

Indigenous Expertise as cultural expertise in the World Heritage Protective Framework

Noelle Higgins¹

Abstract

This paper focuses on the engagement of Indigenous peoples with the international legal framework which seeks to protect world heritage. Significant concerns have been raised as to the role which Indigenous expertise can play in this framework.

There have been numerous criticisms regarding the Eurocentric nature of the framework, and concerns over its the decision-making processes, e.g. in respect of inscription of sites on the World Heritage List. All 3 of the UN mechanisms specific to Indigenous peoples (UN Permanent Forum on Indigenous Issues, UN Expert Mechanism on the Rights of Indigenous Peoples and UN Special Rapporteur on the Rights of Indigenous Peoples) have called on the World Heritage Committee, UNESCO and heritage advisory bodies to take remedial measures and to expand the role of Indigenous peoples in the protective framework. There have also been recommendations made as to how the World Heritage Committee, UNESCO and States can align the implementation of the World Heritage Convention with the principles and requirements of the UN Declaration on the Rights of Indigenous Peoples. As part of the move to be more inclusive of Indigenous voices, an Indigenous Peoples' Forum on World Heritage was established in 2017, however an Indigenous expertise deficit still remains within the world heritage framework. As cultural expertise is necessary to appreciate the context and background of cultural sites, and their status as 'culture', deserving of recognition under the world heritage framework, this paper addresses the role of Indigenous expertise as cultural expertise in the world heritage

1 Noelle Higgins is an Associate Professor in the Law Department at Maynooth University, Ireland. She currently teaches and researches in a variety of fields of public international law, international humanitarian law, international human rights law and the rights of minorities and Indigenous peoples. Her recent publications focus mainly on the field of cultural rights, e.g. *Cultural Defences at the ICC* (Routledge, 2018) and *The Protection of Cultural Heritage During Armed Conflict: The Changing Paradigms* (Routledge, 2020). She was previously the Vice-Chair of the Ethical, Political, Legal and Philosophical Studies Committee of the Royal Irish Academy in Ireland and a member of the Irish Department of Foreign Affairs and Trade - NGO Forum on Human Rights. She currently sits on the Advisory Committee of International Communities Organisation and is a member of the European Coordinating Committee for Academic Freedom Advocacy of Scholars at Risk, Europe.

framework and underlines why Indigenous expertise is necessary in order to ensure that the framework is representative and valid.

Introduction

The current international framework on the protection and safeguarding of world heritage is a complex and multifaceted one, composed of a web of instruments, overseen and implemented by various bodies. This framework falls within the remit of the United Nations Educational, Scientific and Cultural Organization (UNESCO), a specialised agency of the United Nations (UN), founded in 1945, with the aim of building peace through international cooperation in education, the sciences and culture. The cornerstone of the extant legal framework on the protection and safeguarding of world heritage is the World Heritage Convention, adopted in 1972, and overseen by the World Heritage Committee (Francioni, 2008). The latter consists of representatives from 21 of the States Parties to the Convention, elected by their General Assembly. The Committee, which is advised by the International Council on Monuments and Sites (ICOMOS), the International Union for the Conservation of Nature (IUCN) and the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM), has developed criteria for the inscription of properties on the World Heritage List (Anglin, 2008; Rao, 2010). These criteria are contained in the ‘Operational Guidelines for the Implementation of the World Heritage Convention’ (2019). This document has been amended and revised a number of times by the Committee in reaction to new concepts, knowledge or experiences.

As well as the core World Heritage Convention 1972, a number of other instruments have been adopted by UNESCO in the fields of culture and heritage, including the Convention for the Safeguarding of the Intangible Cultural Heritage 2003, and the Declaration concerning the Intentional Destruction of Cultural Heritage 2003. Some international legal instruments focus on the protection of cultural heritage in times of armed conflict, such as the Hague Convention of 1954, and its Additional Protocols, and others relate to the stealing and export of cultural artefacts, including the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995.

