87).

144 Bali Guidelines (n 22) Guideline 16. See also Guideline 17 (with respect to violation of substantive or procedural environmental legal norms).

145 On the notion of a human right to public participation in environmental decision-making, see Malgosia Fitzmaurice, 'Some Reflections on Public Participation in Environmental Matters as a Human Right in International Law' (2002) 2 Non-State Actors and International Law 1.

these rights.[146] The Special Rapporteur on Human Rights and the Environment has thus argued that international law recognises that states have 'a duty to facilitate public participation in environmental decision-making', drawing upon established civil and political rights such as the right to take part in the conduct of public affairs and the need to protect other rights from being infringed upon as a result of environmental harm.[147] The right of the public to participate in environmental decision-making also extends beyond purely domestic decision-making processes; the Special Rapporteur has thus established that states should ensure participatory rights at the international level in the context of 'projects supported by climate finance mechanisms';[148] an argument could thus be made for the application of the same line of reasoning with respect to other international decision-making processes.

This recognition also stretches beyond the environmental context towards the application of the right to participate in decision-making in a wide range of contexts.[149] At the most basic level, the ICCPR guarantees a broad right of the citizens of a state to 'take part in the conduct of public affairs, directly

146 However, Ebbesson notes with respect to the environmental context of rights of access to information, public participation, and access to justice has been 'geographically asymmetric. While Principle 10 issues have been embodied in human rights jurisprudence in Europe, the Americas, and Africa, there is not yet any corresponding development in international law for Asia and the Pacific': Ebbesson, 'Principle 10' (n 18) 308. However, contrast the argument of Olmos Giupponi, who outlines a number of domestic and regional cases within the Latin American and Caribbean region on environmental access rights: Belén Olmos Giupponi, 'Fostering Environmental Democracy in Latin America and the Caribbean: An Analysis of the Regional Agreement on Environmental Access Rights' (2019) 28 RECIEL 136, 138-9; see also CCJ Academy of Law and ECLAC, *Ensuring Environmental Access Rights in the Caribbean: Analysis of Selected Case Law* (2018) UN Doc LC./TS.2018/31.

147 See UN General Assembly, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (30 December 2013) UN Doc A/HRC/25/53, paras 29, 36. See also UN General Assembly, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (3 February 2015) UN Doc A/HRC/28/61, para 42; A/HRC/37/59 (n 25) Annex, Framework Principle 9.

148 UN General Assembly, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (1 February 2016) A/HRC/31/52, para 61.

149 Marjolein Schaap, 'An Inclusionary Governance Model for International Institutions: Ensuring Accountability towards Individuals' (PhD thesis, Erasmus University Rotterdam 2020) 121-22; more broadly, see McMurry, 'Applying Human Rights to Enable Participation' (n 9) on the role of participatory principles in securing human rights such as the freedom of association, and McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) on the existence of a general right to participation under human rights law. See also Human Rights Council, Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-making (23 August 2010) UN Doc A/HRC/15/35, paras 7-16.

or through freely chosen representatives';[150] unlike the right to participate in environmental decision-making, this right is not merely procedural but also a substantive right. Although it has generally been interpreted as being limited to the ability to participate in elections (or declare oneself a candidate in such elections),[151] the Human Rights Committee has nonetheless interpreted 'directly' as not only encompassing participation as a member of public office, but also by the participation of citizens 'in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government'.[152] Similar participatory rights have also been elaborated at the regional level.[153]

A number of other human rights treaties also seek to guarantee the participation of various underrepresented groups in public life,[154] such as that of women,[155] children,[156] or persons with disabilities;[157] rights of participa-

150 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 25(a); see also UN General Assembly, Resolution 217 A (III) (10 December 1948) UN Doc A/810, Universal Declaration on Human Rights (UDHR) art 21(1). More broadly, on the elaboration of other access rights in the ICCPR, see also arts 2(3), 14, 19.

151 McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) notes that the Human Rights Committee 'has tended towards a weak interpretation of the right to direct participation, holding that where representative democracy exists there is no right to direct participation' (at 31).

152 HRC, General Comment No. 25 (12 July 1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 6.

153 McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 64-75, pointing towards the Inter-American Democratic Charter (11 September 2001) OAS Doc OEA/SerP/AG/Res.1; the African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered in to force 15 February 2012); the European Charter of Local Self-Government (adopted 15 October 1985, entered into force 1 September 1988) CETS 122; and the Additional Protocol to the European Charter of Local Self-Government on the Rights to Participate in the Affairs of a Local Authority (adopted 16 November 2009, entered into force 1 June 2012) CETS 207. See also Schaap (n 149) 123-4.

154 McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 76-104.

155 Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 7; see also UN Committee on the Elimination of Discrimination Against Women, General Recommendation No. 23 (1997) UN Doc A/52/38 (on political and public life). In the context of rural areas, CEDAW has underlined that it is necessary for the state to ensure that women are granted the right '[t]o participate in the elaboration and implementation of development planning at all levels' (CEDAW art 14(2)(a)).

156 The CRC requires states to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child': Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 12; see also UN Committee on the Rights of the Child, General Comment No. 12 (20 July 2009) UN Doc CRC/C/GC/12. This right has been interpreted by the CRC in the context of the development of national and local laws and policies, for example in relation to businesses or the fulfilment of the right to health: UN Committee on the Rights of the Child, General Comment No. 15 (17 April 2014) UN Doc CRC/C/GC/

tion have also been extensively acknowledged in relation to the rights of Indigenous peoples and of minorities.[158] These rights seek to ensure that these groups can fully enjoy their right to take part in political and public life without discrimination,[159] and in certain circumstances create obligations to consult with the group in question in the development and implementation of legislation and policies or otherwise in matters affecting them.[160] The latter is particularly relevant in the case of groups with a right to self-determination such as Indigenous peoples.[161]

However, moving beyond these broad rights to participate in public affairs, the UN human rights treaty bodies have established guarantees for the involvement of individuals in procedures which have a potential to affect them.[162] Schaap thus notes that, on the basis of its general comments, CESCR 'recognises a right to participation for the poor, the homeless, and the elderly whenever they are affected by an administrative decision', as well as 'for whomever is affected by forced evictions, by decisions on adequate housing, by decisions on water, by decisions interfering with the right to cultural life, and lastly, with decisions related to one's health',[163] such as forced sterilisation or

15 (on the right to health) para 19; General Comment No. 16 (17 April 2013) UN Doc CRC/C/GC/16 (on the business sector) para 21.

157 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) art 4(3), 29, 33(3). See also UN Committee on the Rights of Persons with Disabilities, General Comment No. 7 (9 November 2018) UN Doc CRPD/C/GC/7.

158 See UNGA Res 61/295, United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) UN Doc A/RES/61/295; UN Doc A/HRC/15/35 (n 149). See also UNGA Res 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (3 February 1993) UN Doc A/RES/47/135, art 2(2)-(3).

159 As in the case of CEDAW (art 7); see also International Covenant on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (ICERD) art 5(c) in this regard.

160 As in the case of the CRPD (art 4(3)), the CRC (art 12), minorities, and Indigenous peoples. Cf. CEDAW art 14(2)(a). McMurry notes that 'UN committees have frequently recommended, and required participation in the formulation and review of policies and legislation': McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 134.

161 Usually in the form of 'internal' self-determination: ibid 37-42. On the possibility of interpreting 'external' self-determination as encompassing a right to participate in international decision-making processes, see Jones, 'Towards a Right of Peoples to Participation in Global Governance' (n 125).

162 Schaap (n 149) 123-4; McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 51 (noting that 'United Nations committees have asserted that persons have a right to participate in decisions affecting their rights', drawing upon the practice of the HRC, CESCR and CERD).

163 Schaap (n 149) 121-22. Similarly, McMurry notes that the UN committees particularly emphasise the importance of participation in case of 'evictions, prevention of communities from accessing or using their land, and industrial projects, particularly with regard to their impact on the right to water, right to life, cultural rights, and labour rights': McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 145. See

abortion. This right to participation is generally paired with a duty for the state to inform potentially affected individuals.[164]

Similar trends have emerged in relation to the other human rights bodies: thus the Human Rights Committee 'recognizes a right to participation in the decision-making for minorities and indigenous people affected by decisions, for those affected by forced evictions and for those subjected to expulsion';[165] the CERD (Committee on the Elimination of Racial Discrimination) has underlined the right to prior consultation for people of African descent 'with respect to decisions which may affect their rights',[166] and in relation to Indigenous peoples that 'no decisions directly relating to their rights and interests are taken without their informed consent';[167] and CEDAW has underlined similar guarantees in the context of rural women, for which the state should 'ensure the active, free, effective, meaningful and informed participation … in political and public life, and at all levels of decision-making'.[168]

However, these guarantees of public participation in decision-making admittedly remain relatively abstract in terms of proposed methods of implementation, and in the case of rights such as the right to water, the right to health and the right to food they mainly relate to ensuring public participation in relation to the formulation of national strategies rather than participation

CESCR, General Comment No. 7 (20 May 1997) UN Doc E/1998/22, para 15(a); CESCR, General Comment No. 12 (12 May 1999) UN Doc E/C.12/1999/5, para 23; CESCR, General Comment No. 14 (11 August 2000) UN Doc E/C.12/2000/4, paras 11, 54; CESCR, General Comment No. 15 (20 January 2003) UN Doc E/C.12/2002/11, paras 24, 37(f), 48; CESCR, General Comment No. 19 (4 February 2008) UN Doc E/C.12/GC/19, para 42(c); CESCR, General Comment No. 21 (21 December 2009) UN Doc E/C.12/GC/21, para 55(e). See further, in relation to the right to water: UN General Assembly, Report of the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation (31 July 2014) UN Doc A/69/213.

164 Schaap (n 149) 125-6. See also HRC, General Comment No. 34 (12 September 2011) UN Doc CCPR/C/GC/34.

165 Ibid 122. See HRC, General Comment No. 15 (11 April 1986); HRC, General Comment No. 23 (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5, para 7.

