APPENDICES

INTERNATIONAL LAW ASSOCIATION

LISBON CONFERENCE (2022) COMMITTEE ON PARTICIPATION IN GLOBAL CULTURAL HERITAGE GOVERNANCE

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Professor Lucas Lixinski (Brazil): *Rapporteur*

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INTERNATIONAL LAW ASSOCIATION

PARTICIPATION IN GLOBAL CULTURAL HERITAGE GOVERNANCE

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FINAL REPORT – EXECUTIVE SUMMARY AND RECOMMENDATIONS*

1. A group of over 50 scholars and practitioners in the field of cultural heritage law from all continents came together under the umbrella of the International Law Association (ILA) and, between 2017 and 2022, dedicated themselves to the topic of participation in global cultural heritage governance. This document contains a brief summary of the main report, alongside its recommendations and the resolution that further fleshes out those recommendations. Should you wish to read the report in full, please reach out to one of the Committee Officers (as per above), or find the report on the ILA Website (https://www.ila-hq.org). The Committee's focus on participation served to address broader issues of heritage governance, seen through the lenses of the conceptualization and implementation of participation. We urge you to consider this report's recommendations in relation to your own work, and remain at your disposal for further discussion and to organize any events with your organization that you might desire to publicise and discuss our findings.
2. In its work, the Committee surveyed over 40 international and regional organizations around the world, as well as over 30 domestic jurisdictions on all continents, to query current practices in the field of participation, its

* The full report is available at: https://www.ila-hq.org/en_GB/documents/01-ila-participation-final-report-lisbonfinal [accessed: 20.12.2022]; German translation of the Executive Summary is available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4222512 [accessed: 21.12.2022].

possibilities and pitfalls. The phenomenon of trying to map and understand participation in governance is not restricted to heritage, nor is heritage restricted to UNESCO. Therefore, the Committee has looked more broadly at how a range of regional and universal bodies, in and beyond heritage, engage with affected participants.

3. The work of the Committee covered a general overview of the actors, forms and conditions of participation in cultural heritage governance at the global level, for which members were invited to consider the following research question: How does the organization frame the concept of participation? This question was split into three sub-questions: (1) Does the organization define who gets to participate? If so, in what terms?; (2) What is the nature of participation (consultation/consent/observation/other)?; (3) In what contexts does participation take place? The Committee also considered in its comparative analysis of national practices of ensuring participation in cultural heritage, the issue of the identification of specific examples of practice within the state, whether positive or negative, that could inform our thinking about participation in heritage governance. The Committee's work was guided by the following questions: (a) Basic legal facts: whether common law or civil law, unitary or federal, status of international law in domestic law, and where heritage sits in the governmental structure (with an eye to the "jurisdictional fragmentation" of heritage discussed above); (b) With respect to federal countries, what is the role of federalism specifically in relation to both culture and heritage matters?; (c) What are the key legal instruments affecting governance of cultural heritage (e.g. urban planning legislation, requirements that formal associations be constituted for communities to participate in public decision-making, environmental law, specific heritage legislation, etc.)?; (d) Who are the stakeholders with a "seat at the table" in the relevant legal regimes (consider political appointees, career civil servants, civil society, non-community experts, communities, individuals, among others)?; (e) What type of governance or participation is available to each stakeholder under the relevant rules (consider identification, description, interpretation, promotion, and management of heritage)? To the extent that there are available data, which forms are most effective, and why? And how do they compare to the power left to state authorities?; (f) Are financial / budgetary decisions with respect to heritage preservation and safeguarding made as part of this decision-making process, or are they done through a separate pathway?; (g) Who decides whether to list / protect / safeguard heritage?; (h) Whether the pandemic situation and relevant anti-COVID legislation can change or has already modified/altered the existing forms and modalities of participation in relation to heritage matters?; (i) Could you list best practices, in terms of legal framework, practice and/or decision-making observed?