While the legal framework on the safeguarding and protection of cultural heritage is substantial in terms of number of legal instruments and expert bodies, there exists information and expertise deficits with regard to the heritage of Indigenous peoples

therein. Criticisms have been leveled at the current heritage safeguarding system for promoting a Western-centric idea of 'heritage', and overlooking or unacknowledging Indigenous conceptions, including in respect of nomination of sites for inscription on the World Heritage List (Meskell, 2013, p. 160; Brumann, 2018, p. 1211). All 3 of the UN mechanisms specific to Indigenous peoples (UN Permanent Forum on Indigenous Issues, UN Expert Mechanism on the Rights of Indigenous Peoples and UN Special Rapporteur on the Rights of Indigenous Peoples) have called on the World Heritage Committee, UNESCO and its advisory bodies to take remedial measures and to expand the role of Indigenous peoples in the protective framework. One central point which has been emphasised is that bodies charged with a role in heritage safeguarding and protection should ensure the alignment of their work with the principles and requirements of the UN Declaration on the Rights of Indigenous (UNDRIP), adopted in 2007. While several attempts had been made to address these criticisms over the years, by, for example, amendments to the Operational Guidelines for the application of the 1972 Convention, an expertise deficit remains.

This paper addresses the role of Indigenous expertise as cultural expertise in the world heritage framework, tracing how this has changed over time and underlining why it is now time to institutionalise Indigenous expertise within the framework. In the context of this article, Indigenous expertise is the special knowledge and experience of Indigenous peoples which locates and describes relevant facts in light of their particular history, background, and context, and facilitates the explanation of Indigenous concepts to a non-Indigenous audience. Cultural Indigenous expertise illuminates the 'value' of Indigenous cultural objects sites and traditions, for the purposes of the world heritage legal framework, and elucidates how they should be treated and managed.

The first part of this article analyses the international framework on the protection and safeguarding of world heritage, with a specific focus on the World Heritage Convention 1972 and the World Heritage Committee, highlighting a number of concerns in respect of Indigenous culture and heritage within this framework. The article then discusses why Indigenous expertise is needed within this framework before then assessing an abandoned attempt to include Indigenous expertise within the heritage framework through the proposed establishment of the World Heritage Indigenous Peoples Council of Experts (WHIPCOE). The paper recommends that such a body is necessary within the world heritage framework, and is in line with developments in international law concerning the rights of Indigenous peoples.

The International Legal Framework on the Protection and Safeguarding of World Heritage

The deliberate destruction of cultural heritage has been a continuing, and frequently occurring, phenomenon throughout history (Francioni and Lenzerini, 2003), both during times of armed conflict and times of peace, and has been well documented (Higgins, 2020). Attacks on cultural heritage were first prohibited in international law in the period between the close of the 19th century and the start of the 20th century. Following on from the destruction to cultural sites during World War II, several new international legal instruments were adopted which sought to protect cultural artefacts and heritage (Higgins, 2020). The cultural heritage legal framework is 'still a young and evolving one with all the uncertainties that this entails' (Blake, 2015, p. 5), and consists of a complex web of instruments, often including different understandings of cultural heritage, but emanating, almost exclusively, from a Western conception of culture (Lenzerini, 2011). It should be noted that the heritage law framework has been criticised as being Western-centric and prioritising and prizing built heritage over other types of heritage, reflecting Western ideals and values, although it does cover some Indigenous sites and the framework has evolved over time in response to critiques. Later instruments, especially the 1995 UNIDROIT Convention and the 2003 Intangible Cultural Heritage Convention do reflect a more expansive view of heritage (Meskell, 2018).