166 CERD, General Recommendation No. 34 (3 October 2011) UN Doc CERD/C/GC/34, para 4(d), see also para 42.

167 CERD, General Recommendation No. 23 (1997) UN Doc A/52/18, Annex V, para 4(d)

168 UN Committee on the Elimination of Discrimination against Women (7 March 2016) UN Doc CEDAW/C/GC/34, para 54. The Committee further adds that states should '[e]nsure the participation of rural women in the development and implementation of all agricultural and rural development strategies, and that they are able to participate effectively in planning and decision-making relating to rural infrastructure and services … Rural women and their representatives should be able to participate directly in the assessment, analysis, planning, design, budgeting, financing, implementation, monitoring and evaluation of all agricultural and rural development strategies' (at para 54(d)) and rural development projects should moreover only be implemented 'after participatory gender and environmental impact assessments … with the full participation of rural women, and after obtaining their free, prior and informed consent' (at para 54(e)).

in individual decisions. States thus retain a large deal of discretion when it comes to the implementation of a potential right to public participation.[169]

Nonetheless, it is possible to sketch the contours of a right to participate in decision-making within international human rights law.[170] While such a right potentially includes the right to participate in the formulation and implementation of policies, the focus of the present contribution is more directly on decisions with a potential to affect the human rights of a given individual or group.[171] While the design of such participatory processes is usually left to the discretion of the state, it is generally accepted that meaningful participation must take place an early stage of the decision-making process when all options are still open, that those affected by the decision must be granted the ability to participate in these decision-making processes, and that the state must take the outcome of the participation by the public into account in its ultimate decision.[172] While this does not amount to the possibility of the public vetoing the decision, there should be a real possibility that the public can influence the outcome of a decision-making procedure.[173]

Moreover, effective public participation is only possible if the public is granted access to the information necessary to form views on the proposed activity or policy.[174] It is not sufficient to simply make information available to the public: provisions must be in place to ensure that this information can be understood and acted upon by non-experts.[175] The state may furthermore need to take additional steps in order to build the capacity of 'marginalised and vulnerable groups' and to ensure that access to information is effective, as certain groups may speak a minority language, have high rates of illiteracy, or have insufficient access to the technologies through which information is

169 McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 127.

170 UN Doc A/69/213 (n 163) para 17.

171 McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 130-151.

172 Schaap (n 149) 130-1, see also 133-4; McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 185; UN Doc A/69/213 (n 163) paras 21, 30. See also UN Doc A/HRC/37/59 (n 25) Annex, Framework Principle 9. However, compare McMurry, who argues that 'participation is not in itself seen as an essential principle of human rights', but rather as a principle to guarantee *other* human rights, such as freedom of association and freedom of expression: McMurry, 'Applying Human Rights to Enable Participation' (n 9) 1063.

173 Ebbesson, 'The Notion of Public Participation in International Environmental Law' (n 17) 59. See UN Doc A/HRC/31/52 (n 148) para 59.

174 UN Doc A/HRC/31/52 (n 148) para 59. See also UN Doc A/HRC/25/53 (n 147) paras 30-5; CESCR, General Comment No. 15 (n 163) para 48; UN Doc A/69/213 (n 163) para 27-8.

175 Human Rights Council, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment (24 January 2018) UN Doc A/HRC/37/58, para 44; UN Doc A/HRC/31/52 (n 148) para 59.

often disseminated, such as the internet.[176] This should be seen as part of the requirements for ensuring that participatory processes are non-discriminatory.[177]

6.2.5 Relevance for cultural heritage law

The development of the principle of public participation outlined above shows clear promise in contributing to the resolution of the problems faced by individuals and local communities under cultural heritage law.[178] The guarantees set out under human rights law and environmental law are both more far-reaching and detailed than those established with respect to public participation in international cultural heritage instruments, in particular the operational guidelines of the World Heritage Convention and the Intangible Cultural Heritage Convention.[179] Public participation in environmental decision-making has moreover been explicitly connected to the fulfilment of the right to a healthy environment; a parallel could be drawn that public participation in cultural heritage governance should similarly be seen as a basic requirement for the fulfilment of the right to take part in cultural life.[180] As such, the fleshing out of standards relating to public participation should arguably be framed

176 A/HRC/31/52 (n 148) para 59; Human Rights Council, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context (6 August 2009) UN Doc A/64/255, para 63; UN Doc A/HRC/37/58 (n 175) para 45; UN Doc A/HRC/37/59 (n 25) para 44.

177 As McMurry notes, '[w]hile deliberation in the public sphere might appear to encourage a single decision-making process that is open to all citizens on an equal basis, this is not necessarily fully inclusive. It is important not only that participation is open to all, but also that the process is fully inclusive in operation, otherwise it can even exacerbate marginalisation': McMurry, *Participation and Democratic Innovation under International Human Rights Law* (n 8) 158.

178 The Special Rapporteur on the Rights of Indigenous Peoples has remarked upon several occasions on the risks of World Heritage nominations for the rights of Indigenous peoples, and the need for procedures to ensure their participation in the nomination and management of World Heritage sites: UN General Assembly, Report of the Special Rapporteur on the Rights of Indigenous Peoples (13 August 2012) UN Doc A/67/301, paras 33-40; UN General Assembly, Report of the Special Rapporteur on the Rights of Indigenous Peoples (19 July 2022) UN Doc A/77/238, paras 39, 72. More broadly on the impact of conservation measures on Indigenous peoples and on World Heritage sites, see UN General Assembly, Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples (29 July 2016) UN Doc A/71/229.

179 UN Doc A/77/238 (n 178) para 44.

180 This has also been recognized by the Special Rapporteur on Cultural Rights, who has noted that '[t]he right of access to and enjoyment of cultural heritage includes the right of individuals and communities … 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': Human Rights, Council, Report of the Independent Expert in the Field of Cultural Rights (21 March 2011) UN Doc A/HRC/17/38, para 79.

as part of the human rights-based approach which has been promoted in recent years within UNESCO.[181]

Environmental law and human rights law thus provide a blueprint for the application of principles of public participation to international heritage governance. Both fields underline the necessity of ensuring that information made available to the public in support of participation processes is accessible and understandable to a non-expert audience, with particular attention being devoted to ensuring access to information for marginalised groups within society. Indeed, in certain situations, the state is expected to actively inform members of affected publics. By comparison, the issue of access to information has yet to be broached within cultural heritage law, despite the problems resulting from a *lack* of information amongst members of the public having become increasingly evident. As the case studies of the Intangible Cultural Heritage Convention in the previous chapter showed, community participation in the designation of intangible heritage is primarily demonstrated through the signing of written consent forms, even in communities with high rates of illiteracy. Calls for more participation in cultural heritage decision-making processes are thus not enough: participation processes need to take account of the barriers faced by individuals and local communities in accessing and understanding the information required to participate in cultural heritage decision-making.

The notion of 'affectedness' emerges as a central criterion in the preceding analysis, being deployed to varying extents not only within Aarhus, Escazú and the Bali Guidelines, but also within the development of participatory rights in human rights law. Whereas in the latter the concept is used as a structuring principle to determine when participatory rights enter into play, in the environmental context it is specifically tied to more stringent obligations for states with respect to their duty to facilitate public participation when authorising specific projects or activities. This lends credence to the argument that public participation should at minimum be facilitated in the context of decisions concerning the inscription or management of particular forms of cultural heritage, and indeed that states should in certain situations take active steps to ensure that the public is aware of opportunities to participate in these decision-making processes.

While the majority of the regimes surveyed above do not necessarily define when members of the public can be considered 'affected', the Aarhus Convention provides helpful guidance which could also be used to give shape to similar criteria within cultural heritage law. Departing from the concept of the 'public concerned', the Aarhus Convention thus provides that this can

181 See also UN Doc A/77/238 (n 178) para 72, which describes participation in cultural heritage decision-making processes as part of a human rights-based approach to World Heritage listing; and more broadly UN Doc A/HRC/17/38 (n 180) which calls for a human rights-based approach to cultural heritage matters.

either mean the 'public affected or likely to be affected by, or having an interest in' a decision-making procedure.[182] The motivation behind this distinction is the view that '[t]hose who are most affected by the outcome of [decision-making] should have a greater chance to influence the outcome'.[183]

The Aarhus Convention's Compliance Committee has held in this regard that affectedness 'depends on the nature and size of the activity' and may not be limited to its immediate geographic vicinity;[184] a large number of people may thus be affected by a single project, such as a nuclear power plant.[185] In this respect, the impact on an individual's quality of life which may result from the authorisation of an activity also constitutes a valid ground to consider that that individual may be considered as 'affected', even if such grounds are not necessarily measurable as such.[186] Similarly, members of the public are considered to 'have an interest' in decision-making not only in situations where their legal interests or rights will be potentially impacted by an activity (including their 'social rights', such as the right to a healthy environment),[187] but also in situations which may potentially impact their 'factual interests'.[188] In this regard, the Committee noted that 'for example, in the case of a proposed activity that may affect a waterway, bird watchers interested in keeping nests intact or anglers interested in keeping waters fishable' could be considered to 'have an interest' in decision-making.[189] And finally, the Committee has held that members of the public can also simply express an interest 'without having stated any specific reason' for that interest.[190]

182 Aarhus Convention art 2(5).

183 UNECE (n 45) 119. See also Jendrośka (n 64) 97.

184 Compliance Committee of the Aarhus Convention, Findings and Recommendations with Regard to Communication ACCC/C/2010/50 concerning compliance by the Czech Republic (2 October 2012) ECE/MP.PP/C.1/2012/11, para 66. See UNECE (n 45) 57.

185 Ibid. See e.g. Compliance Committee of the Aarhus Convention, Findings and Recommendations with Regard to Communication ACCC/C/2004/02 concerning compliance by Kazakhstan (14 March 2005) ECE/MP.PP/C.1/2005/2/Add.2; Compliance Committee of the Aarhus Convention, Findings and Recommendations with Regard to Communication ACCC/C/2009/44 concerning compliance by Belarus (19 September 2011) ECE/MP.PP/C.1/2011/6/Add.1.

186 Compliance Committee of the Aarhus Convention, Findings and Recommendations with Regard to Communication ACCC/C/2013/91 concerning compliance by the United Kingdom of Great Britain and Northern Ireland (24 July 2017) ECE/MP.PP/C.1/2017/14, para 73.

187 UNECE (n 45) 57. In ECE/MP.PP/C.1/2012/11 (n 184), the Compliance Committee held that tenants of an apartment building could be considered to hold the same interests as the owners of the apartment building, even though they did not have ownership rights; certain activities could thus affect their 'social and environmental rights', and for this reason they should be considered part of the 'public concerned' for the purposes of public participation: para 67.