4. With these extensive surveys in mind, the Committee prepared a report that considered a number of important issues. First, it unpicked the notion of global governance in relation to cultural heritage. Second, it fleshed out the ways in which the notion of participation is addressed in international legal debates. Next it focused on the importance of participatory governance of cultural heritage more specifically. In this regard, the report lists the weaknesses in the existing governance frameworks on the one hand, and describes the best practices observed on the other. The fifth section examined those insights on the basis of domestic practices, contextualizing the practice of participation through the legal frameworks that implement or challenge international heritage mandates. Sixth, the report offered some conclusions from the Committee's work, and finally a list of recommendations that may serve international law and policy makers as guidelines to render cultural heritage governance, within their respective mandates, more participatory and inclusive. A special effort has been made to make this report accessible and clear to non-specialized audiences as well. This executive summary reproduces only the recommendations in full, alongside the final resolution adopted by the ILA which further expands on the recommendations.

COMMITTEE RECOMMENDATIONS

The Committee adopted the following recommendations:

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

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

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

3) **Decision-makers (like states), gatekeepers (such as experts), and other affected stakeholders shall be included in governance decisions with respect to heritage and shall all be considered in equal terms in heritage governance matters, except when the interest of minorities warrants more privileged status to these groups**.
The incorporation of actors beyond the state and experts in governance processes after these processes have already been decided necessarily renders their input less valuable and actionable, making therefore a case also for co-design of regimes to ensure that participation is equal across all levels.

4) **State entities, and experts alongside them, need to understand that heritage safeguarding is not possible or sustainable in a way that maintains its human dimension without equal input from other interested parties, thereby necessitating that state and expert actors relinquish some of their privilege in heritage governance**.
Pro forma and poorly designed consultations, in which decision-makers and gatekeepers selectively reinforce their own views while lending them a veneer of consultative legitimacy, are paternalistic and insufficient. They protect the prerogatives of decision-makers and gatekeepers, and do a disservice to heritage safeguarding.

5) **Participation shall be treated as a right of non-state actors, and a duty of state actors, with the aim of establishing consent or consensus as the baseline for action in heritage governance**.
Admittedly, consensus is difficult, and it should be treated primarily as a pathway to correct power imbalances. In minority contexts, in particular, consent is more appropriate than consensus, which is better deployed in non-minority contexts.

6) **Participatory governance should have clear procedural pathways, and its rules should be easily accessible to all involved and affected.**
These pathways include due consideration of levels of participation, as well as the inclusion of participation in all stages of decision-making after the

initial formal decision, including but not limited to implementation, review, and evaluation. These pathways also include due consideration of language, digital, logistical, and other barriers to participation.

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

RESOLUTION 01/2022**

COMMITTEE ON PARTICIPATION IN GLOBAL CULTURAL HERITAGE GOVERNANCE

The 80th Conference of the International Law Association,
held in Lisbon, Portugal, 19-24 June 2022:

HAVING CONSIDERED the Final Report of the Committee on Participation in Global Cultural Heritage Governance;

TAKES NOTE of the Final Report and **COMMENDS** it to all concerned with the issues of participation in global governance, and cultural heritage safeguarding;

** Resolution is available at: https://www.ila-hq.org/en_GB/documents/resolu-1-1 [accessed: 20.12.2022]; French version is available at: https://www.ila-hq.org/en_GB/documents/resolu-2-1 [accessed: 20.12.2022].

ENDORSES the recommendations of the Final Report for the activities of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the organs within it overseeing the implementation of international heritage treaties; the International Institute for the Unification of Private Law (UNIDROIT) in relation to its 1995 Convention on Stolen or Illegally Exported Cultural Objects; United Nations human rights treaty bodies; as well as any other international and regional intergovernmental and non-governmental organisations and authorities with obligations in the area of cultural heritage governance;

PROPOSES the following reforms for the consideration of UNESCO and the organs within it overseeing the implementation of international heritage treaties:

a) amendments to operational guidelines and directives to recognize the right to participate in decision-making about heritage governance;
b) amendments to operational guidelines and directives to acknowledge the integral role of non-state actors in the creation and safeguarding of heritage and its value;
c) amendments to operational guidelines and directives to include greater participation of non-state actors in the definition, listing, and monitoring of heritage safeguarded by international instruments;
d) discontinuance of the practice of relying exclusively on experts to translate the voices and aspirations of non-state actors in relation to heritage governance;
e) adoption of measures that acknowledge the special importance of heritage to minority and Indigenous groups, and attribute considerable weight to minority and Indigenous views over those of states when minority and Indigenous heritage is under consideration;
f) adoption of clear procedural pathways for the participation of non-state actors, particularly heritage communities, in all decisions on heritage governance;
g) piloting of procedures and mechanisms that explore the intersections among different international heritage regimes so as to facilitate the identification of good practices on participation for heritage safeguarding and overall heritage governance.

