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

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7 The humanisation of cultural heritage law

This dissertation has sought to demonstrate the local impacts of international heritage inscription, exploring how actions taken by state actors in the name of the 'common interest' of cultural heritage protection frequently result in the erasure of living heritage value, both in the case of tangible and intangible cultural heritage protected pursuant to public international law. It has argued that the problems faced by individuals and local communities as a result of international heritage inscription – such as displacement or the extension of state control over minority cultural heritage – should not be approached on a case-by-case basis, but should instead be viewed as evidence of a systemic problem within cultural heritage law which can be traced to the field's utilisation of universalist legal concepts, such as the 'cultural heritage of humankind' or the 'common interest'.

These concepts ultimately obscure the costs which are imposed upon individuals and local communities in order to safeguard cultural heritage, and prevent these actors from engaging in cultural heritage law on their own terms. As the foregoing has demonstrated, cultural heritage law is characterised by opaque decision-making processes and a lack of effective safeguards for the protection of the interests of individuals and local communities against the effects of the invocation of the common interest of cultural heritage protection by states. In this sense, cultural heritage law falls in step with broader trends within international law in which 'authority is globalised while responsibility is localised'.[1] The result is that it is unclear to those most affected by decisions taken at the international level concerning the safeguarding of cultural heritage how they can influence and challenge these decisions.

This chapter brings together the various strands of the research project: the issues currently facing individuals and local communities in international heritage governance; the possible alternative approaches to the treatment of individuals and communities drawn from other areas of international law; and the potential solutions that could result from viewing international heritage law through the lens of theories on the humanisation of international law and

1 Julia Dehm, *Reconsidering REDD+: Authority, Power and Law in the Green Economy* (Cambridge University Press 2021) 7.

the role of a potential 'particularistic legal universalism' therein. In doing so, the chapter asks whether adopting such a perspective could help to bridge the tensions between local and universal interests in cultural heritage protection. In this sense, it both summarises the preceding chapters and provides an answer to the overarching research question of the dissertation, which asked how the interests of individuals and local communities should be safeguarded within the state-centric universalist legal structures and norms of cultural heritage law.

7.1 Tensions between the 'form' and 'function' of universalist international law

The first three chapters of the dissertation focused on the phenomenon of universality and the role it has played in the development of public international law, and more specifically cultural heritage law. The chief goal was to place cultural heritage law within broader trends which have driven the development of international law – as well as the anxieties of international lawyers about the operation of universality within the workings of contemporary international law.

Chapter 2 examined how international law regulates the protection of common interests through universalist legal concepts, asking to what extent the role granted to the state in the protection of these common interests is being challenged by new doctrinal and legal developments. It defined universality as the process through which international legal instruments designate certain regulatory issues as being subject to the common interests of the international community, thereby (theoretically) transforming them from issues within the sphere of a state's sovereign interests into the subject of inter-state cooperation in the interests of the international community. These treaties do so by calling upon concepts such as the 'common interest', the 'international community', the 'common heritage of mankind', or the 'common concern'.[2]

International lawyers have traditionally analysed these developments as signifying a broader shift from 'coexistence' to 'cooperation' in public international law – and with it, a reconceptualization of the role of state sovereignty within the international legal order. And indeed, it seems difficult to deny that the growth of common interest norms, such as those found in regimes such as human rights law and the law of the global commons, has resulted in a number of fundamental changes within this order.[3]

For one, common interest regimes frequently establish obligations of means and conduct rather than result, and contain a relative paucity of absolute obligations; this is in part because the goal of many common interest regimes

2 Section 2.1.
3 Section 2.2.

is to promote and facilitate state compliance rather than punish non-compliance. Furthermore, many common interest norms are inward-looking obligations which are not dependent on a mutual exchange and performance of rights and obligations between states (so called 'non-synallagmatic norms').[4] In addition to this, the emergence of concepts such as *jus cogens* norms and obligations *erga omnes* have led to a number of critical developments in the laws of state responsibility and treaty interpretation, which similarly recognise the existence of certain common interests of the international community. Finally, at the level of monitoring and enforcement states increasingly invoke the notion of obligations which are owed to the international community as a whole in order to justify their appearance before international courts as non-injured states; conversely, they are required to answer for their actions safeguarding the common interest before a panoply of political and legal monitoring bodies.

In any event, international law certainly appears to have moved beyond bilateralism, in light of the fact that a wide variety of legal regimes seek to achieve certain goals which have been deemed to be of such importance that they should not (or cannot) be tackled in isolation by individual states. Despite these developments, many international legal scholars argue that state sovereignty and state consent remain central cogs in the machinations of public international law. As such, although certain common interests of the international community are now firmly removed from the scope of a state's 'internal affairs' – with the very idea of a *domaine réservé* seeming almost quaint – individual states continue to play an important role in not only the creation, but also the monitoring and enforcement of common interest norms. In this reading, the idea of an 'international community' and its associated interests should be interpreted as a legal fiction at the heart of the contemporary international legal system,[5] with states being conceptualised as trustees or custodians of the common interest identified in international law.[6]

Simultaneously, these observations have provoked certain anxieties amongst international legal scholars, who have identified a fundamental tension between the goals which international law purportedly sets out to realise and the tools

4 Catherine Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' in Dino Kritsiotis and Michael J. Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 94. See further Section 2.2.1.

5 Pierre-Marie Dupuy, 'From a Community of States Towards a Universal Community?' in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018) 55-6.

6 Christian J Tams, 'Individual States as Guardians of Community Interests' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford University Press 2011) 403); Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 AJIL 295; Wolfgang Benedek and others, 'Conclusions: The Common Interest in International Law - Perspectives for an Undervalued Concept' in Wolfgang Benedek and others (eds), *The Common Interest in International Law* (Intersentia 2014) 224.

with which it is equipped to achieve them. This has been described as a 'tension between [the] form and function' of treaties concluded in the pursuit of common interests, given that the central organising principles of the international legal order nonetheless remain bilateralist in nature.[7] As such, these consensualist models of public international law struggle to account for the enforcement of the underlying goals of common interest regimes.[8] Moreover, decision-making processes concerning common interests frequently take place within international organisations which are largely inaccessible to those on whose behalf they purport to speak, and who are often most affected by the decisions they take in the name of the common interest, leading to calls for the diversification of the stakeholders represented within international governance.

More broadly, critical legal scholars have questioned whether the language of common interest and universality in international law is as emancipatory as it seems at first glance – precisely because the reins still remain firmly in the hands of states and the language of common interest is often used as a trump card over other, competing, interests which struggle to formulate themselves in a universalist register. Moreover, common interest regimes often fail to deliver on their promises when viewed from the perspective of concrete communities of individuals, rather than an inchoate international community.[9] Whilst the emergence of these regimes and the rise of universalist rhetoric in international law thus appears to present a challenge to the central position of state sovereignty in the international legal order, in many situations these regimes in fact solidify the position of the state within that order.

The result of the current condition of the international legal order is thus that states become not only the arbiter of what is considered to be in the 'common interest', but also the actor deciding what methods of protection are most appropriate, and subsequently judge, jury and executioner of whether these methods of protection are indeed being adequately implemented. States are only rarely subjected to independent assessments of their implementation of common interest norms, thereby creating a situation ripe for abuse. The negative consequences of this state of affairs are often shrouded by inter-

7 Catherine Brölmann, 'Law-Making Treaties: Form and Function in International Law' (2005) 74 Nordic Journal of International Law 383 386; Catherine Brölmann, 'Typologies and the "Essential Juridical Character" of Treaties' in Dino Kritsiotis and Michael J. Bowman (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 386. See also Sarah Thin, 'Community Interest and the International Public Legal Order' (2021) 68 Netherlands International Law Review 35, 54-5.

8 Section 2.3.2.

9 Such as in the case of the regime established under the law of the sea for the management of the Area: Isabel Feichtner, 'Mining for Humanity in the Deep Sea and Outer Space: The Role of Small States and International Law in the Extraterritorial Expansion of Extraction' (2019) 32 LJIL 255; Surabhi Ranganathan, 'Seasteads, Land-grabs and International law' (2019) 32 LJIL 205; Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' (2019) 30 EJIL 573.

national law's utilisation of universalist legal concepts, which 'at once obscures and legitimizes the particular interests that drive the operation of international law'.[10] As such, certain legal scholars are inherently suspicious of the universalising aspirations of public international law, and seek to uncover who has the authority to speak on behalf of the universal in public international law (and why), and conversely who is silenced by these claims, thereby questioning the neutrality implied by the act of speaking on behalf of the 'universal'.[11]

How to protect common interests in an international legal order which remains centred around state sovereignty has also formed the focus of scholars working on the 'humanisation' of international law.[12] Scholars in this tradition seek to answer the question 'how a community interest of all individuals can be articulated through, and against, a structure of international law designed to accommodate the interests of States as such.'[13] In doing so, they acknowledge that while concepts such as state sovereignty and state consent remain central structuring principles of the contemporary international legal order, the growing centrality of human rights norms across a broad range of international legal regimes, coupled with the emergence of the individual as a central actor, represent an important leitmotif for the future development of the law.[14] As was outlined in the introduction to the dissertation, this should arguably also be the case for cultural heritage law, in light of the position of notions of living heritage value at the heart of the field – with the proviso that such developments should also recognise the position of the individual within the communities of which they form a part.

7.2 Cultural heritage law as a universalist legal regime

Chapters 3 and 4 subsequently enquired whether cultural heritage law should be seen as a common interest regime similarly to the regimes discussed in Chapter 2, both from the perspective of the justifications put forward from

10 Geoff Gordon, 'Universalism' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law* (Elgar 2019) 865.

11 Martti Koskenniemi, 'Projects of World Community' in Antonio Cassese (ed), *Realizing Utopia* (Oxford University Press 2012) 9-10; Benedek and others 225-6; Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' 597.

12 See e.g. Bruno Simma, 'From Bilateralism to Community Interest' (1994) 250 *Recueil des Cours de l'Académie de Droit International* 217; Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff Publishers 2006); Antonio Cassese, *Realizing Utopia* (Oxford University Press 2012); Antônio Augusto Cançado Trindade, *International Law for Humankind* (2nd rev. edn, Martinus Nijhoff Publishers 2013).