188 ECE/MP.PP/C.1/2017/14 (n 186) para 74.

189 Ibid.

190 UNECE (n 45) 57. See also ECE/MP.PP/C.1/2017/14 (n 186) para 74.

Moreover, both the findings of the Compliance Committee and the practice of States Parties to the Aarhus Convention in the context of the Meeting of Parties have underlined the importance of States Parties interpreting the 'public concerned' as broadly as possible;[191] furthermore, while States Parties are free to define the 'public concerned' within their domestic law, this definition 'must be based on objective criteria and not on a discretionary power to pick individual representatives of certain groups'.[192] As such, while public authorities are the primary entity tasked with identifying the public concerned for the purposes of the Aarhus Convention, the Compliance Committee has commended states who allow for members of the public to self-identify as a member of the 'public concerned' and to subsequently participate in the decision-making process.[193] The reason that the definition of the public concerned can be so broad is precisely because the Aarhus Convention does not grant the public a veto over the decision-making process, merely the right to be heard and to have their interests considered.

There are two key takeaways from the approach of the Aarhus Convention to the notion of 'affectedness' for cultural heritage law. For one, it supports a broad interpretation of who should be considered as relevant participants in public participation processes in cultural heritage law, which is not limited to those who hold strictly legal interests (such as property rights) with respect to a given form of cultural heritage. This means, for example, that members of local communities do not need to be property owners to be considered potentially affected by the measures taken by the state when implementing cultural heritage law; they can also be considered affected if heritage designation will impact a broader panoply of interests (as in the case of the categories of 'social rights' and 'factual interests' described by the Compliance Committee), such as the ability to use a heritage site for traditional practices.[194] Secondly, while the state may be main actor tasked with identifying when actors will be considered to be 'affected' and thus included in participation

191 See e.g. Compliance Committee of the Aarhus Convention, Findings and Recommendations with Regard to Communication ACCC/C/2005 concerning compliance by Belgium (28 July 2006) ECE/MP.PP/C.1/2006/4/Add.2; MOP Aarhus Convention, Report of the Third Meeting of Parties (26 September 2008) ECE/MP.PP/2008/2/Add.1, Addendum: Riga Declaration, para 4(f).

192 Compliance Committee of the Aarhus Convention, Findings and Recommendations with Regard to Communication ACCC/C/2010/51 concerning compliance by Romania (14 July 2014) ECE/MP.PP/C.1/2014/12, para 109.

193 ECE/MP.PP/C.1/2017/14 (n 186) para 78.

194 That being said, there are good reasons to adopt a less broad definition of 'affectedness' than the Aarhus Convention for the purposes of cultural heritage law, chiefly in light of the fact that both cultural heritage law and human rights law recognise that certain individuals or groups deserve *special* consideration in relation to particular manifestations of cultural heritage. Not doing so runs the risk that the interests of local communities will continue to lose out against broadly defined 'public' or 'common' interests over cultural heritage, belonging chiefly to far-removed and diffuse publics.

procedures, this is a rebuttable presumption; most importantly, the Aarhus Convention also supports an interpretation of affectedness in which members of the public can self-identify as being potentially affected.[195]

Moving beyond the concept of 'affectedness', international environmental law and international human rights law could similarly help to concretise when public participation is most crucial in the context of decision-making processes surrounding the designation and management of cultural heritage, as well as the desired outcome of such participation – both elements which remain largely unspecified in cultural heritage law. As such, when members of the public are likely to be affected by a decision concerning cultural heritage, their participation should be facilitated at an early stage when all options are open.[196] Decision-makers furthermore need to take due account of the outcome of public participation processes; while this does not amount to a veto by the public of the proposed action, decisions must indicate how the outcome of the public participation was accounted for. Both of these principles flow from the elaboration of the right of public participation in Aarhus and Escazú.

Finally, both fields have also emphasised the importance of guaranteeing public participation in international decision-making processes when such decisions are likely to affect a given individual or community. This insight is of particular interest for the discussion on public participation in cultural heritage law, as decisions taken at the international level can have a far-reaching impact on the day-to-day lives of individuals at the local level, an argument that has been specifically endorsed by the Special Rapporteur on the Rights of Indigenous Peoples in the context of the World Heritage Convention and other protected areas regimes under international law.[197]

As such, even within international organisations, the participation of the affected public should take place at a stage when all options are still open, and the entity taking the decision – in this case, intergovernmental bodies such as the World Heritage Committee – should be required to take 'due account' of the outcome of public participation when making its decision. Concrete

195 Here, the same caveat holds as above (n 194).

196 As also acknowledged by the Special Rapporteur on Cultural Rights, who has stated that 'general calls for public participation may not be sufficient' (at para 63) and that the guaranteeing of the right to take part in cultural life needs to take into account '[v]arying degrees of access and enjoyment … taking into consideration the diverse interests of individuals and groups according to their relationship with specific cultural heritages. Distinctions should be made between (a) originators or "source communities", communities which consider themselves as the custodians/owners of a specific cultural heritage, people who are keeping cultural heritage alive and/or have taken responsibility for it; (b) individuals and communities, including local communities, who consider the cultural heritage in question an integral part of the life of the community, but may not be actively involved in its maintenance; (c) scientists and artists; and (d) the general public accessing the cultural heritage of others' (at 62). Specific attention should thus be paid to guaranteeing the participation of source and local communities (at 63): UN Doc A/HRC/17/38 (n 180).

197 UN Doc A/67/301 (n 178) paras 90-2; UN Doc A/77/238 (n 178) para 72.

measures elaborated under the Aarhus Convention and Escazú Agreement which could be transplanted to the cultural heritage context involve ensuring that information submitted by members of the public is also available to the public at large; the granting of observer status to affected individuals or groups; facilitating the ability of such actors to circulate statements and speak at intergovernmental meetings; or even their ability formulate text proposals which can be debated and subsequently adopted by the States Parties to the convention in question.

6.3 THE DUTY TO CONSULT AND THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT

The principle of public participation is associated with the duty to consult and the right to free, prior and informed consent (FPIC),[198] both of which are more closely linked to specific members of the public and establish more stringent duties upon states.[199] Both obligations have been specifically developed in the context of the rights of Indigenous peoples under international law, such as within ILO Convention No. 169[200] and UNDRIP.[201] They have also been elaborated upon in a wide range of legal regimes, including human rights law, international environmental law (in particular biodiversity law),[202] and voluntary standards in relation to development projects and businesses. In certain situations, these standards also apply to non-Indigenous peoples.

The content of the duty to consult and the right to FPIC varies depending on the regime in which it is given shape. One of the thorniest questions in relation to both the duty to consult and the right to FPIC is whether these obligations establish a 'veto' of the affected Indigenous community over

198 As acknowledged by Razzaque, FPIC has variously 'been described as a right, a principle and a standard': Jona Razzaque, 'A Stock-Taking of FPIC Standards in International Environmental Law' in Stephen J. Turner and others (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019) 196. For consistency, the present work shall refer to it as a right, on the basis of its inclusion in UNDRIP and recognition by various human rights courts and bodies.

199 Schaap (n 149) 132; Federica Cittadino, 'The Public Interest in Environmental Protection and Indigenous Peoples' Rights: Procedural Rights to Participation and Substantive Guarantees' in E. Lohse and M. Poto (eds), *Participatory Rights in the Environmental Decision-Making Process and the Implementation of the Aarhus Convention: A Comparative Perspective* (Duncker & Humblot 2015) 6.

200 ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 26 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ILO Convention No. 169).

201 UN Doc A/RES/61/295 (n 158).

202 Razzaque (n 198) 207-14.

activities with a possible impact upon them.[203] As has been argued by scholars such as Barelli and Rombouts, it is possible to identify a sliding scale with regards to the degree in which Indigenous peoples must be consulted prior to the undertaking of a given activity or the initiation of a given plan or policy, whether by the state or by private actors. This sliding scale depends on the level of impact of a given activity on the community in question. At the lowest level, there is a requirement to consult with the affected community, with the aim of achieving consent; if impacts are more far-reaching, this obligation can transform into a requirement to actually obtain the consent of the affected community.[204] However, the degree to which each regime implements this sliding scale differs.

6.3.1 ILO Convention No. 169

One of the earliest codifications of the duty to consult can be found in ILO Convention No. 169.[205] Article 6 of the Convention provides that states shall consult with tribal and Indigenous peoples 'whenever consideration is being given to legislative or administrative measures which may affect them directly'. Such consultation should occur 'through appropriate procedures', in particular through the 'representative institutions' of these peoples; they must furthermore 'be undertaken, in good faith and in a form appropriate to the circumstances, *with the objective of achieving* agreement or consent to the proposed measures'.[206]

The obligation to consult was left ambiguous during drafting due to conflicting positions between states and Indigenous organisations.[207] The ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR), the body tasked with observing the implementation of the ILO's conventions by its member states, has thus far interpreted the phrase 'with the objective of achieving agreement or consent' as not requiring such consent to be actually granted by tribal and Indigenous peoples in relation

203 Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16 The International Journal of Human Rights 1, 2.

204 Ibid; S.J. Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers 2014); María Victoria Cabrera Ormaza, *The Requirement of Consultation with Indigenous Peoples in the ILO* (Brill Nijhoff 2018). See further sources cited in Sections 5.3.1-2 below.

205 ILO Convention No. 169 was adopted in order to complement the earlier ILO Convention No. 107, which was adopted in 1957. While Convention No. 107 remains in force it is closed to new ratifications, and a number of States Parties have denounced the Convention and subsequently ratified Convention No. 169. Convention No. 107 does not contain any comparable provisions on states' duty to consult with Indigenous peoples.