Indigenous peoples were not well represented at international institutions until relatively recently and the importance of the rights of Indigenous peoples was not recognised until the 1970s at the UN (Anaya, 2004). While Indigenous peoples had previously been the subject of International Labour Organisation initiatives, such as the Indigenous and Tribal Peoples Convention 1957, these were undertaken from a paternalistic and assimilationist perspective (Saul, 2016, p. 5). 1977 marked the first visit of a delegation of Indigenous peoples to the UN in Geneva, and it was only after this that Indigenous peoples were recognised as rights holders in the sphere of international law (ECOSOC, 1981). This led to work on UNDRIP beginning in 1993, although the Declaration was not adopted until 2007 (Willemsen-Diaz, 2009). Therefore, international heritage instruments adopted before the rise in recognition of Indigenous rights are lacking an Indigenous perspective (Logan, 2012). There is no evidence on the face of the *travaux* or the final text of the World Heritage Convention 1972 that Indigenous peoples participated in its drafting and / or negotiation, either as part of the State delegations, experts, or NGOs. The legal framework has not benefited

from Indigenous expertise, and is, therefore, still lacking in a number of ways with regard to Indigenous heritage.

A difficulty at the very core of the legal framework is the disparity in views on the concepts of cultural property and cultural heritage, between the Western focus on the built environment and the Indigenous understanding in respect of cultural sites as heritage (Abdulqawi, 2008, p. 36; Blake, 2015, p. 134), and indeed, the legal framework uses the phrases ‘cultural property’ and ‘cultural heritage’ sometimes equally, but other times to mean different things (O’Keefe, 1999). Many of the legal instruments focus on the commercial value of the property, rather than on its cultural or spiritual importance, a stance that is at odds with the understanding of Indigenous peoples regarding cultural heritage, although, some cultural heritage of importance to Indigenous peoples could fall under the extant protective mandate (Yupsansis, 2012, p. 348).

The 1972 World Heritage Convention, as its full title indicates, seeks to protect both cultural and natural heritage, and is, therefore, more embracing of non-Western conceptions of culture than previous instruments. It includes in its definition of heritage a reference to ‘combined works of nature and of man’ and to ‘archaeological sites’ (Art. 1), thus including some non-typical Western perspectives. In addition, Article 2 defines ‘natural heritage’ as ‘natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty’ (UNESCO, 1972, Art. 2). While it is an important progression that ‘natural’ sites are included within its remit, the dichotomous paradigm of culture included in the 1972 Convention is not recognised by Indigenous peoples (Blake, 2015, p. 129). The situation was remedied somewhat by the recognition of ‘cultural landscapes’ and ‘living traditions’ as criteria for inscription on the World Heritage List by means of an amendment to the Operational Guidelines to the World Heritage Convention (1994) in the 1990s (paras. 35-42).

The criteria for recognition as cultural heritage have evolved over the years via amendments to the Convention’s Operational Guidelines and these developments were

influenced by the Expert Group for a Global Strategy, whose work led to ‘conceptual shifts in the scope and application of the notion of “cultural heritage” ... [including] a stronger recognition of the link between cultural and natural heritage’ (Abdulqawi, 2008, p. 36). Gfeller states that the Global Strategy ‘marked an anthropological turn in the global conceptualization of cultural heritage.’ She also comments that, in addition, it ‘internationalized the concerns of Australia over the inclusion of its long-repressed indigenous minorities’ (2015, p. 367), thus inciting changes to the framework which were more embracive of Indigenous peoples. A category of mixed cultural-natural heritage was adopted in 1998 in the Operational Guidelines. According to the Guidelines, properties ‘shall be considered as “mixed cultural and natural heritage” if they satisfy a part or the whole of the definitions of both cultural and natural heritage laid out in Articles 1 and 2 of the Convention’ (para. 46). This change reflects the understanding of Indigenous heritage in the 1993 UN Report by Irene Daes, the then-Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, entitled *Discrimination against Indigenous Peoples: Study on the protection of the cultural and intellectual property of indigenous peoples*. This defined Indigenous heritage as including ‘everything that belongs to the distinct identity of a people ... all those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected’ (Daes, 1997, para. 24). Blake comments that ‘this ... makes clear how deeply the cultural and natural heritage is intimately connected in the indigenous worldview’ (Blake, 2015, p. 134). The fact that the 1972 Convention was drafted without the benefit of input from Indigenous experts means that it, without amendments to its Operational Guidelines, could not adequately reflect Indigenous conceptions of culture.