13 Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law' in Ulrich Fastenrath (ed), *From Bilateralism to Community Interest* (Oxford University Press 2011) 81.

14 Section 2.3.3.

within the field in order to defend the necessity of the creation of an international legal regime aimed at the protection of cultural heritage, and at the level of the norms established in order to give shape to this protection in practice. *Chapter 3* thus examined how cultural heritage regimes in public international law have invoked ideas of universality and argued in favour of the idea that cultural heritage protection is a common interest. To this end, the chapter examined the *travaux préparatoires* of UNESCO's five core cultural conventions in order to trace the emergence of this argument in its legal form. These debates demonstrate that the notion of a 'cultural heritage of humankind' is not a timeless principle underlining the common interest of the international community in heritage protection, but merely shorthand for the enduring relevance of state sovereignty for the field.

According to orthodox accounts of the history of cultural heritage law, the notion that cultural heritage is a matter of concern to the international community first emerged in the nineteenth century.[15] Simultaneously, the emergence of this idea was accompanied by an extractivist logic,[16] in which the cultural heritage of colonised nations was removed from its place of origin in the name of universal heritage protection to museums or private collections located in colonial centres of power. The connection between cultural heritage preservation as being intrinsically tied to the interests of humanity at large which emerged in the nineteenth century gained further weight within international legal discourse during the time of the League of Nations, but did not find concrete expression in positive law until the adoption of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

The Hague Convention famously invokes the notion of a 'heritage of all mankind', and explicitly sets out to protect cultural property 'of great im-

15 Section 3.1.

16 Defined here as 'a complex of self-reinforcing practices, materialities, and power differentials underwriting and rationalizing socio-ecologically destructive modes of organizing life through subjugation, depletion, and non-reciprocity': Christoper W Chagnon and others, 'From Extractivism to Global Extractivism: the Evolution of an Organizing Concept' (2022) 49 Journal of Peasant Studies 760, 763. While the concept has in the past mainly been applied to natural resources, scholars have increasingly drawn parallels between natural and cultural forms of extractivism, including in the colonial era: see e.g. Linda Martín Alcoff, 'Extractivist Epistemologies' (2022) 5 Tapuya: Latin American Science, Technology and Society 1, 11-15. See also the phenomenon of 'colonial instructions', which directed ethnographic and natural history collecting practices in the colonies of European nations: Linda Andersson Burnett, 'Collecting Humanity in the Age of Enlightenment: The Hudson's Bay Company and Edinburgh University's Natural History Museum' (2022) 8 Global Intellectual History 387; Danielle L Gilbert, 'Possessing Natural Worlds: Life and Death in Biocultural Collections' (2022) 25 Locus – Tijdschrift voor Cultuurwetenschappen; Yann LeGall and Gwinyai Machona, 'Possessions, Spoils of War, Belongings: What Museum Archives Tell us About the (Il)legality of the Plunder of African Property' (*Verfassungsblog*, 2 December 2022) <https://verfassungsblog.de/possessions-spoils-of-war-belongings/>.

portance to the cultural heritage of every people'.[17] The idea that damage to certain forms of outstanding cultural property caused harm to the international community thus formed the impetus for the adoption of an international convention on this issue. Nonetheless, the *travaux* and subsequent implementation of the Hague Convention also demonstrate that despite its invocation of universalist language, the commitments of the Hague Convention remain overwhelmingly national, with the precise scope of the cultural property protected pursuant to the convention remaining largely within the scope of individual state discretion – rather than necessarily being an expression of the views of the international community.

While the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property adopts a radically different approach to the rationalisation of international protection, it also grants states a great deal of freedom to determine what constitutes 'their' heritage for the purposes of the convention in recognition of the principle of sovereign equality.[18] However, unlike many of UNESCO's other cultural conventions, the 1970 Convention does not rely upon an invocation of the position of looted cultural property within a broader heritage of humankind. Instead, the ability for the state to define what forms part of its 'national culture' – and to subsequently retain or demand the return of that cultural property – becomes an expression of the state's sovereignty. The 1970 Convention is thus an outlier within cultural heritage law, at least at the level of the rhetoric it employs to justify international protection.

By contrast, the 1972 World Heritage Convention reverses this trend, returning to the universalist language which characterised the earlier Hague Convention, seeking to protect cultural heritage of 'outstanding universal value'.[19] However, a closer examination of the drafting history of the World Heritage Convention and its subsequent implementation once again reveals that the emergence of the privileged category of cultural heritage of outstanding universal value within the World Heritage Convention was not intended to indicate its removal beyond the realm of individual state sovereignty. Instead, it becomes a shorthand for the view that the state is to be seen as a trustee of the common interest of the international community – indicating the need for the state to enter into international cooperation for the purpose of safeguarding this common interest, but nonetheless retaining ultimate decision-making power.

The 2001 Underwater Cultural Heritage Convention articulates a similar universalist position to that of the Hague Convention and World Heritage Convention, positing this underwater cultural heritage within the 'heritage of humanity' and stating that its preservation is similarly 'for the benefit of

17 Section 3.2.
18 Section 3.3.
19 Section 3.4.

humanity'.[20] Like these conventions, it also departs from the perspective that individual states should act as custodians of the common interest of the international community, by managing and preserving the underwater cultural heritage located within their jurisdiction, and more broadly by engaging in international cooperation with other states. Perhaps most tellingly, it does not establish any international body tasked with the protection of underwater cultural heritage absent any state interest in engaging in such protection; quite to the contrary, it also recognises that certain states will have *particular* interests in protecting certain forms of underwater heritage, for example on the basis of their historical ties.

By contrast, the 2003 Intangible Cultural Heritage Convention is perhaps the most clearly non-universalist of UNESCO's cultural conventions.[21] It thus explicitly emphasises the importance of protecting intangible cultural heritage from the perspective of its source communities, rather than that of the international community. The Convention nonetheless also acknowledges that the act of safeguarding cultural heritage is of interest to humanity as a whole, thereby still departing from a perspective in which the act of protecting cultural heritage is perceived as a common interest. The role of universality similarly played an important role during the drafting of the convention, with numerous states expressing the need to add some kind external yardstick of cultural heritage value – in order to motivate states to participate in the legal regime and thereby provide funding and support to states requesting it. The subsequent practice of the States Parties to the Convention underlines their continuing ambivalence towards the possibility of a truly non-universalist intangible heritage convention.

Thus, even though contemporary cultural heritage law acknowledges that it is not cultural heritage which is itself universal in nature – in light of the relativisation of the notion of cultural heritage value – but rather that the interest in its protection is universally shared amongst the members of the international community, the language of universality remains remarkably tenacious within heritage law. This becomes particularly evident when one looks beyond the realm of UNESCO to fields such as international criminal law and human rights law; when discussing issues related to the protection of cultural heritage, both areas of law quickly veer back into the comforting language of the 'cultural heritage of humanity' developed and heavily publicised under the aegis of UNESCO. Doing so has concrete consequences for the conceptualisation of cultural heritage protection within these fields; in the case of international criminal law it has the potential to marginalise local communities within the broader narratives of international criminal trials concerning cultural heritage destruction, whereas in human rights law notions

20 Section 3.5.
21 Section 3.6.

of universal heritage value and the public interest are deployed in order to support limitations by the state of other rights, such as the right to property.[22]

While notions of common interest are a leitmotif of contemporary cultural heritage law, the debates during the drafting of each of UNESCO's cultural conventions unsettle the delicate balancing act between state sovereignty and the common interest in relation to the act of safeguarding cultural heritage. Many of these debates touch upon the question of who should hold the ultimate power to define what constitutes the heritage to be protected by virtue of international law, what shape this protection should take, and the degree to which other actors (whether on the international stage or elsewhere) should influence these issues. An examination of the positive law established by the conventions clearly indicates that while they repeatedly draw upon universalist language, this power remains firmly in the hands of their respective States Parties. Even though these states can be seen as trustees of the common interest of cultural heritage protection – with the matter of cultural heritage protection being firmly removed from the sole purview of state sovereignty – the law by and large does not seek to establish any limitations on how they choose to exercise this custodianship beyond the bare minimum of engaging in international cooperation.

7.3 UNIVERSALIST CULTURAL HERITAGE LAW AND ITS LIMITATIONS

In light of these conclusions, *Chapter 4* delved deeper into the question whether the protection, monitoring and implementation mechanisms employed within cultural heritage law suffer from the same tension between 'form and function' which can be identified with respect to other common interest regimes in public international law. It did so by first examining the nature of the norms established by the conventions for the protection of cultural heritage.[23] Like many other common interest regimes, cultural heritage treaties rely centrally upon non-reciprocal obligations with an inward-facing character with respect to cultural heritage located within the territory of each State Party, and seek to establish a framework of common cooperation amongst states.[24] With the exception of the 1954 and 1970 Conventions, this framework of common cooperation is centred around the establishment of lists of protected heritage and a corresponding system of financial and technical support for listed heritage.[25]

22 Section 3.7.2 and 3.7.3.
23 Section 4.1.
24 With two notable exceptions: the 1954 and 1970 Conventions.
25 Although over time the 1954 Hague Convention has evolved to incorporate a moderate form of listing processes in the form of its special protection and enhanced protection regimes.

Given that many of the obligations established by UNESCO's cultural conventions mandate performance in the name of the international community, rather than on the basis of a web of bilateral relationships amongst individual States Parties, a number of these obligations could potentially be characterised as obligations *erga omnes partes*. This constitutes an additional indicator of the nature of cultural heritage law as a common interest regime.[26] Examples in point are the obligations established by cultural heritage relating to the prohibition of the destruction of cultural heritage during armed conflict, corresponding peacetime obligations to safeguard both tangible and intangible cultural heritage, and the duty to preserve underwater cultural heritage (particularly when located in the Area). However, even if these norms can be identified as *erga omnes partes*, it is questionable whether this provides any additional utility in order to circumvent the state-centric nature of cultural heritage law so as to protect the common interest of safeguarding cultural heritage and thereby overcome the tension between 'form and function' which the field faces.