206 ILO Convention No. 169, art 6(2) (emphasis added).

207 Cabrera Ormaza (n 204) 67.

to a certain measure.[208] Instead, it has conceptualised it 'as an obligation of means, understood as the obligation to facilitate "genuine dialogue" characterized by "communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord"'.[209] The ability of Indigenous peoples to participate in these decision-making processes thus should not be illusory: there must be a real chance that they can affect the outcome of a decision.[210]

However, Convention No. 169 also provides a number of substantive guarantees, pursuant to which states have specific obligations to consult with Indigenous and tribal peoples in the case of exploration or exploitation of natural resources located on traditional lands,[211] and in the case of the transmission of land rights.[212] In addition, the Convention establishes what is clearly a more stringent regime with regards to the removal of tribal and Indigenous peoples from their traditional lands: article 16 provides that they 'shall not be removed from the lands which they occupy';[213] it furthermore establishes that '[w]here the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent'.[214] If this consent cannot be obtained, tribal and Indigenous peoples can only be relocated 'following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned'.[215] Moreover, if the tribal or Indigenous peoples cannot return to their lands following the relocation, they must be provided with appropriate compensation.[216] As such, while there is an obligation of consent in relation to relocation, it is not an absolute requirement and thus still does not provide a 'veto' to Indigenous peoples.[217]

208 See e.g. ibid 119-20, 146; Cittadino, 'The Public Interest in Environmental Protection and Indigenous Peoples' Rights: Procedural Rights to Participation and Substantive Guarantees' (n 199) 8-9; María Victoria Cabrera Ormaza and Martin Oelz, 'The State's Duty to Consult Indigenous Peoples: Where Do We Stand 30 Years after the Adoption of the ILO Indigenous and Tribal Peoples Convention No. 169?' (2020) 23 Max Planck Yearbook of United Nations Law 71, 84.

209 Cabrera Ormaza (n 204) 119-20. On the obligation to consult as an obligation of process, not result, see also Cittadino, 'The Public Interest in Environmental Protection and Indigenous Peoples' Rights: Procedural Rights to Participation and Substantive Guarantees' (n 199) 2; Cabrera Ormaza and Oelz (n 208) 84.

210 Barelli (n 203) 6.

211 ILO Convention No. 169, art 15.

212 Ibid art 17.

213 Ibid art 16(1).

214 Ibid art 16(2).

215 Ibid.

216 Ibid art 16(3)-(4).

217 Cabrera Ormaza (n 204) 119-20.

6.3.2 UNDRIP

Moving beyond the duty to consult embedded in ILO Convention No. 169, a range of other regimes focus on obligations to obtain FPIC. While there is not necessarily a single definition of FPIC under international law, the principle has been extensively developed in the context of UNDRIP, which was adopted by the UN General Assembly in 2007.[218] The notion of FPIC emerges in two main contexts within UNDRIP: in response to prior wrongs committed against Indigenous peoples and as a safeguard for future action. In the case of the former, UNDRIP establishes that states must provide redress in relation to the 'cultural, intellectual, religious and spiritual property' of Indigenous peoples which has been taken without their free, prior and informed consent;[219] they must similarly do so in the case of their 'lands, territories and resources which they have traditionally owned or otherwise occupied or used', and which have been taken without their free, prior and informed consent.[220]

In the latter category, FPIC becomes a safeguard which must be met in the dealings of the state with Indigenous peoples. As such, states are obliged to ensure that FPIC is obtained in the case of the 'storage or disposal of hazardous materials' on Indigenous lands or territories,[221] and in the case of relocation of Indigenous peoples from their lands or territories.[222] In both situations, the state cannot undertake these activities without obtaining the FPIC of the Indigenous peoples in question, in recognition of 'the importance of the spiritual relationship that Indigenous peoples have with their lands';[223] in other situations, the state is merely required to 'consult and cooperate … in order to obtain their free, prior and informed consent',[224] a noticeably lower standard. This obligation is applicable 'prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources',[225] and whenever the state seeks to adopt and implement

218 While UNDRIP's status as a declaration means that it is not strictly speaking formally legally binding, it is still considered to carry significant 'normative weight': S. James Anaya and Luis Rodríguez-Piñero, 'The Making of the UNDRIP' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press 2018) 62.

219 UNDRIP art 11(2).

220 Ibid art 28(1). The full phraseology of the article is 'confiscated, taken, occupied, used or damaged'.

221 Ibid art 29(2).

222 Ibid art 10.

223 Mauro Barelli, 'Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press 2018) 255.

224 UNDRIP art 19, 32.

225 Ibid art 32(2).

'legislative or administrative measures that may affect [indigenous peoples]'.[226] More broadly, UNDRIP also guarantees the right of Indigenous peoples 'to participate in decision-making matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures'.[227] This also includes decision-making processes with an impact on Indigenous peoples' cultural heritage, particularly when viewed in light of the right to cultural autonomy that emerges from a joint reading of articles 3 and 4 of UNDRIP as an expression of the internal element of their right to self-determination.[228]

Commentators have considered that the obligation to obtain the FPIC of Indigenous peoples prior to the adoption and implementation of legislative or administrative measures establishes a broader standard than that established by ILO Convention No. 169: firstly because it establishes a clearer link between the duty to consult and the necessity of obtaining FPIC;[229] and secondly, because consultation is not only required in relation to legislative or administrative measures which may 'directly' affect Indigenous peoples,[230] but simply all measures which may 'affect' them.[231] However, some disagreement still exists as to the meaning of the requirement in UNDRIP to consult with Indigenous peoples in order to obtain their FPIC, and whether this requirement amounts to a veto of the proposed project or measure.[232] These disagreements became visible once again upon the adoption of the American Declaration on

226 Ibid art 19.

227 Ibid art 18.

228 Yvonne Donders, 'The UN Declaration on the Rights of Indigenous Peoples: A Victory for Cultural Autonomy?' in Ineke Boerefijn and Jenny Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman* (Intersentia 2008) 118-22.

229 Cabrera Ormaza (n 204) 149-50.

230 ILO Convention No. 169 art 6(1)(a).

231 Cabrera Ormaza (n 204) 150.

232 Ibid 150. Compare in this regard Cittadino (n 199), who considers that the requirement of consulting to obtain FPIC requires actually obtaining the consent of Indigenous peoples, not merely attempts to obtain it. By contrast, others, such as Anaya (the former Special Rapporteur on the Rights of Indigenous Peoples), Cabrera Ormaza and Barelli consider that the obligation does not establish a veto power for Indigenous peoples – while simultaneously acknowledging that it establishes a more stringent standard than mere consultation, requiring 'that the relevant consultations should not be a mere formality, but, rather, should be conducted in good faith and with the objective of finding a common agreement': Mauro Barelli, 'Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent' in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (Routledge 2016) 70; S. James Anaya and Sergio Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples' (2017) 67 University of Toronto Law Journal 435, 437; Cabrera Ormaza (n 204) 149-50; Cabrera Ormaza and Oelz (n 208) 92. See also UN General Assembly, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (15 July 2009) UN Doc A/HRC/12/34.

the Rights of Indigenous Peoples (ADRIP) in 2016,[233] with Colombia explicitly objecting to an interpretation of the FPIC standard which would amount to a veto-power for Indigenous peoples with respect to 'legislative or administrative measures that may affect them'.[234]

The chief difficulty in providing an answer to the debate on the role of the 'veto' in UNDRIP is that there is no body which can issue an authoritative interpretation of UNDRIP, nor are there any subsequent agreements which can be called upon as aids in interpretation. While it is possible to rely upon subsequent state practice, either on a unilateral basis or as it has been developed in the context of other international organisations, it is arguably not possible to give an answer to this question in the abstract. However, arguably the most persuasive approach is that which considers that the duty to consult in order to obtain FPIC should be interpreted flexibly, in light of the travaux préparatoires of UNDRIP. During drafting, proposals to provide a veto to Indigenous peoples pursuant to the right to FPIC were thus rejected; however, simultaneously, the phrase in UNDRIP that it is necessary for states to 'consult in order to obtain' the free, prior and informed consent of Indigenous peoples should also not be construed too restrictively, given that such restrictive interpretations were also rejected at the time of drafting.[235]

Scholars have thus suggested that article 32(2) should be read in a flexible manner and in light of the rest of the Declaration, in particular articles 25, 26, and most importantly article 3 on self-determination; if a proposed project or measure is likely to have serious negative impacts on an Indigenous community, the obligation transforms into one in which the consent of the affected community becomes critical.[236] Such an approach is ultimately in line with the object and purpose of UNDRIP.[237] In this sense, FPIC becomes a 'process of negotiation and consultation'.[238] Instead of seeing FPIC as an 'all or nothing' decision fixed at a single point in time, it should thus be seen as an iterative process in which Indigenous peoples should have a 'genuine chance to influence the decision-making process'.[239]

233 OAS, American Declaration on the Rights of Indigenous Peoples (15 June 2016) AG/RES.2888 (XLVI-O/16) (ADRIP).
234 ADRIP art XXIII(2), fn 3.
235 Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (n 203) 11.
236 Ibid 16-17.
237 Barelli, 'Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent' (n 232) 72.
238 Rombouts (n 204) 220.
239 Ibid 171-2.

6.3.3 Human rights bodies

The notion of FPIC has also found extensive elaboration in the area of human rights, in particular as an element of the right to self-determination of Indigenous peoples.[240] It is thus evident in the work of the UN Human Rights treaty bodies, such as the Human Rights Committee,[241] the CERD,[242] and the CESCR,[243] even prior to the adoption of UNDRIP in 2007, as well as in the jurisprudence of the Inter-American Court (and Commission) of Human Rights[244] and the African Court (and Commission) on Human and Peoples' Rights.[245] In doing so, these bodies have elaborated their interpretation of their respective treaties in light of ILO Convention No. 169 and UNDRIP. Similarly, the UN Special Rapporteur on the Rights of Indigenous Peoples has also

240 See Razzaque (n 198) 199.

241 See e.g. HRC, *Poma Poma v. Peru* (24 April 2009) UN Doc CCPR/C/95/D/1457/2006, para 7.6; HRC, *Campo Agua'ē Indigenous Community v. Paraguay* (21 September 2022) UN Doc CCPR/C/132/2552/2015, para 8.7; HRC, *Roy v. Australia* (10 July 2023) UN Doc CCPR/C/137/D/3583/2019, para 8.5. See further e.g. HRC, Concluding observations on the eight periodic report of Colombia (4 September 2023) UN Doc CCPR/C/COL/CO/8, paras 38-9; HRC, Concluding observations on the third periodic report of Brazil (6 September 2023) UN Doc CCPR/C/BRA/CO/3, paras 37, 67-8.

242 See e.g. CERD, *Ågren et al. v. Sweden* (18 December 2020) UN Doc CERD/C/102/D/54/2013, para 8.5. See further CERD, General Recommendation No. 23 (n 167) para 4(d).