The World Heritage Committee has now acknowledged that international law has developed since the adoption of the 1972 Convention in respect of recognition of the rights of Indigenous peoples, including with regard to their right to self-determination, the prohibition of racial discrimination and the special relationship of Indigenous peoples to their traditional lands, and has accepted that it has obligations in respect of Indigenous peoples. In a report on Kakadu National Park (Logan, 2013), situated on the lands owned, or claimed, by the Mirarr people, the Traditional Aboriginal Owners

of lands in the north of Australia's Northern Territory, the Committee concluded, given such developments in international law, that Indigenous peoples were entitled to 'certain rights vis-à-vis the State where they are located', including respect for 'their collective identity and living culture', and that these rights must be taken into account when interpreting the Convention and its Operational Guidelines (WHC, 1998, p. 6).

However, the Guidelines do not expound on how this is to be done in practice. Indeed, the role of deciding what constitutes heritage, and thus what falls within the Convention's scope, is still vested in the State, with no defined role for Indigenous cultural expertise. The Operational Guidelines provide that 'the participation of local people in the nomination process is essential to make them feel a shared responsibility with the States Parties in the maintenance of the sites (para. 14). How this is to be achieved is not further explained, and leaves discretion to the State. The State-centric nature of the heritage protective framework does not facilitate groups within a State, such as Indigenous peoples, who have a special connection to a particular site, which may be at odds with, or rejected by, the ruling majority in that State.

The role of 'communities', including Indigenous communities, is expanded somewhat in the context of intangible cultural heritage. Article 11 of the 2003 Convention on Intangible Cultural Heritage provides in Article 11(b) that each State Party shall 'identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations', while Article 15 provides that '[w]ithin the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management'. Unfortunately, there is no definition of the term 'community' in the Convention text, nor is there any explanation as to how communities will interact with the State with regard to the implementation of the Convention, although it seems clear that community input is conceived of at the national, rather than international level, e.g. a dialogue between a community and State authorities regarding the identification of intangible cultural heritage (Lixinski, 2011; Kuruk, 2004). At the international level, the input of communities is restricted

to the requirement of consultation and of free, prior and informed consent (FPIC).² Over time, however, revisions to the Operational Directives for the implementation of the Convention have facilitated greater participation of communities. Paragraph 80 of the Operational Directives provides that ‘States Parties are encouraged to create a consultative body or a coordination mechanism to facilitate the participation of communities, groups and, where applicable, individuals, as well as experts, centres of expertise and research institutes, in particular in: (a) the identification and definition of the different elements of intangible cultural heritage present on their territories; (b) the drawing up of inventories; (c) the elaboration and implementation of programmes, projects and activities; (d) the preparation of nomination files for inscription on the Lists, in conformity with the relevant paragraphs of Chapter 1 of the present Operational Directives; (e) the removal of an element of intangible cultural heritage from one List or its transfer to the other’ (2018, para. 80). These developments could indicate a greater role for Indigenous expertise in the future in the context of decision-making on intangible cultural heritage (Lixinski, 2011).

The shift in understanding of ‘world heritage’ as reflected in the Operational Guidelines to the World Heritage Convention was the result of the input of a number of experts in the field of heritage at World Heritage Committee meetings. According to Gfeller, ‘[i]n particular, Joan Domicelj, an expert from the margins of the North in cultural heritage terms—Australia—instigated an indigenous turn in the conceptualization of cultural World Heritage’ (2015, p. 373). Gfeller details the impact of Domicelj’s contribution to the amendment of the Operational Guidelines and criteria for the World Heritage List in respect of Indigenous peoples and states that her contribution ‘reflected the growing responsiveness of Australian heritage practitioners to indigenous claims’ (2015, p. 374). Gfeller also points to Isabel McBryde, who pioneered the development of Indigenous archaeology in Australia, as a very influential figure in the context of indigenizing