Furthermore, many of the obligations established by the more recent cultural conventions – such as those of 1972, 2001 and 2003 – are largely obligations of means and conduct rather than of result. As such, these conventions can arguably be seen as prototypical framework conventions similar to those found in fields such as international environmental law, in which the main normative weight of the international legal regime is not merely located in the obligations contained in the conventions themselves but rather in the ongoing development of the law by their governing bodies. The chief motivating aim behind these conventions is thus to become a clearing house for the exchange of information amongst stakeholders, by providing scientific and technical advice, and where necessary also financial support.

The field thus shows many affinities with other common interest regimes in public international law when viewed from the perspective of the types of norms it employs to achieve its goals. Simultaneously, it also faces the same tensions that other common interest regimes face in achieving their goals and ensuring effective implementation and compliance. The cultural conventions thus rest heavily upon the idea that states are entrusted with the protection of cultural heritage within their territory, taking on the mantle of the international community. In doing so, the conventions do not seek to establish explicit limitations on state sovereignty or punish states for non-compliance.

Accordingly, this means that the conventions depart from the view that the territorial state will carry out its duty of protection in good faith and in a manner that is in line with the overall object and purpose of the conventions, and that the primary role of other states is to assist the territorial state in fulfilling this duty. And indeed, a first reading of the conventions' monitoring

26 Section 4.1.6.

and implementation mechanisms suggests that they are largely toothless, as has been frequently lamented by commentators. To this end, the chapter proceeded by examining the evolution of these mechanisms beyond the scope of the direct treaty text on the basis of the continuous revision of their respective operational guidelines and the practice of the governing bodies of the conventions.

In this regard, the conventions have undergone a remarkable degree of institutionalisation, first and foremost as the result of the regularisation of the meetings of the plenary bodies of the conventions and in certain cases the establishment of new subsidiary bodies responsible for monitoring the implementation of the convention on a more regular basis than the convention's plenary body.[27] In addition, the States Parties to the conventions have increasingly created operational guidelines which provide additional interpretative guidance with respect to the obligations established by the conventions, and in some cases even developing new obligations which are entirely absent from the original treaty text.[28]

On the one hand, these developments can be seen as demonstrating a baseline commitment by states to the status of cultural heritage protection as a common interest, by virtue of the fact that the subsequent development of the conventions is no longer wholly reliant upon individual state consent but is instead increasingly outsourced to a body of their peers,[29] who have engaged in a process of progressive development by virtue of the conventions' operational guidelines. However, there is an important caveat to those who would construe these developments as necessarily minimising the role of state sovereignty within cultural heritage law: while they indeed represent a slight devolution of the power of the state over cultural heritage located within its territory and a minimising of the role of absolute state consent within cultural heritage regimes, this is a devolution to *other states*.[30]

Furthermore, while cultural heritage law has indeed witnessed a rather remarkable institutional expansion over the course of the past two decades, contemporary cultural heritage conventions also more clearly delineate the responsibilities of their subsidiary bodies vis-à-vis plenary decision-making organs. In this respect, there is a growing trend towards establishing plenary bodies as the 'sovereign' bodies of the convention to which all other organs

27 Section 4.2.1.

28 Section 4.2.2.

29 For this reason, the World Heritage Committee has been described as an 'autonomy gaining institution': Diana Zacharias, 'The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010).

30 Of course, this does not mean that these developments could not be turned on their head: as argued within the introduction, these developments can also be drawn upon by legal scholars in order to facilitate an evolutionary interpretation of the cultural conventions.

must ultimately answer, as in the case of the Underwater and Intangible Cultural Heritage Convention. These developments indicate that while states are content to establish more regular monitoring of the implementation of the conventions, they are loath to wholly relinquish their sovereignty to consensus-based decision-making by their fellow states – let alone an independent expert body. As the reach of international heritage governance has expanded, the freedom of subsidiary bodies has accordingly decreased.

Similar tensions are at play with respect to the conventions' monitoring procedures. While the conventions have historically relied heavily upon periodic self-reporting by states in order to monitor the implementation of the conventions, these periodic reporting processes have struggled with low submission rates of States Parties' reports and have thus been seen as insufficient to monitor compliance.[31] As a result, a number of the conventions have also developed a range of alternative monitoring and non-compliance mechanisms, in many cases wholly on the basis of the development of their operational guidelines rather than on the basis of their respective treaty texts: reactive monitoring (World Heritage Convention), ad hoc monitoring (1999 Second Protocol), and the enhanced follow-up procedure (2003 Convention).[32] In the case of the 1999 Second Protocol and the 2003 Convention, these are recent developments which have been explicitly modelled on the purported successes of the World Heritage Convention's reactive monitoring procedure.

These conventions have developed procedures through which States Parties can request the sending of an expert advisory mission in order to provide the requesting state with technical advice on the safeguarding of cultural heritage. In addition, each of these conventions have developed monitoring procedures which can be triggered in the absence of strict state consent, and which are usually paired with the sending of expert missions to the state in order to gather information on the state's compliance with the convention. Furthermore, each of these three conventions have developed non-compliance mechanisms which focus on placing heritage listed pursuant to the convention on a list of endangered heritage, or deleting the heritage from the international list entirely.

What is most critical about these procedures is that they remove one of the most significant handicaps of the bodies established by the conventions with regard to monitoring: the fact that, historically, they were almost wholly reliant (formally speaking) on information provided by the territorial State Party with respect to issues of implementation and compliance. By comparison, these new procedures open up the possibility for third parties to provide information which can form the basis of decisions to initiate further State Party monitoring – or, in the case of the 2003 Convention, the ability for these third parties to even trigger monitoring procedures of their own accord. However,

31 Section 4.2.3.
32 Section 4.2.4 and 4.2.5.

it is important to emphasise that the majority of these procedures remain reliant upon consultation with the State Party concerned and are thus unlikely to be used against a state's will. Similarly, in the case of information received from third parties, this has also been limited to very specific circumstances, and the information is usually not subsequently made accessible to the public at large, thereby hampering transparency.

However, while innovations such as reactive monitoring, ad hoc monitoring and the enhanced follow-up procedure have attenuated the central role played by state consent in cultural heritage law, they still struggle to overcome the inherent tension between state sovereignty and compliance which other common interest regimes also face. States thus effectively remain in the driving seat within these monitoring mechanisms; the outcomes of monitoring are moreover often inconsistent, with States Parties failing to follow up on the recommendations of intergovernmental bodies and often not facing any sanctions for doing so. This leads to a highly uncertain regulatory environment for all stakeholders involved in the conventions. As such, even though contemporary cultural heritage law is better placed to 'collect more and better information about the nature and frequency of threats'[33] to cultural heritage, this information is ultimately of little use given that the monitoring and non-compliance procedures it is meant to support are inconsistent and unpredictable.

As such, the argument can certainly be made that cultural heritage law suffers from the same tensions between 'form and function' which are more broadly faced by common interest regimes in public international law. Finally, the chapter turned to the issue of individual and community participation in international heritage governance, and whether developments with respect to the fostering of such participation have helped to remedy some of the worst excesses of the state-centric nature of cultural heritage law.[34] In doing so, it argued that while UNESCO's cultural conventions have placed an ever-greater emphasis on the importance of living heritage value and its direct association with the individuals and communities which contribute to its continuous (re)construction, this is not necessarily reflected in the working methods of the conventions.

Thus, on the one hand, some of the strongest guarantees for community participation within cultural heritage law are those provided with respect to participation in the process leading up to international inscription and domestic safeguarding practices. The World Heritage Convention thus encourages states to prepare nominations with the 'widest possible participation' of stakeholders

33 Evan Hamman and Herdis Hølleland (eds), *Implementing the World Heritage Convention: Dimensions of Compliance* (Elgar 2023) 30.

34 Section 4.3.

and to adopt a human rights-based approach;[35] if a site concerns the lands, territories, or resources of Indigenous peoples, states 'shall demonstrate, as appropriate, that the free, prior and informed consent of indigenous peoples has been obtained'.[36] Similarly, the Intangible Cultural Heritage Convention provides that nominations must be preceded by the 'widest possible participation' of communities and individuals, and with their free, prior and informed consent; this consent is also required for the transfer of elements from one list to another and in the process to remove elements from one of the lists.[37] The latter also notably provides for the direct influence of communities, groups and individuals over the processes for the transfer or removal of elements from the lists established by the Intangible Cultural Heritage Convention (although the prerogative for proposing sites to the lists remains with the States Parties).

However, a closer analysis of these guarantees reveals that they do little to increase meaningful participation of communities, groups and individuals. Thus in the case of the World Heritage Convention these guarantees are largely hortatory; even for those guarantees which are phrased in obligatory terms – such as those concerning the FPIC of Indigenous peoples – the practice of the World Heritage Committee in enforcing these requirements has been lacklustre at best. Issues relating to the FPIC of Indigenous peoples have certainly not been considered in relation to all potential sites, and counterindications that FPIC has *not* been granted are sometimes ignored even in high-profile inscriptions, such as those of Kaeng Krachan. As such, inscriptions on the World Heritage List can still succeed even in the absence of proof of community participation.

Similarly, in the case of the Intangible Cultural Heritage Convention, the Convention provides very little guidance to States Parties on when the guarantees it establishes with respect to community participation and free, prior and informed consent will actually be considered as being met. Moreover, the practice of the States Parties thus far indicates that there are many inscriptions which can be considered problematic from the perspective the Convention's requirements with regards to community participation and consent. Notwithstanding this state of affairs, the convention's monitoring bodies by and large take States Parties at their word when they assert that community participation has taken place.

Moreover, comparably little guidance is provided within the conventions with respect to community participation throughout the life of an inscription on an international heritage list, even though such participation remains critical. In the case of the World Heritage Convention, for example, a lack of

35 World Heritage Convention Operational Guidelines, para 123; in relation to the human rights-based approach, see para 12.

36 Ibid para 123.

37 Intangible Cultural Heritage Convention Operational Directives, paras 1.1.U.4, 2.R.4, 17.2, 38.1.

participation of local communities in the management of the site does not seem to be sufficient to trigger the convention's reactive monitoring procedures, in light of the fact that these procedures focus on threats to the outstanding universal value of a site; meaningful community participation is not considered to be an element of OUV.