243 Chiefly in its concluding observations issued to States Parties of the ICESCR: for an overview, see Yu Kanosue, 'When Land is Taken Away: States Obligations under International Human Rights Law Concerning Large-Scale Projects Impacting Local Communities' (2015) 15 Human Rights Law Review 643, 652, 656; Barelli, 'Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent' (n 232) 75; Cabrera Ormaza (n 204) 160; Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (Oxford University Press 2018) 72; Cabrera Ormaza and Oelz (n 208) 90-1; Andrea Mensi, *Indigenous Peoples, Natural Resources and Permanent Sovereignty* (Brill Nijhoff 2022) 212. See further CESCR, General Comment No. 21 (n 163) paras 36-7.

244 IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 79 (31 August 2005); IACtHR, *Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 172 (28 November 2007); IACtHR, *Kichwa Indigenous People of Sarayaku v. Ecuador* (Merits and Reparations) Inter-American Court of Human Rights Series C No. 245 (27 June 2012); IACtHR, *Kaliña and Lokono Peoples v. Suriname* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 309 (25 November 2015); IACtHR, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 400 (6 February 2020).

245 ACmHPR, *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria* (2001) Communication No. 155/96; ACmHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (4 February 2010) Communication No. 276/2003; ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya* (Judgment of 26 May 2017) Application No. 006/2012.

placed great emphasis on the fulfilment of FPIC obligations by states since the adoption of UNDRIP.[246]

The jurisprudence of the Inter-American Court has proven to be highly influential, with the case of *Saramaka People v. Suriname* of 2007 being of particular importance for its interpretation of the requirement to obtain FPIC.[247] *Saramaka* was preceded by a number of cases of the Inter-American Commission and Court, primarily on the control of indigenous peoples over their ancestral lands in the context of the right to property under the Inter-American system, such as *Awas Tingni Community v. Nicaragua* in which requirements for the participation of Indigenous peoples in decisions concerning tenure over customary lands were laid out.[248] While it is not possible to provide a full account of these developments in the present work, it is nonetheless important to point out the core elements of the approach of the IACtHR from *Saramaka* onwards.

Saramaka concerned the granting of timber concessions by the government of Suriname on the customary land of the Saramaka tribal people. The IACtHR considered that while the Saramaka's right to property – in this case, the right of the Saramaka to the use of the resources on their customary lands – could be limited, this could only be done if the restriction of their rights complied with the requirements that this limitation was 'previously established by law, necessary, proportional and with the aim of achieving a legitimate objective in a democratic society', and if the restriction did not deny the survival of the Saramaka as a people (either physical or cultural).[249]

In order to assess whether the restriction indeed amounted to a denial of the survival of the Saramaka people, the Court established three criteria: that the effective participation of the Saramaka must be guaranteed in the decision-making processes surrounding development and investment projects; that the Saramaka should derive reasonable benefits from these plans; and that the project is not implemented until an environmental and social impact assessment has been carried out.[250] In doing so, the Court explicitly referred to article 32 of UNDRIP and the notion of FPIC embedded within it, considering that 'regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent'.[251] This approach has been interpreted as implying that the state

246 Cabrera Ormaza (n 204) 163. See e.g. UN Doc A/HRC/12/34 (n 232); Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples (11 August 2014) UN Doc A/HRC/27/52.

247 *Saramaka People v. Suriname* (n 244).

248 *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (n 244). See Rombouts (n 204) 230-42 for an extensive overview of these developments.

249 Rombouts (n 204) 269. See *Saramaka People v. Suriname* (n 244) paras 127-8.

250 Rombouts (n 204) 260-2. See *Saramaka People v. Suriname* (n 244) para 129.

251 *Saramaka People v. Suriname* (n 244) para 134.

must secure the consent of Indigenous peoples prior to undertaking development projects (whether a single large-scale project, or several small-scale projects) which are likely to have a major impact upon them.[252]

The criteria established in *Saramaka* have been elaborated upon in later cases of the IACtHR, such as *Sarayaku v. Ecuador*,[253] *Kaliña and Lokono Peoples v. Suriname*[254] and *Lhaka Honhat v. Argentina*.[255] However, the focus of the Court has gradually shifted away from the firm obligation of obtaining consent established in *Saramaka*, instead seeking to consolidate and clarify safeguards in relation to the duty to consult and affirming its status as a principle of customary law.[256] In this context, the Court has underlined that while consent is not necessarily the required final result of the duty to consult, 'agreement' should nonetheless be the aim of such consultations.[257]

This approach is echoed in the practice of the UN treaty bodies, such as CESCR and CERD; on the basis of ILO Convention No. 169 and UNDRIP, the treaty bodies have thus interpreted the duty to consult as not necessarily requiring consent in all circumstances, nonetheless emphasising that consent should be the ideal end goal of consultations.[258] For its part, the Human Rights Committee has emphasised the importance of guaranteeing Indigenous peoples' 'effective participation' in decisions affecting them, particularly in the context of their ability to practice traditional activities within their territories pursuant to article 27 of the ICCPR.[259] In doing so, it has increasingly referred to the need for such decision-making processes to be taken with the free, prior and informed consent of the community concerned.[260] While the Committee's practice leaves open the question whether the FPIC standard requires obtaining

252 Rombouts (n 204) 264-5, 269; Barelli, 'Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent' (n 232) 74.

253 *Kichwa Indigenous People of Sarayaku v. Ecuador* (n 244).

254 *Kaliña and Lokono Peoples v. Suriname* (n 244).

255 *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 244).

256 Cittadino, 'The Public Interest in Environmental Protection and Indigenous Peoples' Rights: Procedural Rights to Participation and Substantive Guarantees' (n 199) 10-11. See also Stéphanie de Moerloose and C. Ignacio de Casas, 'The Lhaka Honhat Case of the Inter-American Court of Human Rights: The Long-Awaited Granting of 400,000 Hectares under Communal Property Rights' (*EJIL: Talk!*, 16 July 2020) <https://www.ejiltalk.org/the-lhaka-honhat-case-of-the-inter-american-court-of-human-rights-the-long-awaited-granting-of-400000-hectares-under-communal-property-rights/>, who consider *Lhaka Honhat* as a missed opportunity for the IACtHR to clarify the distinction between consultation and consent under the Inter-American system.

257 Cabrera Ormaza and Oelz (n 208) 96-7; see *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (n 244) para 174.

258 Ibid 91-2; Kanosue (n 243) 658; Razzaque (n 198) 201-3. See e.g. CERD, General Recommendation No. 23 (n 167) para 4(d); CESCR, General Comment No. 21 (n 163) paras 36-7; *Ågren et al. v. Sweden* (n 242) paras 6.7, 6.17-22.

259 HRC, General Comment No. 23 (n 165) para 7; *Poma Poma v. Peru* (n 241) para 7.6.

260 *Poma Poma v. Peru* (n 241) para 7.6; *Campo Agua'ẽ Indigenous Community v. Paraguay* (n 241) para 8.7; *Roy v. Australia* (n 241) para 8.5.

and not merely seeking such consent, it has emphasised that 'effective participation' in any event requires the state to take positive measures.[261] In this sense, Indigenous peoples must not only have the ability to participate in decisions affecting them according to the law: the state needs to remain aware of potential barriers to their participation.[262]

Bodies such as CERD and CESCR have moreover held in several of their concluding observations that in some situations obtaining the consent of Indigenous peoples becomes compulsory, for example in situations of forced eviction or relocation.[263] Both CESCR and the Special Rapporteur on Cultural Rights have moreover affirmed the applicability of the right to FPIC in relation to the fulfilment of cultural rights in the context of development projects,[264] with the latter applying this right not only in relation to Indigenous peoples but in the case of any people or community affected by such projects.[265] In any event, the practice of human rights bodies and courts thus appears to align with the broader 'flexible' approach to FPIC advocated by scholars, whereby Indigenous peoples cannot veto all decisions with potential impact on their customary lands, but their consent must be obtained 'when a development project is likely to have a serious (negative) impact on their cultures and, ultimately, lives'.[266]

6.3.4 Voluntary guidelines

Simultaneously, a parallel development has emerged to the discussion on FPIC and consultation within human rights: the growth of a wide range of voluntary guidelines seeking to establish safeguards for Indigenous peoples and local communities. While these frameworks are not legally binding as such, they provide a useful elaboration of the content of FPIC as a legal norm; voluntary guidelines may moreover also be the only way to push the issue forward within cultural heritage law, given that they provide lessons from which it is possible to learn how the problem has been tackled in other sectors.[267] These voluntary guidelines have been adopted across several regimes, such as in the context of the implementation of measures to protect biological diversity, to mitigate the effects of climate change, and in projects involving

261 HRC, General Comment No. 23 (n 165) para 7.
262 *Roy v. Australia* (n 241) para 8.7.
263 For an overview, see Kanosue (n 243) 652; Razzaque (n 198) 197-203.
264 CESCR, General Comment No. 21 (n 163) paras 36-7.
265 Report of the Special Rapporteur in the Field of Cultural Rights (15 August 2022) UN Doc A/77/290, para 98. Compare CESCR, General Comment No. 21 (n 163) para 55(e).
266 Barelli, 'Development Projects and Indigenous Peoples' Land: Defining the Scope of Free, Prior and Informed Consent' (n 232) 79.
267 Rombouts (n 204) 321.

international development funds.[268] While it is not possible to provide an overview of all these developments, the following section will provide a brief overview of proposals made within the various sectors.

In the case of the Convention of Biological Diversity, the issue of the consent of Indigenous peoples has thus been dealt with in a number of voluntary guidelines adopted by the Conference of the Parties of the CBD,[269] of which the Akwé: Kon Guidelines (dealing with impact assessments for development projects taking place on or impacting traditional lands),[270] and the Mo'otz Kuxtal Guidelines (dealing with the development of mechanisms for FPIC in relation to access to traditional knowledge) are of particular interest.[271]

The Akwé: Kon Guidelines seek to establish a framework for the participation of Indigenous or local communities in cultural, environmental and social impact assessments relating to developments which 'are proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used' by these communities,[272] in order to 'prevent or mitigate any negative impacts of proposed developments'.[273] The state is hereby expected to undertake public consultations prior to the proposed project.[274] However, the Guidelines simultaneously note that only '[w]here the national legal regime requires prior informed consent of indigenous and local communities, the assessment process should consider whether such prior informed consent has been obtained', and thus do not establish far-reaching standards with regards to FPIC per se.[275]

The Mo'otz Kuxtal Guidelines similarly establish a voluntary framework for the obtaining of FPIC or the 'approval or involvement' of Indigenous peoples and local communities in the context of access to their traditional knowledge. The Guidelines provide that such access should be subject to FPIC, and explicit-

268 Razzaque (n 198) 199.

269 Ibid 207-14.

270 CBP COP, Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred sites and on Lands and Waters Traditionally Occupied or Used by Indigenous or Local Communities (13 April 2004) UN Doc UNEP/CBD/COP/DEC/VII/16, p 10. See also CBD art 8(j); Nagoya Protocol arts 6, 7, 10, 13(1)(b), 16(1).