2 The FPIC requirement has proven to be significant in a number of ways. For example, in 2011 the African Commission on Human and Peoples’ Rights adopted Resolution 197 on the Protection of Indigenous Peoples’ Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage (5 November 2011, available at <http://www.achpr.org/sessions/50th/resolutions/197>). This related to the proposal to designate Lake Bogoria as a World Heritage site by the Kenyan government without the free, prior and informed consent of the Endorois people. The Commission stated that inscription on the list ‘without involving the Endorois in the decision-making process and without obtaining their free, prior and informed consent’ constituted a ‘... violation of the Endorois’ right to development under Article 22 of the African Charter ...’

world heritage by ensuring that the category of 'cultural landscape' would encompass Indigenous understandings of landscape, including the spiritual value often attached to landscapes by Indigenous communities (2015, p. 374). It is clear that individuals can have a significant impact on the conceptualisation and understanding of heritage if they can have an input to the World Heritage Committee. However, the input should be systematised to ensure that expertise from various viewpoints will be heard, including Indigenous expertise.

The Role of 'Cultural Expertise' and the Need for Indigenous Expertise in the Heritage Protection Legal Framework

Indigenous expertise is vital in the field of world heritage, given that Indigenous peoples live in all regions of the globe and own, occupy or utilise 22% of global land area (UNESCO, nd). There are approximately 370-500 million Indigenous people, comprising approximately 5% of the world's total population, and representing the greater part of the world's cultural diversity (UNESCO, n.d.). While there is no universally accepted definition of 'indigenous' under international law, and the concept is treated somewhat differently in different regional legal systems, a study by the former UN Special Rapporteur Martínez Cobo states that 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or part of them' (UN 1986, paras. 379-80). Given that Indigenous peoples are recognised as 'distinct' from other sectors of society, and represent such a significant proportion of the world's cultural diversity, it is vital that they have an opportunity to provide insights on their particular understanding and conception of culture and heritage within the international legal framework.

One of the commonly accepted defining characteristics of Indigenous peoples is their relationship with land (UN, 1986, para. 380). For example, Indigenous groups are acknowledged as having a special physical, spiritual, cultural and social connection with their lands, which differs significantly from the relationship of non-Indigenous people with land (Gilbert, 2007, p. xiii). Therefore, land-related heritage is of particular significance to Indigenous peoples. Indigenous peoples alone 'own' knowledge with respect to land and the natural world that is unknown to others, and without Indigenous voices and expertise in the international heritage framework,

our understanding of 'world' heritage is incomplete. Indigenous cultural expertise is necessary to provide the context and background of sites of importance to Indigenous peoples, and their status as 'culture', deserving of recognition under the world heritage framework. Given the special relationship of Indigenous peoples with the land, their expertise in managing and conserving heritage sites is also vital. Indigenous peoples have been custodians of particular areas of land for millennia, and know how to best protect and preserve it. However, under the current world heritage framework, Indigenous expertise in the maintenance and management of cultural sites is not always recognised despite the fact that numerous world heritage sites are situated on Indigenous lands (Meskell, 2018, p. xix).

Unfortunately, rather than the expertise of Indigenous peoples being prized within the world heritage framework, numerous Indigenous cultural sites and artefacts have regularly been destroyed and disrespected at the hands of colonial powers and are in need of legal protection (Watson, 2015). Yupsansis comments that '[i]ndigenous peoples have historically experienced countless losses of cultural relics and material and spiritual treasures as well as the destruction of their sacred cultural sites, a situation that continues to prevail. This desecration of ancestral sites and the pillaging of sacred objects results in the cultural debasement of indigenous peoples, causing a serious threat to their continuing collective existence as distinct societies' (Yupsanis, 2011, p. 335). Without Indigenous expertise within the world heritage system, the history, culture, and even identity of Indigenous groups can be worn away, leading to significant harm to the groups and diminishing cultural diversity.