As such, there are no clear pathways through which affected individuals and communities can contest assertions made by the state with regards to their purported participation in listing and subsequent safeguarding. This is in part due to the fact that there are very limited opportunities for these groups to participate directly in international decision-making procedures. While non-state actors thus have the ability to participate in international meetings as observers, their influence remains limited; observer status is moreover weighted heavily towards encouraging participation by 'expert' actors rather than entities representing affected individuals or communities. The main way that individuals and communities can influence international decision-making processes is thus by submitting information to the relevant international bodies of the conventions – a largely passive function, in which the State Party in question continues to play an important role in filtering the information which is received and how it is brought to the attention of the broader public.

The broader reticence of states towards fostering truly meaningful participation of individuals and local communities within international heritage governance becomes even more apparent when one examines the status of human rights standards within the decisions of the intergovernmental heritage bodies. Whereas the operational guidelines of the World Heritage Convention call upon States Parties to adopt a human rights-based approach, and the World Heritage Committee occasionally calls upon States Parties to ensure that the relocation of individuals from World Heritage sites is in accordance with the 'relevant international standards', neither the Operational Guidelines nor the Committee's decisions provide much guidance to States Parties as to what these standards entail. Such calls are furthermore invoked inconsistently; when the Committee does draw attention to human rights, it receives strong pushback from the States Parties. The Intangible Cultural Heritage Convention, for its part, almost wholly eschews references to human rights, beyond using them as a criterion to exclude certain forms of cultural heritage from the scope of the convention due to an incompatibility with internationally accepted human rights standards – thereby ignoring the role that human rights norms play with respect to standards of public participation.

By and large, states thus remain exceedingly reluctant to relinquish control of the means and modalities of the implementation of cultural heritage treaties to actors such as local communities. This state of affairs is increasingly at odds with developments beyond UNESCO which have emphasised the importance of community participation in heritage governance, such as the 2011 recommendation by the Special Rapporteur in the Field of Cultural Rights that '[c]oncerned communities and relevant individuals should be consulted and

invited to actively participate in the whole process of identification, selection, classification, interpretation, preservation/safeguarding, stewardship and development of cultural heritage'.[38] This should arguably also include participation within international decision-making processes, as these have an important effect on decisions made at the local and domestic levels.

As such, even though cultural heritage law has witnessed the emergence of requirements with respect to individual and community participation in international heritage governance over the course of recent years, these developments have done little to remedy the state-centric nature of the field. This is because the modalities of community participation remain strictly limited and do not provide for participation where it counts most: at the international level, within bodies such as the World Heritage Committee and the Intergovernmental Committee. Nor do these guidelines provide sufficient guidance to states as to what is required from them in order to ensure meaningful community participation, particularly in the case of issues which would inherently require a legal assessment, such as in the case of the principle of free, prior and informed consent. Perhaps most problematically, intergovernmental bodies are not equipped with sufficient tools in order to judge whether community participation has truly taken place in the manner asserted by States Parties.

7.4 THE IMPACT OF CULTURAL HERITAGE LAW UPON INDIVIDUALS AND LOCAL COMMUNITIES

In *Chapter 5*, the dissertation subsequently examined the concrete effects of the state-centric nature of UNESCO's cultural conventions by turning towards the impact of the implementation of these conventions on individuals and local communities, with a specific focus on the impact of the 1972 World Heritage Convention and the 2003 Intangible Cultural Heritage Convention. Both of these conventions seek to establish long-term heritage management regimes in which there is a close relationship between local, national and international levels of governance. In doing so, the chapter sought to bring together scholarship in fields such as archaeology and anthropology, which have captured the intricacies of implementing UNESCO's cultural conventions on the ground, and the international legal literature on cultural heritage law.

An analysis of the practice of the World Heritage and Intangible Cultural Heritage Conventions revealed that while international heritage listing can lead to positive effects for individuals and local communities, as well as to the increased protection of inscribed heritage, it also invariably grants the state additional discretionary powers without satisfactory oversight of the exercise

38 Human Rights Council, Report of the Independent Expert in the Field of Cultural Rights (21 March 2011) UN Doc A/HRC/17/38, para 80(c).

of this power by international decision-making bodies. In this sense, the invocation of the purported universal or common interest of cultural heritage protection leads to the marginalisation of the voices of individuals and local communities who are most directly affected by international heritage inscription processes – yet these impacts rarely feature in the decisions of the World Heritage Committee and the Intangible Cultural Heritage Convention's Intergovernmental Committee.

The negative effects of international heritage listing on individuals and local communities can be roughly divided into two categories: those that are a direct consequence of requests formulated by intergovernmental bodies within UNESCO's cultural conventions; and those that are the result of a lack of engagement by these bodies with the ways that states take up their mantle as the custodians of the common interest of cultural heritage protection in ways that ultimately run counter to the object and purpose of cultural heritage law – yet remain beyond the view of intergovernmental bodies due to the state-centric structures of the conventions.

A prime example of the first category concerns the recommendations made by the World Heritage Committee with respect to purported 'encroachments' by local communities upon World Heritage sites. The Committee has thus frequently requested States Parties to address 'illegally constructed dwellings' or 'illegal encroachments' – often the homes of local community members – within the boundaries of World Heritage sites without adequately considering the impact of the recommended measures upon these communities. The end result is often the eviction or forced displacement of residents, with the Committee frequently appearing to take at face value the assertion that such settlements are indeed illegal.

While the Committee has increasingly also recommended States Parties to enter into consultations with residents who are to be displaced, it provides very little guidance to states as to what such consultations should look like in practice, and it does not consistently follow up on its recommendations to carry out consultations. Nor does it provide any indication for the legal basis on which it considers settlements within World Heritage sites as a form of illegal encroachment, making it difficult for local actors to contest such assertions of illegality. As such there is an urgent need for the adoption of guidelines which can ensure that the Committee's approach towards the eviction and forced displacement of residents from World Heritage sites is in line with international human rights standards.[39]

39 Stefan Disko and Dalee Sambo Dorough, '"We Are Not in Geneva on the Human Rights Council": Indigenous Peoples' Experiences with the World Heritage Convention' (2022) 29 International Journal of Cultural Property 487 521. See e.g. UN Commission on Human Rights, Resolution 1993/77 (10 March 1993) UN Doc E/CN.4/RES/1993/77; UN Committee on Economic, Social and Cultural Rights, General Comment No. 7 (20 May 1997) UN Doc E/1998/22; Office of the High Commissioner for Human Rights, *Forced Evictions: Fact Sheet No. 25/Rev. 1* (United Nations 2014). For a consideration of the human rights framework

Ultimately, the Committee is more likely to commend States Parties for taking action to prevent the deterioration of a site's outstanding universal value than taking action to safeguard the interests of the individuals and local communities located within these sites. Moreover, in any event the desired end result of such consultations – the removal of residents – has effectively already been fixed by the Committee, drawing into question whether such consultations can be truly genuine.

A similar dynamic is at play in the World Heritage Committee's treatment of ritual, religious or subsistence uses of heritage sites by local communities, which are also often treated as a form of 'encroachment' rather than as contributing to the living heritage value of a site. In recommending States Parties to respond to such encroachments in order to safeguard the outstanding universal value of a given World Heritage Site, the impact of these recommendations on the economic livelihoods and continuity of cultural practices often remains beyond the scope of the Committee's decision.

In these situations, the Committee has once again also increasingly requested States Parties to engage in consultations when dealing with the issue of community practices considered as encroaching upon heritage sites, but here the outcome of these consultations also often already appears fixed. In any event, the outcome of these consultations is not subject to follow-up by the Committee and thus appears normatively negligible. All in all, the Committee's approach to such encroachments is often inconsistent not only between different World Heritage sites, but also with respect to the same site over time, leading to uncertainties for both States Parties and local communities as to what they can reasonably expect from international decision-making processes under the aegis of the World Heritage Convention.

The World Heritage Committee thus often appears to depart from a perspective in which individuals and local communities form a threat to the safeguarding of a heritage site – requiring their adaptation or removal – rather than the recognition that they are actually an integral element of the heritage value of the site. The result is that the Committee's requests to States Parties to undertake consultations with affected communities are effectively an empty shell: their outcome is fixed by the terms set by the Committee. As such, the Convention's participation and consultation procedures continue to cast individuals and local communities as passive subjects of World Heritage governance rather than participants in their own right; they are not granted the agency to define the 'problem' of heritage safeguarding on their own terms.

The listing practices of the Intangible Cultural Heritage Convention provide an illustration of the other dynamic which is frequently at play with regards to the impacts of international listing on individuals and local communities:

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in relation to development-induced displacement, see Roman Girma Teshome, 'The Human Cost of Development: Situating Development-induced Displacement in International Human Rights Law' (PhD thesis, University of Amsterdam 2023).

the absence of effective oversight by international monitoring bodies of the Convention's implementation by States Parties. Listing becomes a way for certain states to exercise symbolic (and sometimes very real) power over members of minority groups, by circumscribing cultural practices in ways that align with broader goals of nation-building and often run counter to the communities' own conceptualisations of themselves and their heritage. Certain communities who are already marginalised at the domestic level are thus also often likely to be insufficiently involved in the preparation of inscriptions of subsequent safeguarding measures by the state.

The main challenge faced by the Intangible Cultural Heritage Convention is thus how the governing bodies of the Convention can assess to what extent assertions by the state of community, group and individual participation in safeguarding and inscription processes are genuine. This is complicated by the fact that the Convention's Intergovernmental Committee maintains a largely deferential position towards States Parties; the fact that repressive state policies are not identified anywhere within the Convention's governance framework as a threat to the safeguarding of intangible cultural heritage is particularly telling. While this means that the negative consequences of inscription do not result directly from decisions of the Intergovernmental Committee in the same way as in the case for the World Heritage Committee, it does leave States Parties with a great deal of discretion in implementing the convention in whatever way they deem fit – including implementation which might run contrary to the convention's object and purpose. This not only results in unsatisfactory safeguarding of intangible cultural heritage, but is also particularly problematic from the perspective of the guarantees the convention seeks to provide with respect to community participation and the principle of free, prior and informed consent.