271 CBP COP, Mo'otz Kuxtal Voluntary Guidelines for the Development of Mechanisms, Legislation or other Appropriate Initiatives to Ensure the "Prior and Informed Consent", "Free, Prior and Informed Consent" or "Approval and Involvement", Depending on National Circumstances, of Indigenous Peoples and Local Communities for Accessing their Knowledge, Innovations and Practices, for Fair and Equitable Sharing of Benefits Arising from the Use of their Knowledge, Innovations and Practices Relevant for the Conservation and Sustainable Use of Biological Diversity, and for Reporting and Preventing Unlawful Appropriation of Traditional Knowledge (17 December 2016) UN Doc CBD/COP/DEC/XIII/18.

272 Akwé Kon Guidelines (n 270) para 1, 14.

273 Ibid 3.

274 Ibid 10.

275 Ibid 53.

ly provide that Indigenous peoples and local communities have a 'right not to grant consent or approval' for such access.[276] Simultaneously, the Guidelines leave a relatively great deal of leeway to individual states,[277] and place Indigenous customary laws on the same footing as national legislation in the elaboration of FPIC within the domestic sphere.[278] Yet the Guidelines nonetheless set out a useful framework for the conducting of FPIC processes, calling attention to – where appropriate – '[w]ritten application[s] in a manner and language comprehensible to the traditional knowledge holder';[279] '[a]dequate and balanced information from a variety of sources that is made available in indigenous or local languages using terms understood by indigenous peoples and local communities';[280] and 'culturally appropriate timing and deadlines'.[281]

Much akin to the biodiversity regime, climate mitigation projects have long faced issues with respect to the safeguarding of the rights of Indigenous peoples and other local communities, with many reports of such projects resulting in human rights violations or forced displacement.[282] REDD+, which was developed in the context of the UNFCCC as framework for the adoption of climate mitigation measures, is an example of this dynamic. Projects developed under REDD+ seek to reduce emissions from deforestation or forest degradation, as well as to conserve and enhance existing forest carbon stocks; however, the programme has similarly faced issues with respect to human rights violations.[283] As a result, a number of safeguard programmes have been developed in the context of REDD+.[284] These safeguards have increasing-

276 Mo'otz Kuxtal Guidelines (n 271) para 7(e).
277 Ibid para 9.
278 Ibid para 10.
279 Ibid para 17(c)(i).
280 Ibid para 17(c)(iii).
281 Ibid para 17(c)(iv).
282 Sébastien Duyck, Sebastien Jodoin and Alyssa Johl, 'Integrating Human Rights in Global Climate Governance: An Introduction' in Sébastien Duyck, Sebastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 4-5.
283 Deborah Delgado Pugley, 'Rights, Justice, and REDD+: Lessons from Climate Advocacy and Early Implementation in the Amazon Basin' in Sébastien Duyck, Sebastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 185-6; Kirsty Gover, 'REDD+, Tenure and Indigenous Property: the Promise and Peril of a "Human Rights-based Approach"' in Christina Voigt (ed), *Research Handbook on REDD+ and International Law* (Elgar 2016) 260.
284 For an overview, see Razzaque (n 198) 216-9. See UNFCCC COP, 'Guidance and Safeguards for Policy Approaches and Positive Incentives on Issues Relating to Reducing Emissions from Deforestation and Forest Degradation in Developing Countries; and the Role of Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries' (15 March 2011) UN Doc FCCC/CP/2010/7/Add.1, Appendix I, para 2; UN-REDD Programme Social and Environmental Principles and Criteria (25-26 March 2012) UN Doc UNREDD/PB8/2012/V/1; Guidelines on Stakeholder Engagement in REDD+ Readiness: With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities (20 April 2012); Guidelines on Free, Prior and Informed

ly sought to promote the 'full and effective participation' of Indigenous and local communities in the implementation of REDD+ activities,[285] including support for FPIC not only for Indigenous peoples, but in some cases also for forest-dependent communities.[286]

Finally, in the realm of development banks, the World Bank has adopted a number of environmental and social safeguards, the most recent of which is the World Bank Environmental and Social Framework (ESF).[287] The ESF requires FPIC in a number of situations, namely in cases of resettlement; in situations with 'adverse impacts on indigenous peoples' land and resources'; and 'where there are significant impacts on their cultural heritage'.[288] However, it has also been critiqued for adopting a less stringent standard of consent than that proposed by human rights bodies given that it considers that 'consent may be achieved even when individuals or groups explicitly disagree'.[289] The ESF moreover eschews references to other instruments containing FPIC requirements, such as UNDRIP; moreover, the number of situations in which FPIC is required is more restrictive than those enumerated in UNDRIP.[290] That being said, the fact that a requirement for FPIC in cases of resettlement has not only been embedded in the case of the safeguards of the World Bank, but also in the safeguards of other development banks, highlights the lack of attention to this issue in cultural heritage law.[291]

Consent (UN-REDD Programme January 2013).

285 See e.g. UN Doc FCCC/CP/2010/7/Add.1, Appendix I (n 284); UN Doc UNREDD/PB8/2012/V/1 (n 284) Principle 6.

286 UN Doc UNREDD/PB8/2012/V/1 (n 284) Criterion 9; Guidelines on Free, Prior and Informed Consent (UN-REDD Programme January 2013).

287 *The World Bank Environmental and Social Framework* (International Bank for Reconstruction and Development/World Bank 2017) (World Bank ESF). On FPIC in the earlier Operational Policies of the World Bank, see Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (n 203) 5. As Barelli notes, the emphasis of the Operational Policies is on consultation, not consent.

288 World Bank ESF (n 287) ESS 5, para 17. See also Corinne Lewis and Carl Söderbergh, 'The World Bank's New Environmental and Social Framework: Some Progress but Many Gaps Regarding the Rights of Indigenous Peoples' (2019) 23 The International Journal of Human Rights 63, 72-3.

289 Stéphanie de Moerloose, 'Indigenous Peoples' Free, Prior and Informed Consent (FPIC) and the World Bank Safeguards: Between Norm Emergence and Concept Appropriation' (2020) 53 Verfassung in Recht und Übersee 223, 236; see also Margherita Brunori, 'Protecting Access to Land for Indigenous and Non-indigenous Communities: A New Page for the World Bank?' (2019) 32 LJIL 501, 501.

290 Lewis and Söderbergh (n 288) 72-3.

291 de Moerloose (n 288) 232; Razzaque (n 198) 204-5.

6.3.5 Relevance for cultural heritage law

FPIC has undoubtedly emerged as a standard within international law which seeks to guide decision-making with a potential to affect Indigenous peoples.[292] These developments have frequently been shaped by the conceptualisation of FPIC within UNDRIP. As a result, it is possible to identify a minimum normative content of the standard across the numerous legal regimes where it has been employed: 'if the decision could result in a substantial impact on a people's fundamental rights, consent will be required',[293] whereas if the impact is less severe, the state will simply be expected to undertake consultation with the aim of obtaining of free, prior and informed consent.[294] However, it is important to note that the majority of these developments are limited to Indigenous peoples (although the precise definition of Indigenous peoples varies depending on the institutional context in which it is being discussed); standards for consultation or FPIC are much less precise with regards to other groups.

Doubts moreover continue to circulate amongst commentators as to whether the requirement of FPIC is binding upon states (or, for that matter, other legal persons such as businesses or international organisations),[295] in light of the varied normative origins of the instruments in which FPIC is elaborated upon, ranging from binding instruments such as ILO Convention No. 169 or the Nagoya Protocol, to formally non-binding texts such as UNDRIP, and explicitly voluntary frameworks such as the Akwé: Kon Guidelines adopted in the context of the CBD and the World Bank's ESF. As such, many commentators remain doubtful as to whether FPIC has entered into customary international law as a legal principle;[296] by contrast, the obligation to consult with Indigenous peoples has been more clearly established as being part of customary international law.[297]

Nonetheless, the conceptualisation of FPIC and consultation standards outlined above could certainly inform the further development of consent and consultation standards in cultural heritage law. In this context, there is still room for clearer application of consultation and FPIC requirements to both

---

292 Jones, 'Towards a Right of Peoples to Participation in Global Governance' (n 125) 141-2.
293 Ibid.
294 Ibid 159-60; Barelli, 'Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' (n 223) 269.
295 However, in relation to international organisations, see the assertion of the Special Rapporteur on Indigenous Peoples that 'agencies, funds, programmes and intergovernmental organizations of the United Nations system should consult with indigenous peoples, in accordance with the same standards of consultation that apply to States under the Declaration, in the development and execution of activities or policies which may affect the rights or interests of indigenous peoples': UN Doc A/67/301 (n 178) para 87.
296 de Moerloose (n 288) 229-30.
297 Barelli, 'Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' (n 223) 269.

Indigenous and non-Indigenous peoples, in particular with respect to forced evictions and other activities which might preserve tangible cultural heritage at the expense of intangible cultural heritage. One of the key takeaways in this regard is that almost all regimes which provide for FPIC standards establish an absolute requirement of consent in situations concerning the potential relocation of Indigenous peoples, in addition to decisions concerning their access and use of their traditional lands. This has yet to be clearly formulated within cultural heritage law, despite the fact that many inscription and management decisions do result in such consequences, whether for Indigenous peoples, other minority groups, or simply local communities.

In the context of cultural heritage law, the application of FPIC beyond Indigenous peoples to non-Indigenous local communities seems unlikely; by contrast, there is still room for clearer application of consultation requirements in cultural heritage law to non-Indigenous communities, in particular with respect to forced evictions and other activities which might preserve tangible cultural heritage at the expense of intangible cultural heritage. Moreover, the operationalisation of FPIC for Indigenous peoples, for example in the World Heritage Committee, as well as requirements of consent more broadly within cultural heritage law, could certainly be established more clearly and more ambitiously in light of standards elsewhere; they should also refer to these standards established and thereby build upon the lessons which have been learned in similar forums. Indigenous peoples' right to cultural autonomy, as recognised in UNDRIP,[298] further underscores the need for cultural heritage law to guarantee robust FPIC standards for Indigenous peoples in the context of decisions affecting the management of their cultural heritage.