The deficit in Indigenous expertise in the world heritage framework has been highlighted in academia and by organisations working in the field of Indigenous rights. Also, as stated above, all 3 of the UN mechanisms specific to Indigenous peoples (UN Permanent Forum on Indigenous Issues, UN Expert Mechanism on the Rights of Indigenous Peoples and UN Special Rapporteur on the Rights of Indigenous Peoples) have called on the World Heritage Committee, UNESCO and its advisory bodies to take remedial measures and to expand the role of Indigenous peoples in the protective framework. In a 2019 report, the Permanent Forum on Indigenous Issues noted that 'the importance of traditional knowledge, indigenous peoples' traditional knowledge remains threatened by misappropriation, misuse and marginalization' (Permanent Forum on Indigenous Issues, 2019, para. 7). The role of Indigenous knowledge in implementing the right to self-determination as promoted in UNDRIP is also

highlighted, with the report stating that '[s]elf-determination is closely linked to the generation, transmission and protection of traditional knowledge, given that indigenous peoples have the right to determine their own conditions for safeguarding and developing their knowledge' (Permanent Forum on Indigenous Issues, 2019, para. 6).

EMPRIP's Advice No. 2 focuses on Indigenous peoples and the right to participate in decision-making, which would include decision-making in respect of heritage. This calls on UNESCO to 'enable and ensure effective representation and participation of indigenous peoples in its decision-making, especially with regard to the implementation and supervision of UNESCO Conventions and policies relevant to indigenous peoples, such as the 1972 World Heritage Convention' (2011, para. 38). It also states that 'robust procedures and mechanisms should be established to ensure indigenous peoples are adequately consulted and involved in the management and protection of World Heritage sites, and that their free, prior and informed consent is obtained when their territories are being nominated and inscribed as World Heritage sites' (2011, para. 38). A 2015 study by EMRIP concerning the Promotion and Protection of the Rights of Indigenous Peoples with respect to their Cultural Heritage noted that 'effective participation in decision-making processes relating to cultural heritage is crucial for indigenous peoples, who are often the victims of both cultural and natural heritage protection policies that fail to take their rights and perspectives into consideration' (para. 34). The Study underlined the UNDRIP provisions which underpin the participation and consent of Indigenous peoples in decision-making. Specifically regarding the World Heritage Convention 1972, the Study stated that there have been 'repeated complaints by indigenous peoples and human rights organizations about violations of the rights of indigenous peoples' in its implementation (para. 38), and it highlighted that there is 'no procedure to ensure the participation of indigenous peoples in the nomination and management of World Heritage sites nor is there a policy to ensure their free, prior and informed consent to the nomination of such' (para. 38).

The Special Rapporteur on the Rights of Indigenous Peoples has frequently underlined the issue of cultural heritage in thematic and country reports. These reports document instances where Indigenous peoples have had major concerns regarding the protection of their cultural heritage, such as the endangerment of their sacred places, heritage languages and cultures (HRC, 2012). Other reports highlight the lack of control of Indigenous peoples over their historical cultural heritage sites (HRC, 2010, para. 64). The Special Rapporteur has also underlined the dearth of inclusion and participation of

Indigenous peoples in the nomination and management of world heritage sites under the World Heritage Convention (Secretary General of the United Nations, 2012, paras. 33–42).

The work of these three expert bodies on Indigenous peoples all underline the importance of Indigenous expertise within the cultural heritage legal framework and highlight the framework's flaws. While the legal framework has evolved from being based on a purely Western-focused conception of culture, additional amendments are required in order to ensure that the understanding of heritage reflects all traditions in the same way. For this to be the case, the framework needs to facilitate the input of Indigenous experts who can act as 'cultural brokers' (Holden, 2020, p. 1) to assess cultural artefacts and sites from an Indigenous perspective and contribute to decision-making processes on cultural heritage. Without such expertise, the world heritage legal framework is essentially assessing culture in the absence of context, and is, therefore, lacking in legitimacy. In addition, in order to fulfill international legal obligations in respect of Indigenous peoples, including the implementation of their right to self-determination, as recognised in UNDRIP, their input is required on decisions impacting on their lives, including their culture, and group identity.