Above all, international heritage governance operates on the assumption that states will carry out safeguarding activities pursuant to the cultural conventions in good faith. Furthermore, because individuals and local communities are marginalised within international bodies such as the World Heritage Committee and the Intergovernmental Committee, issues arising from the implementation at the local level are effectively made invisible within the conventions' monitoring systems. The net result is that cultural heritage law invariably empowers the state, by extending the nature and extent of its reach over cultural heritage law, and by entrusting the state – above all other actors – with the power to safeguard that heritage on behalf of the world at large.

By comparison, the implementation of cultural heritage treaties often presupposes that the interests of individuals and local communities with regards to cultural heritage 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. Moreover, opportunities for members of the local community to speak on behalf of their interest in the heritage – as opposed to the universal

interest of the international community – are few and far between; in the rare circumstances in which local communities are granted the ability to participate, they are expected to speak with one voice.

Simultaneously, the practice of both the World Heritage and Intangible Cultural Heritage conventions also demonstrates that processes of heritagisation contain an inherent emancipatory potential for marginalised groups, whether on the domestic or international stage. This insight aligns with the view put forward within critical heritage studies that heritagisation processes are always political, as well as with the discussions raised within the introduction of the present work about the potential of a counterhegemonic universalist international law. As such, the past two decades have also witnessed the emergence of numerous situations in which Indigenous peoples or minorities have used international heritage status as a bargaining chip with local or national authorities in order to ensure the protection of their customary practices.

More broadly, international listing demonstrates the potential to revitalise cultural practices, bring economic benefits to communities, and strengthen both individual and communal feelings of self-worth and identity. It frequently frees up crucial resources, both financial and technical, for cultural heritage which might have otherwise languished despite still being valued by its communities of origin and others across the globe. As a result, heritagisation is far from a wholly negative process: local communities often appreciate the results of heritage listing, even if it results in changes to their cultural heritage. The main takeaway is that this is not possible without providing guarantees that those affected by international heritage listing are able to have a genuine say in the inscription and subsequent management of this heritage, both at local and at international levels.

In any event, more research is needed on the impact of international heritage law on individuals and local communities in the context of UNESCO's cultural conventions. Whereas the preceding section has focused on the impact of the World Heritage Convention and the Intangible Cultural Heritage Convention, the impact of international heritage protection on these groups in the context of the restitution debate, the protection of cultural property during armed conflict, and the safeguarding of underwater cultural heritage has remained largely unexplored, despite comparable risks of marginalisation. In order to fully capture the intricacies involved with the implementation of cultural heritage law 'on the ground', this future research agenda will require further and deeper interdisciplinary collaboration between legal scholars and researchers in fields such as archaeology, anthropology, and heritage studies.

7.5 FOSTERING THE PARTICIPATION OF AFFECTED INDIVIDUALS AND COMMUNITIES

Finally, *Chapter 6* asked to what extent developments in other areas of international law can shape efforts to foreground the interests of individuals and local communities in cultural heritage law. In the fields of environmental law and human rights law, a range of legal techniques have been proposed as potential mitigating factors in response to similar dynamics of dispossession which have emerged from crises of legitimacy in the context of climate change mitigation and international development projects, where the creation of protected areas regimes has led to the displacement of communities. Three of these are of particular interest: the principle of public participation (containing the tripartite rights of access to information; to public participation in decision-making; and to justice); the duty to consult and the right to free, prior and informed consent (FPIC); and the duty to conduct impact assessments.

There are two main compelling reasons for examining these techniques more closely: firstly, the fact that many of the participating states in cultural heritage regimes are also bound by these norms by virtue of their participation in parallel environmental or human rights regimes; thereby raising the question of their applicability in the cultural heritage context. At a more practical level, cultural heritage law has also increasingly made reference to each of these concepts; as such, their elaboration in neighbouring legal regimes, even if not legally binding within the context of cultural heritage law, could nonetheless help to further flesh out these concepts within the context of international heritage governance.

Broadly speaking, international law has recognised the importance of involving affected groups in decision-making processes with a potential impact upon them.[40] From the 1990s onwards, public participation has thus emerged as a structuring principle of international environmental law, precipitated by its codification in the 1992 Rio Declaration on Environment and Development and subsequent inclusion in numerous multilateral environmental agreements. The principle of public participation has subsequently also been codified as a tripartite right in instruments such as the Aarhus Convention and Escazú Agreement, which guarantee the right to information, the right to participation, and the right to a judicial remedy in environmental matters. Compliance with the procedural environmental rights of Aarhus and Escazú is ensured by their respective compliance committees, which notably also have the ability to consider individual communications.

The manner in which these conventions have sought to codify the right to public participation provides a useful framework within which to structure public participation in cultural heritage law.[41] First of all, the conventions

40 Section 6.2.1.
41 Section 6.2.2.

recognise that the requisite standards of public participation should differ according to the level at which decision-making takes place: they thus distinguish between participation in specific activities (for which it is accordingly easier – relatively speaking – to identify affected individuals and groups); broader plans, programmes and policies; and generally applicable regulations and normative instruments.[42] Participatory requirements for activities are more stringent than those required in the case of broadly applicable normative instruments. In relation to the first category – specific activities – participation needs to take place at an early stage when all options are still open, so that the contributions of the affected public can be genuinely considered in the decision-making process. All in all, the state needs to take due account of the outcome of the public participation: participation should not be merely performative.

Finally, of particular interest is the fact that both Aarhus and Escazú emphasise the importance of guaranteeing public participation in international forums for those directly affected by decision-making processes taking place at this level. While obviously modified in their operation, the core principles the conventions formulate for domestic public participation continue to hold true within international organisations: affected publics should be granted access to information and subsequently also the ability to participate at a point in the international decision-making process at a moment when all options are still open, and decision-makers should accordingly take due account of the outcome of participatory processes and provide a reasoned decision in which they take account for this process. However, both Aarhus and Escazú remain notably silent about the scope of a potential right of access to justice in the context of international decision-making processes.

The guidelines formulated in the context of both conventions provide concrete steps which can be taken to facilitate public participation in intergovernmental bodies such as the World Heritage Committee, such as ensuring the availability of documents to the public (and, by extension, ensuring that the documents submitted by the public to international decision-makers are also made available to the public at large); the granting of observer status to affected individuals and groups, not just to expert-driven civil society organisations; allowing members of affected publics to circulate statements and speak at international meetings; and potentially even facilitating their ability to formulate text proposals which can be debated and subsequently adopted by the States Parties to the convention in question.

It is nonetheless important to underline that the development of participatory rights in Aarhus and Escazú does not represent a panacea for the

42 Although the categorisation within the Escazú Agreement differs slightly: the Agreement distinguishes between projects, activities, and processes granting environmental permits, on the one hand, and policies, plans, programmes, rules and regulations, on the other hand.

issues facing cultural heritage law.[43] For one, both conventions were explicitly developed within a regional setting; the codification of global principles on public participation in (environmental) decision-making remains a sensitive topic for many states, even more so when it comes to the matter of public participation in international forums. As such, the framework developed under these conventions can only function as a possible path forward for the development of similar principles under the aegis of UNESCO's cultural conventions.

Notwithstanding this state of affairs, a global right to public participation has also been gradually emerged in the course of a number of parallel developments within international human rights law.[44] These developments have recognised not only the existence of a right to public participation in environmental decision-making (including within international decision-making processes such as those of climate finance mechanisms), but have also more broadly underscored the participatory rights of marginalised groups and individuals in decisions which affect them. The potential existence of such rights has been particularly acknowledged in the context of evictions and in relation to decisions which have a potential impact on land use or the enjoyment of the right to take part in cultural life. These developments carry obvious relevance for the problems described above with respect to the impact of international heritage governance on individuals and local communities, which have resulted in forced displacement and the limiting of communities' access to lands which are tied to the exercise of their cultural rights.

While the precise scope of these broader participatory rights remains somewhat unsettled within human rights law – and human rights bodies have generally held that states retain a large deal of discretion in designing the participatory processes required to give effect to them – the broad contours of the right to public participation align with those established under environmental law. This lends further weight to the argument that cultural heritage law should take these standards into account, if not as a matter of human rights law which is automatically binding upon the States Parties of the cultural conventions, then at minimum as a highly compelling example of good practices to be followed. Much akin to how participation has been construed within environmental law and human rights law as a fundamental guarantee of the right to a healthy environment, the argument could be made that participation is one limb of the right to take part in cultural life and should thus be central to the elaboration of a human rights-based approach to international heritage governance advocated by the World Heritage Convention and Intangible Cultural Heritage Convention.[45]

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43 Section 6.2.3.

44 Section 6.2.4.

45 See also Report of the Special Rapporteur on the Rights of Indigenous Peoples (19 July 2022) UN Doc A/77/238, para 72, which describes participation in cultural heritage decision-making processes as part of a human rights-based approach to World Heritage listing; and

Both environmental law and human rights law furthermore underline the critical importance of ensuring that the information available to the public which forms the basis of public participation needs to be accessible and understandable to a non-expert audience, taking into account the need to ensure that access to information for marginalised groups is effective and that the overall process of participation is non-discriminatory. This has important consequences for the operationalisation of participation in cultural heritage law, which has thus far – if it has been put into practice at all – largely relied upon written consent forms in order to demonstrate the existence of community participation. The latter are patently inadequate as a way of demonstrating that informed public participation has taken place, particularly in the case of marginalised groups which may speak a different language than the majority and face additional barriers to participation such as illiteracy.

Moving on from the principle of public participation, the chapter also examined the emergence of more stringent participatory standards which have been developed in relation to the duty to consult and the right to free, prior and informed consent (FPIC), particularly in the context of regimes such as ILO Convention No. 169 and UNDRIP.[46] Similarly to the elaboration of the principle of participation in human rights law and environmental law, the elaboration of the duty to consult and the right to FPIC within these regimes also contains a number of elements which could be implemented in the conceptualisation of these norms within cultural heritage law.

ILO Convention No. 169 thus establishes that Indigenous peoples should not be removed from their traditional lands unless they have given their 'free and informed consent'; if the state cannot obtain their consent, the convention establishes the need for appropriate procedures and compensation for Indigenous peoples if such removal nonetheless takes place. The standards established by the convention with respect to relocation are notably more stringent than the other obligations it establishes with regards to the duty of the state to consult with Indigenous peoples prior to taking other decisions which will affect them, such as in the case of the exploration or exploitation of natural resources.