Furthermore, the inclusion within UNDRIP of the need to provide redress in situations where the 'cultural, intellectual, religious and spiritual property' of Indigenous peoples[299] or the 'lands, territories and resources which they have traditionally owned or otherwise occupied or used'[300] have been taken without their free, prior and informed consent raises interesting questions about the need for the development of similar standards within cultural heritage law. This is particularly the case for the World Heritage Convention, given that there have been many sites which have been designated without the FPIC of Indigenous (or tribal) peoples on whose territories the cultural site in question is located, in many cases leading to the forced displacement of these peoples. These developments thus open up the question of how cultural heritage law can reckon with its historical legacy and its far-reaching impact upon individuals and local communities.

298 Yvonne Donders (n 228) 118-22.
299 UNDRIP art 11(2).
300 Ibid art 28(1).

6.4 IMPACT ASSESSMENTS

A final legal technique with potential for greater application within cultural heritage law is the use of impact assessments, a concept which has been extensively elaborated in the field of environmental law. In this context, impact assessments have been developed as a tool to prevent potential harms to the environment, frequently in the transboundary context. In comparison to the concepts examined above, impact assessments can be seen as a method to facilitate participation in decision-making, rather than a form of participation as such. In addition to their role in preventing environmental harms, impact assessments can also be used in order to assess whether the impact of a proposed plan or project will be such that it is likely to meet the standard required in relation to the obligation to obtain free, prior and informed consent. Impact assessments emerged as a law-making tool in the 1960s in the USA in the context of domestic environmental legislation; since then, the field has expanded to cover not only environmental impact assessments (EIAs) but also other types of impact assessments, such as social impact assessments (SIAs), and human rights impact assessments (HRIAs).[301]

While most of these types of impact assessment have developed in silos, they share a number of similarities, particularly with regards to the basic structure of the impact assessment and the integral role of the participation of the affected public(s) in each stage of the assessment.[302] Moreover, a distinction is often made – particularly in the case of EIAs – between EIAs focusing on a particular project (EIAs proper) and those focusing on the impact of plans or policies (known as Strategic Environmental Assessments, or SEAs). Another frequent distinction is made between impact assessments which solely focus on the project or plan under proposal, compared to those which also seek to assess the cumulate impacts of other projects or proposals already underway or in the pipeline; the latter are referred to as cumulative impact assessments.[303]

However, the broad variety of impact assessments which are carried out in practice are not necessarily always carried out as a matter of legal obligation; the main obligations under international law have been established in relation

301 On SIAs and HRIAs, see e.g. Rebecca De-Winter Schmitt and Kendyl Salcito, 'The Need for a Multidisciplinary HRIA Team: Learning and Collaboration Across Fields of Impact Assessment' in Nora Götzmann (ed), *Handbook on Human Rights Impact Assessment* (Elgar 2019); Frank Vanclay, 'Reflections on Social Impact Assessment in the 21st century' (2019) 38 Impact Assessment and Project Appraisal 126.

302 Nora Götzmann, 'Introduction to the Handbook on Human Rights Impact Assessment: Principles, methods and approaches' in Nora Götzmann (ed), *Handbook on Human Rights Impact Assessment* (Elgar 2019) 7-8.

303 Jill A.E. Blakley, 'Introduction: Foundations, Issues and Contemporary Challenges in Cumulative Impact Assessment' in Jill A.E. Blakley and Daniel M. Franks (eds), *Handbook of Cumulative Impact Assessment* (Elgar 2021) 5-6, 10.

to EIAs. International law thus establishes an obligation to carry out an EIA in transboundary contexts in the case of a likely significant environmental harm.[304] The obligation to carry out an EIA is seen as a path through which states can fulfil their due diligence obligations pursuant to the no harm principle under international environmental law, with the ICJ famously noting in *Pulp Mills* that 'it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource'.[305] This obligation has developed over time into a principle of customary international law, but has also been codified in a range of soft law documents[306] and treaty law,[307] although the modalities of the obligation vary across regimes, with some regimes leaving states a broad deal of discretion in the design and conducting of EIAs.[308] International law thus does not set precise standards on how EIAs should be conducted, as this falls within the discretion of individual states and is a matter for domestic regulation.[309]

Moreover, there is some degree of dissatisfaction amongst commentators on the effectiveness of EIAs in actually preventing environmental harm, given that most frameworks in which EIAs have been established do not necessarily state what should be the outcome of the impact assessment procedure – only that it needs to be conducted.[310] EIAs are thus essentially procedural: they set out steps for decision-makers, create guarantees in the execution of these

304 Astrid Epiney, 'Environmental Impact Assessment' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2009) paras 51-4; Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press 2008) 133-4. On the conduct of impact assessments beyond transboundary settings, see Neil Craik and Kristine Gu, 'Implementing Environmental Impact Assessment in Areas Beyond National Jurisdiction: Epistemic, Institutional and Normativity Challenges' in Rosemary Rayfuse, Aline Jaeckel and Natalie Klein (eds), *Research Handbook on International Marine Environmental Law* (Elgar 2022).

305 Most famously established by the ICJ in the *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [2010] ICJ Rep 14, para 204. Timo Koivurova, 'Transboundary Environmental Impact Assessment in International Law' in Simon Marsden and Timo Koivurova (eds), *Transboundary Environmental Impact Assessment in the European Union: The Espoo Convention and its Kiev Protocol on Strategic Environmental Assessment* (Routledge 2011) 23; Craik (n 304) 150-1.

306 See e.g. Rio Declaration (n 19) Principle 17.

307 See e.g. Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entry into force 10 September 1997) 1989 UNTS 309 (Espoo Convention); UNCLOS art 206; CBD art 14; UNFCCC art 4(1)(f); Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entry into force 14 January 1998) 2941 UNTS 3, arts 3, 8.

308 Craik (n 304) contrasts this to the Espoo Convention, which provides detailed requirements on the conducting of EIAs (101).

309 See *Pulp Mills* (n 305) para 205; see also Epiney (n 304) para 65.

310 Craik (n 304) 150-1.

steps, but do not mandate a particular outcome.[311] As Craik notes, EIAs seek to bring the numerous actors involved in a decision together, and 'to lay bare the choices and tradeoffs between competing objectives'.[312] Thus in the case of the Espoo Convention, the state needs to provide justifications for its actions taken subsequent to the EIA;[313] in doing so, 'EIAs promote reasoned decision-making by requiring decisions to be made openly, in writing and accompanied by reasons',[314] much akin to the procedural guarantees examined above in relation to the principle of public participation and the duty to consult.

As noted above, a number of parallel procedures have developed alongside EIAs, seeking to assess the impact of decision-making through the lenses of social change, health, and human rights.[315] In some cases, impact assessments seek to combine an assessment of these fields as well as environmental impacts, resulting in categories such as Environmental and Social Impact Assessments and Sustainability Impact Assessments.[316] While the structure of these assessments remains fairly unsettled in comparison to EIAs,[317] they have seen increasing rates of adoption in fields such as business and human rights law in the case of human rights impact assessments (HRIAs).[318] Multiple categories of HRIAs have been developed, with the main distinction between them being who carries out the assessment: either the state, certain non-state actors (such as companies), or even the affected community.[319]

Human rights impact assessments are slightly different in nature compared to EIAs or SIAs, in light of their basis in legally binding human rights frame-

311 Ibid 4; Elizabeth Fisher, 'Environmental Impact Assessment: "Setting the Law Ablaze"' in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Elgar 2016) 424-5.

312 Craik (n 304) 9.

313 Ibid 151.

314 Ibid 160.

315 James Harrison, 'Human Rights Measurement: Reflections on the Current Practice and Future Potential of Human Rights Impact Assessment' (2011) 3 Journal of Human Rights Practice 162, 163.

316 Vanclay (n 301) 126.

317 De-Winter Schmitt and Salcito (n 301) 323-4; Harrison (n 315) 165; James Harrison, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment' (2013) 31 Impact Assessment and Project Appraisal 107, 110.

318 Vanclay (n 301) 126; Götzmann (n 302) 4-6. See also Harrison, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment' (n 317) on the comparison between the approach in the UN Guiding Principles and HRIAs.

319 Caroline Brodeur, Irit Tamir and Sarah Zoen, 'Community-based HRIA: Presenting an Alternative View to the Company Narrative' in Nora Götzmann (ed), *Handbook on Human Rights Impact Assessment* (Elgar 2019) 51; Harrison, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment' (n 317) 109-10.

works;[320] as such, HRIAs adopt a somewhat different approach to the question of the outcome of the HRIA and states are more likely to be subject to an obligation to conduct HRIAs prior to potentially harmful activities in areas under their jurisdiction.[321] This is because, unlike EIAs, HRIAs are based upon human rights obligations which are in and of themselves binding. As such, if an HRIA finds a (possible) violation of human rights, the state will be bound to act. Scholars have thus considered that HRIAs can help to contribute to the due diligence of states (and potentially also other actors) in relation to individuals or communities likely to be adversely affected.[322] Simultaneously, HRIAs are also not considered a panacea, given that there is a risk that they simply become a 'box ticking' exercise in the absence of meaningful external monitoring.[323]

6.4.1 Relevance for cultural heritage law

Impact assessments have also gradually emerged in the context of heritage protection, in the form of heritage impact assessments (HIAs), having for example been introduced into the Operational Guidelines of the World Heritage Convention (along with EIAs and SEAs) at the 43rd session of the World Heritage Committee in 2019,[324] albeit without much further guidance for States Parties on how such impact assessments are to be conducted.[325] In the context of the Intangible Cultural Heritage Convention, impact assessments play an even more marginal role, with the Operational Directives merely calling upon States to 'endeavour' to take account of the impacts of development plans and programmes on intangible cultural heritage by conducting

320 Kamrul Hossain and Anna Petrétei, 'Resource Development and Sámi Rights in the Sápmi Region: Integrating Human Rights Impact Assessment in Licensing Processes' (2017) 86 Nordic Journal of International Law 302, 308; Malayna Raftopoulos, 'REDD+ and Human rights: Addressing the Urgent Need for a Full Community-based Human Rights Impact Assessment' (2016) 20 The International Journal of Human Rights 509, 520-2.