PROPOSES the following normative suggestions and changes in institutional practice for the consideration of UNIDROIT in relation to its 1995 Convention on Stolen or Illegally Exported Cultural Objects:

a) elaboration of additional guidance to states parties in the practice of the 1995 Convention on Stolen or Illegally Exported Cultural Objects

so as to further remove possible obstacles for the standing of collective claimants to cultural heritage;

b) additional work on the creation of uniform rules on the legal standing of non-state actors for the safeguarding of cultural heritage by non-state actors;
c) further guidance on the status and role of minorities or Indigenous peoples in controlling their heritage, particularly in relation to substantive and procedural rules about cultural objects;
d) further enhancement of cooperation with UNESCO and other international organizations whose activities affect heritage governance to as to explore the intersections among different international heritage regimes, with a view to facilitate the identification of good practices on participation for heritage safeguarding and overall heritage governance.

PROPOSES the following normative options for the consideration of United Nations human rights treaty bodies:

a) recognition of the right to participate in decision-making as extending to multiple dimensions of the lives of individuals, and particularly to groups on matters including, but not limited to, cultural heritage;
b) greater receptivity to group rights, or at least the collective dimensions of rights, in the work of these bodies on matters including, but not limited to, cultural heritage;
c) recognition of cultural heritage governance as a right that affects the cultural identity of individuals, minorities and Indigenous peoples, and which has a significant impact on multiple human rights, as discussed in the Final Report;
d) adoption of clear procedural pathways for the participation of non-state actors in all decisions concerning the governance of these bodies, including in setting normative standards that intersect directly or indirectly with cultural rights on matters including, but not limited to, cultural heritage.

PROPOSES the following reforms for the consideration of any other international and regional intergovernmental and non-governmental organisations and authorities with obligations in the area of cultural heritage governance:

a) amendments to normative instruments, whether hard law or soft law, to recognize the right to participate in decision-making about resource governance, including but not limited to cultural heritage;

b) amendments to normative instruments, whether hard law or soft law, to acknowledge the integral role of non-state actors in the creation and safeguarding of heritage and its value;
c) amendments to normative instruments, whether hard law or soft law, to include greater participation of non-state actors in the definition, listing, and monitoring of heritage safeguarded by international instruments;
d) adoption of measures that acknowledge the special importance of heritage to minority and Indigenous groups and attribute considerable weight to minority and Indigenous views over states' views when minority and Indigenous heritage is under consideration;
e) adoption of clear procedural pathways for the participation of non-state actors, particularly heritage communities, in all decisions on heritage governance.

PROPOSES the following options for the consideration of national and local authorities invested in the optimal safeguarding of cultural heritage:

a) enshrinement, in domestic law and heritage management practices, of the understanding that heritage safeguarding is not possible or sustainable in a way that maintains its human dimension without equal input from other interested parties;
b) creation of legal and policy pathways that elevate the role of heritage communities and allow for state and expert actors to relinquish some of their privilege in heritage governance;
c) expansion of options that allow for communities to have a greater say in how budgets are allocated to, and spent on, cultural heritage governance and safeguarding;
d) enhancement of the presence of stakeholders in addition to political appointees, civil servants and experts in fora that make cultural policy and take financial and procedural decisions affecting cultural heritage;
e) recognition of the importance of minorities and Indigenous peoples and minority and Indigenous heritage for the creation of truly plural democratic nations;
f) removal of procedural obstacles that impinge upon the ability of non-state actors to try and influence, politically or judicially, the governance of cultural heritage;
g) facilitation of procedural ways and means, including via access to justice, to enable non-state actors to exercise control over their heritage and its governance.

RECOMMENDS that UNESCO, UNIDROIT, United Nations human rights treaty bodies, all any other international and regional intergovernmental and non-governmental organizations and authorities with obligations in the area of cultural heritage governance, as well as states, consider the recommendations set out in the Final Report;

REQUESTS the Secretary-General of the Association to transmit this Resolution together with the Final Report to the UNESCO Director-General, the UNIDROIT Secretary-General, the members of the various United Nations human rights treaty bodies, and the presidents of ILA national branches for further distribution;

RECOMMENDS to the Executive Council that the Committee, having completed its mandate, be dissolved.