For its part, UNDRIP provides that the FPIC of Indigenous peoples must be obtained – not merely sought – in the case of their relocation from their lands or territories, similarly establishing a higher standard than that which is applicable for other decisions affecting Indigenous peoples. However, even in such situations, the state must engage in a process seeking to obtain the FPIC of Indigenous peoples, acknowledging and facilitating their ability to genuinely influence the decision at stake. Whereas this is a lower standard which does not automatically grant Indigenous peoples a veto over proposed

more broadly UN Doc A/HRC/17/38 (n 38), which calls for a human rights-based approach to cultural heritage matters.

46 Section 6.3.

projects or measures, their consent becomes critical if the project or measure is likely to have a serious negative impact upon the enjoyment of their rights. When one takes into consideration the fact that UNDRIP also guarantees Indigenous peoples' right to cultural autonomy, this underscores the need for states to ensure the consultation of Indigenous peoples in decision-making processes concerning their cultural heritage.

The approach adopted within UNDRIP has also been echoed by human rights courts such as the IACtHR and by the UN human rights treaty bodies, both of which have underlined that while consent is not the required end result of consultations with Indigenous peoples carried out by the state in the context of FPIC obligations, consent should nonetheless always be the *aim* of such consultations.[47] That being said, consent *is* required in the case of specific situations, such as the relocation of Indigenous peoples from their traditional lands, akin to the standards established by ILO Convention No. 169 and UNDRIP. Similarly to the elaboration of the right to public participation discussed above, consultations with Indigenous peoples should thus be genuine and not mere window-dressing; if the ultimate outcome of the consultation is already fixed at its inception, this standard would likely not be met.

The conceptualisation of FPIC and consultation standards within the abovementioned regimes certainly holds promise for their conceptualisation within cultural heritage law, where there is an urgent need for the adoption of guidelines which can assist the panoply of actors involved in the implementation of heritage law at the domestic and international level in assessing whether they can consider standards in relation to FPIC to have been met in relation to specific inscriptions. States should thus be required to demonstrate that they have obtained the consent of affected Indigenous peoples in the case of inscription or management decisions which are likely to have a significant impact upon their enjoyment of their fundamental rights.[48] In all other situations, there should be a requirement for the state to undertake consultation with Indigenous peoples with the aim of obtaining their free, prior and informed consent.

Moreover, the fact that all of the regimes examined above have established more stringent consent requirements in relation to decisions which will result in the relocation of Indigenous peoples, in addition to decisions concerning their access to and use of traditional lands, should be a cautionary tale for cultural heritage law. Whereas neither the operational guidelines of the World Heritage Convention or the Intangible Cultural Heritage Convention recognise more stringent FPIC standards in these situations, an argument can thus be made that they should be amended in order to draw them in line with relevant human rights standards.

47 Section 6.3.3.

48 Disko and Sambo Dorough (n 39) 521.

An important caveat to both of these conclusions is that the FPIC and consultation requirements examined above have been developed in the context of Indigenous peoples' rights. An alternative approach thus needs to be developed in the case of cultural heritage law, in light of the fact that decisions concerning the inscription and management of international heritage can have far-reaching impacts on a wide range of non-Indigenous communities, groups and individuals as well. While there have been some calls for the application of FPIC standards to non-Indigenous communities in order to ensure their cultural rights in the context of sustainable development projects,[49] it remains to be seen whether these will be taken up more broadly in the context of international heritage governance.

That being said, when approaching this issue from the perspective of the internal logic of cultural heritage law – which seeks to safeguard living heritage values – the argument can certainly be made that FPIC and consultation standards would be useful in the context of non-Indigenous communities as well. Doing so would particularly help to prevent situations in which the law runs the risk of preserving tangible cultural heritage at the expense of intangible cultural heritage. Furthermore, the extension of these standards within cultural heritage law to non-Indigenous communities does not necessarily need to undermine the privileged legal status granted to Indigenous peoples pursuant to general international law.

One final tool which has been developed within international law to facilitate public participation in decision-making is the requirement for the state (or occasionally also other actors) to conduct an impact assessment prior to the authorisation of a proposed project, plan or policy.[50] Although the primary recognition of impact assessments in international law relates to the customary obligation to carry out an environmental impact assessment (EIA) in cases of likely significant transboundary environmental harm, there are also a broad variety of other impact assessment methods which are carried out in practice without necessarily being stipulated as obligatory pursuant to positive international law. These include social impact assessments (SIAs), heritage impact assessments (HIAs), and human rights impact assessments (HRIAs).

Once again, the elaboration of such impact assessments in neighbouring fields does not necessarily represent a panacea for the issues faced by individuals and local communities in the context of international heritage governance. Thus, even in situations where international law obligates states to conduct an impact assessment, they retain a great deal of discretion in how these impact assessments will be designed or carried out; nor does international

49 UN General Assembly, Report of the Special Rapporteur in the Field of Cultural Rights (15 August 2022) UN Doc A/77/290, para 98(b).

50 Section 6.4.

law subsequently mandate what the outcome of an impact assessment procedure should be – simply that it should be carried out.

However, this does not mean that impact assessments cannot nonetheless constitute useful tools in the context of heritage governance when deployed as part of a broader arsenal of participatory techniques: much akin to the principle of public participation and the principle of FPIC, impact assessments can create fixed paths which decision-makers are expected to follow as a matter of good practice. Impact assessment procedures can thus bring together the various stakeholders involved or affected by a project, plan or policy, and force the state to justify any actions taken after the impact assessment has been conducted to the public at large. As such, impact assessments are generally considered to promote open and reasoned decisions.

It is for this reason that while a further emphasis on the role of impact assessments in cultural heritage law is unlikely to resolve the issues currently faced by individuals and communities within international heritage governance, they can nonetheless ensure that the impact of heritage protection decisions upon individuals and local communities remains visible to decision-makers. While there has been a growing reliance within UNESCO's cultural heritage conventions on the use of impact assessments, in particular within the context of the World Heritage Convention, these developments have thus far mainly focused on the importance of environmental impact assessments or heritage impact assessments; as such, there is room to grant greater emphasis to the potential use of human rights impact assessments alongside these existing tools, in order to ensure that human rights concerns are integrated into heritage decision-making processes from the get-go.[51]

7.6 FOREGROUNDING THE INTERESTS OF INDIVIDUALS AND LOCAL COMMUNITIES IN CULTURAL HERITAGE LAW

As is evident from the above, cultural heritage law can and should be seen as an example of a common interest regime in public international law – not only in light of its reliance upon universalising legal concepts such as the 'cultural heritage of mankind', but also in light of the fact that it is dogged by the same tension between 'form and function' faced by other common interest regimes. The underlying concern behind this tension is the fact that international law aspires towards the protection of common interests, but seeks to do so through the vehicle of a legal system centred around state sovereignty which continues to struggle to accommodate and effectively protect these common interests.

51 The recently developed *Guidance and Toolkit for Impact Assessments in a World Heritage Context* (UNESCO, ICCROM, ICOMOS and IUCN 2022) is a promising first step in this regard.

Cultural heritage law replicates this pattern; consequently, states continue to play a dominant role in giving shape to notions of common interest and universality within the field. As this dissertation has argued, this results in an imbalance towards the position of individuals and local communities within international heritage governance. It is for this reason that it sought to answer the following research question: how should the interests of individuals and communities be safeguarded within the state-centric universalist legal structures and norms of cultural heritage law?

It is possible to give twin answers to this question, both at the level of positive law and in relation to international legal doctrine. In relation to the former, the above demonstrates that there is a clear need for cultural heritage law to draw more closely upon developments in neighbouring areas of law with respect to the position of individuals and communities in international governance. In this regard, the recent proposal by the ILA Committee on Participation in International Heritage Governance to amend the operational guidelines of UNESCO's cultural conventions to explicitly 'recognise a right to participate in decision-making about heritage governance' certainly has merit,[52] and would further facilitate comparisons between cultural heritage law and other legal regimes establishing environmental procedural rights, such as the Aarhus Convention and Escazú Agreement.

An important lesson to be drawn from the elaboration of standards for public participation in environmental law and human rights law is that these standards should not only be implemented with regards to decision-making procedures at the local level, but also in terms of access to decision-making processes taking place within international organisations which are likely to have an impact upon local communities.[53] Affected individuals and local communities should be granted the ability to participate more actively in decision-making processes within international organisations concerning their cultural heritage, moving beyond the assumption that such representation will automatically flow from the participation of 'their' state within the intergovernmental forum in question.[54]

There are a number of forms such participation could take in the context of international decision-making processes concerned with the safeguarding of cultural heritage, which can be divided according to the tripartite structure of the principle of public participation as conceptualised within human rights and environmental law: access to information; the ability of the public to participate in decision-making processes; and access to justice.

52 International Law Association (2022) Resolution 01/2022.

53 See e.g. Escazú Agreement art 7(12); Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums.

54 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/brab 004, 21-3. On this point, see also Eyal Benvenisti, *The Law of Global Governance* (Brill 2014) 172.

In relation to access to information, the most fundamental step is ensuring that affected individuals and communities are able to access the nomination documents which states submit to the World Heritage Committee and Intergovernmental Committee at a moment of the nomination process when they can still influence the decision-making process. In the case of the World Heritage Committee, for example, nomination documents are not automatically made available to affected communities prior to the discussion of the nomination unless the State Party concerned decides to share them.[55] As such, there is at present no way for communities to assess whether claims made in the nomination file concerning the nature of the site and the extent of their participation in its nomination and proposed management are accurate – at least not at a sufficiently early stage of the decision-making process.

Moreover, it is important to consider that the public's access to information also needs to be effective, in line with the development of participatory standards by human rights bodies.[56] Such information needs to be able to be understood and acted upon by non-experts. In the case of cultural heritage governance, nomination files for international inscriptions are often lengthy documents spanning hundreds if not thousands of pages, and steeped in jargon which may be difficult to understand for members of the general public. Moreover, states may need to take extra steps in order to ensure that marginalised members of the public are able to effectively access information concerning nominations, taking into account language differences, literacy rates, and potentially insufficient access to information technologies such as the internet.