321 Gauthier de Beco, 'Human Rights Impact Assessments' (2009) 27 Netherlands Quarterly of Human Rights 139, 143.

322 Brodeur, Tamir and Zoen (n 319) 50.

323 Harrison, 'Establishing a Meaningful Human Rights Due Diligence Process for Corporations: Learning from Experience of Human Rights Impact Assessment' (n 317) 111, 114.

324 World Heritage Convention Operational Guidelines, para 118bis. See also World Heritage Committee, Decision 39 COM 7.11 (2015), which first proposed the use of HIAs and EIAs in the context of development projects being carried out in or around World Heritage Sites.

325 However, see the 2022 Guidance and Toolkit for Impact Assessment in a World Heritage Context (UNESCO, ICCROM, ICOMOS and IUCN 2022). Notably, these guidelines only focus on EIAs and HIA, not HRIAs. See also Patrick R. Patiwael, Peter Groote and Frank Vanclay, 'Improving Heritage Impact Assessment: an Analytical Critique of the ICOMOS Guidelines' (2019) 25 International Journal of Heritage Studies 333; Baharak Ashrafi, Carola Neugebauer and Michael Kloos, 'A Conceptual Framework for Heritage Impact Assessment: A Review and Perspective' (2022) 14 Sustainability 27.

impact assessments,[326] without providing any further guidance on the nature of such impact assessments. Moreover, no mention is made in the Directives of the need to carry out impact assessments with regards to the inscription of intangible cultural heritage pursuant to the Convention, even though – as the previous chapter has shown – such impact can be far-reaching for individuals and local communities.

However, even in the event of further incorporation of impact assessment methodologies into international heritage governance, it is important to keep in mind the broader limitations of impact assessments as a methodology which have been described above: as a purely procedural tool, the intended outcomes of impact assessments are often indeterminate, and only a few legal regimes establish obligations for states to conduct EIAs, as opposed to voluntary guidelines. As such, they cannot be considered the sole remedy to the problems which are faced by individuals and local communities within international heritage governance which have been described at the beginning of this chapter, although an increased emphasis on the role of impact assessments – in particular the potential of further developing human rights impact assessments – could ensure that the voices of individuals and local communities likely to be affected by international heritage governance become less invisible within these governance processes.

6.5 Conclusion

This chapter has sought to explore whether lessons can be drawn from other areas of international law which have grappled with similar problems to those faced by individuals and communities in the context of cultural heritage law, such as international environmental law and international human rights law, in order to establish greater synergies between cultural heritage law and these fields. The chapter has mapped the contours of a range of legal obligations established in these fields: the principle of public participation, and a corresponding right to public participation; the duty to consult and the allied obligation for states to (seek to) obtain free, prior and informed consent; and the conducting of impact assessments. These developments underline that the participation of affected individuals and communities in decisions which are likely to have an impact upon them or their cultures, homes or ways of life is inescapable within international law.

Some immediate lessons can be drawn from these developments which are of relevance to ongoing discussions on the roles of individuals and communities within international heritage governance. Perhaps the most important of these is the sliding scale approach which has been elaborated upon in numerous contexts in relation to the principle of free, prior and informed

326 Intangible Cultural Heritage Convention Operational Directives, para 172.

consent, in which the obligation for the state to consult with Indigenous peoples hardens into one of actually obtaining their consent in situations with a severe impact upon a given Indigenous people. Such consent will automatically be required in situations where Indigenous peoples are to be relocated from their lands or territories. This also means that there are many situations in which the FPIC standard does not establish an absolute obligation for the state to obtain the consent of Indigenous peoples, as opposed to merely undertaking consultation *with the aim of* obtaining consent. This insight has important consequences for the emerging conceptualisation of FPIC within international heritage governance.

It would also be fruitful for debates on participation within cultural heritage law to distinguish more clearly what is meant when one speaks of such participation: does this entail participation at the local level, at the international level, or both? Does it refer to participation in the creation or implementation of cultural heritage law, or its decision-making processes? And how can we define who needs to be involved within these processes of participation? Drawing upon developments across international law can help international heritage lawyers to answer these questions, and thereby shape emerging legal principles.

As such, while the principle of public participation is firmly embedded within certain areas of international law, the emergence of this principle in relation to participation in international organisations as opposed to participation at the local level remains somewhat hesitant. Striking an appropriate balance between participation at the local and at the international level will be critical in the realm of heritage governance, given that fostering participation at the local level might ultimately be of little use to communities if the bulk of decision-making is taking place within international forums such as the World Heritage Committee. However, regional developments within environmental law hold some promise here, as this chapter has discussed in relation to the Almaty Guidelines established under the Aarhus Convention in Europe and the emerging guidelines of the Escazú Agreement within Latin America.

In any event, the developments surveyed above indicate that if participation does take place, it must take place at a stage when all options are still open, and the members of the public have a genuine chance to (co-)shape the outcome of a given process. In the case of the principle of public participation, practice shows that while the state does not need to follow the outcome of public participation processes – in other words, the public does not hold a 'veto' in decision-making – it does need to take due account of the outcome of these processes. The question remains how such obligations could be incorporated into the governance frameworks of international heritage conventions in such a way that they do not simply become another reporting requirement for states, which in many cases already suffer from a lack of resources – whether financial or otherwise – allowing them to meet their reporting obligations. The distinctions made within conventions such as Aarhus and Escazú

in terms of the level of participation required depending on the type of process under examination – such as the distinction between activities, policies, and generally applicable regulations – could be fruitful to explore in the context of cultural heritage law as well.

Surveying the development of the principle of public participation within international environmental law evidences that its conceptualisation in cultural heritage law remains somewhat handicapped. Whereas in environmental law the principle is a tripartite concept – comprised of the right to information, the right to participation, and the right to a judicial remedy – these elements are less clear in relation to cultural heritage law. Thus far, cultural heritage law has neglected that participation can only be successful if individuals and communities have access to the necessary information to form the basis of their participation, and if they also have access to an appropriate judicial remedy, should there be shortcomings in the participation process.

It goes without saying that there are also a number of limitations to relying upon principles of public participation in order to resolve the tensions surrounding community participation in cultural heritage law. All of the standards surveyed in the present chapter are thus procedural and have often been given shape in different ways across different legal regimes. As such, cultural heritage law will need to find its own way to incorporate these obligations within its own instruments, as the path is by no means clearly set out. This also means that this process of incorporation may not necessarily proceed in a uniform manner across all of UNESCO's cultural conventions. Furthermore, as many commentators have noted, implementation has remained wanting for many of these procedural obligations – an issue which should be kept in mind within cultural heritage law as well, although this should not be a reason to not develop such rights at all.

In addition, an overemphasis on principles of public participation runs the risk of putting the onus of improving cultural heritage governance on individuals and communities, rather than on states. In this regard it is important to avoid 'participation fatigue' within communities: it can provoke very real frustration for communities if their participation is solicited and the outcomes of these participatory processes are subsequently not genuinely considered by decision-makers.[327] The very concept of participation has also drawn critique from scholars in neighbouring disciplines, pointing to the 'tyranny of participation',[328] and how participation can reify existing differences within communities and societies,[329] given that the 'barriers to parti-

327 Wesselink and others (n 12) 2689.

328 Bill Cooke and Uma Kothari (eds), *Participation: The New Tyranny?* (Zed Books 2001).

329 Anika Singh Lemar, 'Overparticipation: Designing Effective Land Use Processes' (2021) 90 Fordham Law Review 1083.

cipation are unevenly distributed'.[330] Nor is participation a panacea for challenging long-standing held beliefs about the nature of heritage safeguarding, and the role of expert opinion in the construction of heritage value,[331] or an immediate solution to the histories of exclusionary heritage conservation strategies which have characterised many cultural heritage sites (let alone broader structural inequalities which certain communities might face).[332] All of these considerations raise the question – which perhaps cannot be resolved within the current legal framework – what approach cultural heritage law should adopt with respect to situations in which local communities explicitly refuse to be co-opted in participatory processes, despite the best efforts of the state to involve them in decision-making.

Ultimately, drawing more closely upon principles of public participation and free, prior and informed consent in the context of international heritage governance does not necessarily entail that the interests of individuals or local communities will automatically prevail over broader public interests or the interests of the international community, as some might fear.[333] Instead, the core of participation is 'about attending to and staying open to different ways of understanding the world, and different insights into our situation', providing those affected by a decision with 'an opportunity to be heard',[334] and forcing the state to reflect on how it balances competing interests when undertaking heritage protection pursuant to international law.[335] The standards established by human rights law and environmental law simply provide for a framework within which affected publics can be heard and participate, and in which decision-making authorities are required to be transparent in outlining how the outcome of public participation has been taken into account in the making

330 Chiara Armeni and Maria Lee, 'Participation in a Time of Climate Crisis' (2021) 48 Journal of Law and Society 549, 557; such barriers include 'time, mobility, literacy and communication skills, as well as often technical or specialist expertise': Lee (n 9) 779.

331 Jodoin draws useful parallels here with the role of participation in environmental law, noting that 'conservationists frequently continue to hold prejudicial views about the knowledge or capabilities of local communities. Moreover, local communities themselves may hold beliefs and adopt defensive strategies that make it more difficult for outsiders to understand their views and concerns and collaborate with them': Sébastien Jodoin, 'Can Rights-Based Approaches Enhance Levels of Legitimacy and Cooperation in Conservation? A Relational Account' (2014) 15 Human Rights Review 283, 288.

332 Ibid 297; Armeni and Lee (n 330) 570-1.

333 Indeed, as Donders (n 228) notes, cultural rights are not absolute: 111.

334 Armeni and Lee (n 330) 570-1.

335 For a discussion of similar considerations in the context of the use and exploitation of natural resources, see Nico Schrijver, 'Unravelling State Sovereignty? The Controversy on the Right of Indigenous Peoples to Permanent Sovereignty over their Natural Wealth and Resources' in Ineke Boerefijn and Jenny Goldschmidt (eds), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman* (Intersentia 2008) 98.

of the decision. Doing so will strengthen, not weaken, the legitimacy of cultural heritage protection under international law.[336]

336 Cf. arguments made in the context of environmental law on the importance of public participation: Gerd Winter, 'Theoretical Foundations of Public Participation in Administrative Decision-Making' in Gyula Bándi (ed), *Environmental Democracy and Law* (Europa Law Publishing 2014).