However, ensuring access to information in international heritage governance should arguably go both ways: documents submitted by members of the public or civil society organisations with regards to the nomination or management of international cultural heritage should also be made available to the public at large, and should moreover remain publicly available even after the conclusion of the international meeting at which they were discussed. The secretariats of the World Heritage Convention and the Intangible Cultural Heritage Convention frequently receive communications from members of the public, NGOs and other UN bodies. However, these documents are usually not available to actors other than the State Party concerned; if they are made broadly available, it is often only for the duration of the meeting at which the document will be discussed. It would thus be fruitful for cultural heritage law to draw upon the procedures followed by the UN human rights treaty bodies, in which reports submitted by States Parties concerning their compliance with their human rights obligations are displayed on the treaty body's website alongside shadow reports submitted by NGOs and national human rights institutions. Similarly to the UN human rights system, the submission of

55 Disko and Sambo Dorough (n 39) 521.
56 Section 6.2.4.

shadow reports in the cultural heritage context could ensure that intergovernmental bodies possess accurate information in order to arrive at an informed decision.[57]

A number of modalities can be envisaged with regards to facilitating the ability of the public to participate in international decision-making processes. Intergovernmental bodies such as the World Heritage Committee and Intergovernmental Committee could thus consider the expansion of the category of observer status at international meetings to directly include affected individuals or communities: in the case of most bodies established by the cultural conventions, this status is limited to representatives of civil society, or to actors which can otherwise demonstrate that they have sufficient 'expertise' to contribute to the decision-making of the international body.

While representatives of affected communities have occasionally been granted observer status at international meetings and have thus been allowed to make statements at the meetings of bodies such as the World Heritage Committee, their ability to meaningfully contribute to their decision-making processes remains relatively limited as they are usually only permitted to make interventions *after* States Parties have adopted a decision. Another proposal which could strengthen their ability to participate would be to amend the rules of procedure of the intergovernmental bodies established by the cultural conventions in order to allow for lengthier and more substantive interventions by affected individuals and communities at a moment of the decision-making process when their contributions can still have impact, rather than as an afterthought to such decisions as is currently often the case.[58]

Finally, whereas the applicability of the principle of access to justice in the context of international decision-making processes has remained largely curtailed within both environmental law and human rights law, it is also possible to make several suggestions in this regard which could be drawn upon in the context of cultural heritage law. The Special Rapporteur on the Rights of Indigenous Peoples has thus recently called for the establishment of a grievance mechanism which could respond to human rights complaints of Indigenous peoples arising in the context of the World Heritage Convention.[59] While the creation of such an independent grievance mechanism is perhaps unlikely, this does not mean that individuals and communities could not seek to obtain access to justice with regards to the negative impact of international heritage inscriptions by drawing upon mechanisms developed outside the context of cultural heritage law, such as the UN human rights treaty bodies

57 See Heidi Nichols Haddad and Isaac Cui, 'Localizing Rights Compliance: The Case for Cities as "Shadow Reporters" at International Human Rights Treaty Bodies' (2021) 43 HRQ 491, 492-8.

58 UN Doc A/77/238 (n 45) para 72; see also Disko and Sambo Dorough (n 39) 521.

59 UN Doc A/77/238 (n 45) para 71.

or regional human rights courts,[60] or perhaps even UNESCO's Committee on Conventions and Recommendations.

More broadly, the Special Rapporteur has also called for greater interconnection between international heritage governance and human rights actors, such as the Office of the High Commissioner for Human Rights (OHCHR) and the special procedures of the Human Rights Council, for example by creating procedures through which intergovernmental heritage bodies could invite the latter to conduct country visits in states where suspected human rights violations have taken place in the process of heritage inscription and management.[61] This demand for stronger connections between heritage governance and human rights has been echoed by several legal scholars, who have proposed that human rights experts should be called upon to conduct human rights impact assessments in the course of nomination processes, and that human rights should become an integral element of periodic reporting processes – accordingly allowing for the possibility of delisting in the case of human rights violations by management authorities.[62] While the adoption of such proposals would not strictly speaking lead to direct access to justice for individuals and local communities affected by heritage governance, it could ensure that their interests are better represented within the international decision-making processes of bodies such as the World Heritage Committee and the Intergovernmental Committee.

However, it is important to underline that the mere application of a human rights logic to the problems faced by individuals and local communities within heritage governance will not automatically mean that their interests will be vindicated in the processes of heritage inscription and management. As the practice of the European Court of Human Rights has shown, the approach of human rights bodies towards the issue of heritage protection has often resulted in the prioritisation of the protection of the 'public interest' above individual rights – thereby replicating the problematic dynamic of cultural heritage law which is the focus of the present analysis.[63]

The issues concerning individuals and communities within cultural heritage law should thus not simply be 'outsourced' to human rights bodies; a genuine attempt should at least be made to resolve the root cause of the issue from

60 Ana Filipa Vrdoljak, 'UNESCO, World Heritage and Human Rights' (2022) 29 International Journal of Cultural Property 459; Disko and Sambo Dorough (n 39) 520.

61 UN Doc A/77/238 (n 45) para 70.

62 Ibid para 72. See also Vrdoljak (n 60); Disko and Sambo Dorough (n 39). See also the proposals made in ILA Committee on Participation in Global Cultural Heritage Governance, 'Final Report' in International Law Association Report of the Eightieth Conference (Lisbon 2022) (International Law Association, London 2023).

63 Marie-Catherine Petersmann, *When Environmental Protection and Human Rights Collide* (Cambridge University Press 2022) 107-56.

within cultural heritage law itself.[64] It is for this reason that this dissertation does not necessarily call for the 'human-rightization' of cultural heritage law, but rather a more fundamental reimagination of the role of universalising legal techniques within it, as outlined within the introduction of the dissertation. The following section will return to this line of argument.

The conclusion that incorporating the language of human rights within cultural heritage law will not resolve the problems faced by individuals and local communities in heritage governance also follows from the findings of Chapter 6. This analysis demonstrated that even if cultural heritage law were to draw more closely upon developments in relation to the right to public participation in environmental law and human rights law, this will 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 in relation to cultural heritage protection.[65]

In this regard, the present work adopts a slightly different approach than that advocated by the ILA Committee on Participation in Cultural Heritage Governance in its recent final report, which noted that heritage decision-making processes should aim at achieving consent; if consent is not possible, 'then the views of those whose identities are most affected should prevail'.[66] While this position is laudable from the perspective of the underlying object and purpose of the cultural conventions – namely the safeguarding of living heritage value, as outlined in the introduction – it is somewhat out of step with the law on public participation as it has been developed within environmental law and human rights law.

As seen in Chapter 6, the standards established within these neighbouring legal regimes thus 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 participation

64 For a critique of the language of 'root causes' in human rights law, see Susan Marks, 'Human Rights and Root Causes' (2011) 74 Modern Law Review 57.

65 It is possible to draw parallels here with resistance to the adoption of participatory standards in environmental contexts, in which participation is often deemed to be ineffective in times of 'climate emergency' when immediate results are of existential importance. Cultural heritage practice sees similar resistance to the language of participation, with the argument here being that there is an urgent need to safeguard something unique from being lost forever to the sands of time – combined with the strong emphasis on the idea that people need to be 'taught' what their heritage is and how to value it by heritage experts. For a rebuttal against the use of the language of 'climate emergency' as an argument against the use of participatory techniques in environmental law, see Chiara Armeni and Maria Lee, 'Participation in a time of climate crisis' (2021) 48 Journal of Law and Society 549, 549-54.

66 ILA Committee Final Report (n 62) para 132. However, compare the conclusions of the Committee in its subsequent resolution, in which it merely noted that the UNESCO cultural conventions should merely 'attribute considerable weight to minority and Indigenous views over those of states when minority and Indigenous heritage is under consideration': Resolution 01/2022 (n 52).

processes have been taken into account in the taking of any given decision.[67] For communities, 'this indicates if not an assurance, then at least a possibility of constructive dialogue and outcome'.[68] Further embedding participatory approaches within cultural heritage law will thus ultimately strengthen, not weaken, its legitimacy.[69] Indigenous peoples of course constitute an important exception to this general rule, given that the state needs to obtain their FPIC in the context of decisions affecting them, particularly in cases concerning potential alienation from their traditional lands.[70]

While the current conceptualisation of participatory principles under international law thus does not grant the public an absolute right to veto certain decisions, it does establish that there should be a real possibility that the public can influence the outcome of a decision-making procedure. As the preceding chapters have shown, this is simply not the case for most individuals and local communities affected by international heritage governance at present.[71] The strength of further embedding these procedural elements in cultural heritage law is that doing so will demonstrate the delicate balancing act of interests which is inherent to the act of cultural heritage protection, simultaneously providing a transparent framework in which this balancing act can take place. Returning to the overall theme of the dissertation – the role of universality in cultural heritage law – one could thus argue that fostering public participation in cultural heritage provides a way to directly bridge the divide between the global and the local with regards to how we interpret and bring into practice 'universal' cultural heritage.

However, it is also important to remember that cultural heritage law does not necessarily need to look towards other disciplines in order to improve the positions of individuals and local communities. As discussed in the dissertation, cultural heritage law already contains a number of guarantees with respect to consultation and free, prior and informed consent, such as in the World Heritage Convention's Sustainable Development Policy, the UNESCO Policy on Engaging with Indigenous Peoples, or the string of recent amendments to the operational guidelines of the World Heritage Convention and the Intangible Cultural Heritage Convention. The main issue is that these guarantees (beyond not always being legally binding and heavily focused on

67 This also aligns with principles identified by GAL scholars on the core elements which decision-making processes should meet: see Benvenisti, *The Law of Global Governance* (n 54) 166.

68 Giedre Jokubauskaite, 'Tied Affectedness? Grassroots Resistance and the World Bank' (2018) 3 Third World Thematics 703, 711.

69 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).

70 See also the assertion by the Special Rapporteur on the Rights of Indigenous Peoples: UN Doc A/77/238 (n 45) para 70.

71 Ibid.

impacts for Indigenous peoples rather than all potentially affected groups) are not taken into account in a consistent manner within international heritage governance, leading to uncertain situations not only for states but also for affected individuals and communities. As such, there remains an urgent need to continue work on improving the implementation and enforcement mechanisms within cultural heritage law and to ensure the consistency of its decision-making bodies.

It is moreover critical that participation in international heritage governance does not become a form of window-dressing in which the participation of individuals and local communities is co-opted by states.[72] The development of participatory principles within the Intangible Cultural Heritage Convention should thus represent a cautionary tale, demonstrating that half-hearted attempts at participation can lead to greater feelings of exclusion and marginalisation than if a community has not participated at all. Such developments similarly require a closer level of monitoring of state assertions of public participation within the intergovernmental bodies of UNESCO's cultural heritage conventions; for this reason, the abovementioned proposals with regards to access to justice in the context of international heritage governance are of particular importance.

More broadly, it is important to remain attentive to the limitations of fostering public participation in international governance mechanisms. Similar developments in other international organisations have thus led to wariness amongst states from the Global South, who fear that facilitating more participation within international governance will simply mean greater representation of the views of the most powerful within the international community.[73] Moreover, even if participatory mechanisms are successfully embedded within international heritage law in future, they will not start with a clean slate but will perforce take place against the background of past interactions between local communities and the state.[74] Whereas these relationships might be characterised by broader histories of violence against and marginalisation of the community in question – drastically reducing the potential for facilitating genuine participation – participatory frameworks within public international law offer few tools with which to repair these broken relationships. Finally, care needs to be taken that the promotion of participatory frameworks in cultural heritage law does not lead to further marginalisation of particularly vulnerable members of local communities, such as women. These questions

72 Jokubauskaite (n 68) 713; Jan Sändig, Jochen Von Bernstorff and Andreas Hasenclever, 'Affectedness in International Institutions: Promises and Pitfalls of Involving the Most Affected' (2018) 3 Third World Thematics 587, 589.

73 Benvenisti, *The Law of Global Governance* (n 54) 166.

74 John Forester, 'Making Participation Work When Interests Conflict: Moving from Facilitating Dialogue and Moderating Debate to Mediating Negotiations' (2006) 72 Journal of the American Planning Association 447, 450.

have remained underexplored within the literature on participation in cultural heritage governance, and thus represent a fruitful line of future enquiry.

7.7 Reading cultural heritage law against the grain: the humanisation of cultural heritage law

As such, calls for more participation of individuals and local communities within cultural heritage law need to remain mindful of the broader legal landscape within which this participation must take place, and the extent to which the universalist legal structures of cultural heritage law obscure the interests of these groups within the operation of the law. This calls for a fundamental reconceptualization of cultural heritage law at two levels: firstly, with regards to the question who should be seen as the legal actor at the heart of cultural heritage law; and secondly, with regards to how the relationship between the universal and the particular within cultural heritage law should be conceptualised.

If one thus looks beyond the developments outlined above with regards to the emergence of the principle of public participation in positive international law, the argument to place greater emphasis on the role of individuals and local communities within international heritage governance can thus also be justified by reference to developments in a wide range of traditions within contemporary legal thought, most prominently the work of 'humanisation' scholars.[75] This dissertation aligns with the view put forward by these humanisation scholars that while international law might still be centred around state sovereignty, the growing centrality of the individual represents an important agenda for the future development of the law. Individuals, and the communities of which they form a part, should thus be seen as the core actors and beneficiaries of cultural heritage law.

In this sense, viewing cultural heritage law through the lens of the 'humanisation' of public international law provides momentum to the argument that there is an urgent need to balance the role of states in cultural heritage law with that of individuals (and, by extension, the communities of which they form a part). It allows us to reconceptualise the field as no longer being (solely) about the state, but also about communities and their cultural practices, and to structure the international legal framework for cultural heritage protection accordingly. This perspective recognises that while state sovereignty continues to be an important structuring principle in the contemporary international legal order, individuals and the communities of which they form a part should also be granted the ability to invoke the language of the universal – but on their own terms, rather than those of the state.

75 As discussed in Section 2.3.3.

Simultaneously, many of the examples examined in the present work also pinpoint an important shortcoming of much of the scholarship on the purported humanisation of public international law: a general neglect of the role of the communities, groups and peoples of which individuals form a part. These entities also have a claim to being affected by international governance, but often if they do not merit the status of Indigenous peoples they remain woefully underrepresented within the structures of public international law, which predominantly grants rights to individuals rather than groups. This is regrettable, as individuals' membership within a given community often forms the bedrock of their identity. While this should not lead to the tyranny of the group over the individual, it nonetheless deserves greater consideration within discussions on the humanisation of international law.

Ultimately, as outlined in the introduction, the present dissertation seeks to align itself with broader critical legal thinking on the function of universality in international legal argumentation, which recognises that the 'universal' does not have a fixed form or content in international law, but is instead constantly subject to contestation by competing actors. The claiming of the mantle of universality is thus an important part of international politics. The 'solution' to the problem examined in this dissertation with respect to the position of individuals and local communities in cultural heritage law is thus not to eliminate the role of universality and the invocation of common interests of the international community in cultural heritage law, but to recognise that these problems are at least in part due to an imbalance in the ability of actors other than the state to articulate their claims in a universal register. As such, there is a need to facilitate the ability of communities to reclaim the label of the 'universal' in cultural heritage law and draw upon its counterhegemonic potential – while remaining mindful that certain communities may wish to explicitly refuse to adopt such universalising narratives,[76] and thereby jump off the 'ladder of participation' in order to pursue alternative political and legal projects.[77]

In this sense, changes to the substantive and procedural law of cultural heritage protection are unlikely to be able to wholly address the difficulties faced by individuals and local communities in international heritage governance if they are not also paired with a reimagination of notions of universality

76 See e.g. Sophia Rabliuskas, 'An Indigenous Perspective: the Case of Pimachiowin Aki World Mixed Cultural and Natural Heritage, Canada' [2020] Journal of World Heritage Studies 9. On the limits of the counterhegemonic potential of such a particularistic legal universalism, see Stephen Young, *Indigenous Peoples, Consent and Rights: Troubling Subjects* (Routledge 2020) 27-8; Dehm (n 1) 271. For a perspective from cultural heritage studies, see Laurajane Smith, *The Uses of Heritage* (Routledge 2006) 37.

77 Allison B. Laskey and Walter Nicholls, 'Jumping Off the Ladder: Participation and Insurgency in Detroit's Urban Planning' (2019) 85 Journal of the American Planning Association 348, paraphrasing the work of Sherry R. Arnstein, 'A Ladder Of Citizen Participation' (1969) 35 Journal of the American Institute of Planners 216.

in cultural heritage law. While the adoption of human rights-based approaches could thus represent one facet of a potential 'humanisation' of cultural heritage law, this is only one aspect of the present call for this humanisation – particularly in light of critiques of such rights-based approaches (let alone broader critiques of the human rights project).[78] Larsen thus aptly notes that '[h]uman rights may offer grammars of heritage justice, yet if subject to neglect and denial, these can be transformed and neutralized into grammars of injustice'.[79] To demand the humanisation of cultural heritage law should thus not necessarily be equated with the 'human-rightization' of that law, a distinction which is sometimes lost within debates on humanisation.

That being said, it is also critical for cultural heritage scholars to push back against the narrative put forward by certain states within UNESCO that the organisation's cultural heritage conventions are effectively a rights-free zone.[80] Quite to the contrary: UNESCO is a member of the UN family; its mandate touches closely upon issues intimately tied to the fulfilment of human rights; and the majority of its Member States have ratified the relevant human rights instruments which are implicated by the problems in cultural heritage governance outlined above, and are thus bound by the obligations set out in these instruments. Future work in the field of cultural heritage law should thus continue to engage with the potentialities of human rights law within the context of UNESCO's cultural heritage conventions and beyond, while remaining mindful of its limitations.

Moving beyond human rights, what is thus at stake is the ability of individuals and local communities 'to enter into the normative space in which they can demand (rather than waiting "to be invited") for their agency to be recognised and respected'.[81] It is thus not about the foreclosure of possibilities within cultural heritage law in favour of a particular point of view (that of the individual and their community), but rather 'about contesting and thus expanding political space'[82] by calling upon the inherent political potential

78 Andrea Cornwall and Celestine Nyamu-Musembi, 'Putting the "rights-based approach" to development into perspective' (2004) 25 Third World Quarterly 1415. See also Peter Uvin, 'From the Right to Development to the Rights-based Approach: How 'Human Rights' Entered Development' (2007) 17 Development in Practice 597. In the cultural heritage context, see Stener Ekern and Peter Bille Larsen, 'Introduction: The Complex Relationship Between Human Rights and World Heritage' (2023) 41 Nordic Journal of Human Rights 1, 1; Lucas Lixinski and Noam Peleg, 'Paternalism in International Human Rights Law' (2023) 33 Duke Journal of Comparative and International Law 1.

79 Peter Bille Larsen, 'The Lightness of Human Rights in World Heritage: A Critical View of Rights-Based Approaches, Vernaculars, and Action Opportunities' (2023) 41 Nordic Journal of Human Rights 70, 79.

80 Disko and Sambo Dorough (n 39)

81 Jokubauskaite (n 68) 714-5.

82 Ibid.

of indeterminate concepts such as the 'cultural heritage of humanity'.[83] As such, individuals and local communities should be granted the ability – through the vehicle of cultural heritage law, and in particular through the procedural mechanisms outlined above – to advocate for a form of particularistic legal universalism by articulating their own visions of what the 'universal' interest is in protecting certain forms of cultural heritage, as a counterbalance to the ability of the state to invoke ideas of universality and common interest.[84] Doing so can help to bridge the tensions between the local and the global in cultural heritage protection.

83 Ukri Soirila, *The Law of Humanity Project: A Story of International Law Reform and State-Making* (Hart Publishing 2021) 165; Massimo Iovane and others, 'The Protection of General Interests in Contemporary International Law' in Massimo Iovane and others (eds), *The Protection of General Interests in Contemporary International Law* (Oxford University Press 2021) 6.

84 Lucas Lixinski, *International Heritage Law for Communities: Exclusion and Re-Imagination* (Oxford University Press 2019) 101-5; Lucas Lixinski, 'A Third Way of Thinking about Cultural Property' (2019) 44 Brooklyn Journal of International Law 563, 565.