The World Heritage Indigenous Peoples Council of Experts

A significant attempt was made to include Indigenous expertise within the heritage framework in November 2000, when a proposal by Australia, New Zealand and Canada to establish a World Heritage Indigenous Peoples Council of Experts (WHIPCOE) was introduced at the 24th session of World Heritage Committee in Cairns, Australia. The proposed body was intended to provide a mechanism through which Indigenous experts could advise on the implementation of the World Heritage Convention. The WHIPCOE proposal underlined the need to give 'Indigenous people greater responsibility for their own affairs and an effective voice in decisions on matters which affect them' (WHC, 2000, p. 12). This proposal was well-received, a working group with representatives from Australia, New Zealand and Canada was set up, and a feasibility study was presented at the 25th session of the Bureau of the World Heritage Committee in Paris in 2001. During the Paris meeting, a number of States raised concerns over the creation of the proposed body. Zimbabwe and the United States, for example, highlighted the difficulty in identifying who is 'Indigenous' and the definition of 'Indigeneity' (WHC, 2001a). No agreement on the proposal was made by the end

of this meeting, but it was decided that the working group would expand to include Indigenous representatives from Australia, Belize, Canada, Ecuador, New Zealand, the United States, as well as the Secretariat for the Convention on Biological Diversity and representatives from ICOMOS, IUCN and ICCROM, the UN Indigenous Peoples Working Group, the World Heritage Centre and other relevant parties. A decision on the establishment of the body was deferred to the next meeting of the Bureau in Winnipeg in September 2001. During the Winnipeg meeting, further discussions on the proposed body, its role, relationship with other advisory bodies, potential work with stakeholders, potential contribution to the inscription process and to the development of Indigenous site management techniques ensued. ICOMOS, IUCN and ICCROM made presentations on their engagement and work with Indigenous peoples. However, once again no decision was made on the setting up of the proposed body but a recommendation was made that the proposal for the new body should be formally considered by the 25th session of the World Heritage Committee in Helsinki in December 2001. Prior to this meeting, a report on the previous discussions on the proposed body was placed on the World Heritage Centre's internal website, for the 21 member States of the Committee and its advisory bodies. Input was also invited from States Parties to the World Heritage Convention, and a final presentation on the proposed body was made in Helsinki. There was a disparity between the States' comments on the proposal, with some States like Australia, New Zealand, Mexico, Brazil, and Iceland commending and supporting the proposal, while other States such as France and the United States were quite negative.

In the end, the 21 States on the Committee at the time, Argentina, Belgium, China, Colombia, Egypt, Finland, Greece, Hungary, India, Lebanon, Mexico, Nigeria, Oman, Portugal, Republic of Korea, Russian Federation, Saint Lucia, South Africa, Thailand, United Kingdom of Great Britain and Northern Ireland, and Zimbabwe, did not support the proposal. The Committee raised concerns relating to the funding, legal status, role and relationships with States Parties, advisory bodies, the Committee itself and the World Heritage Centre. While a number of States on the Committee, as well as observers, and representatives from the advisory bodies noted the special role of Indigenous peoples with regard to heritage and commented that a network could provide a positive forum for an exchange of information and experience concerning their protection, the Committee did not approve the establishment of WHIPCOE as either a consultative body or as a network to report to the Committee (WHC, 2001b). Instead, they recommended that 'indigenous peoples could meet on their own initiative,

be included as part of State Party delegations to the Committee and were encouraged to be involved in UNESCO's work relating to the intangible heritage' (WHC, 2001b). Meskell comments that this dismissal 'imputes that (1) indigenous people should organize themselves separately since their contributions are not deemed mainstream procedurally; (2) that they resign themselves to the positions adopted by their sovereign states, often likely to be against their own interests; and (3) that indigenous contributions pertain only to intangible "living traditions," rather than tangible heritage sites and places' (Meskell, 2013, p. 166).

Given the concerns voiced by Indigenous peoples regarding their (lack of) role in the heritage protective framework which ignited the WHIPCOE proposal and the extensive work done by the Working Group, the advisory bodies, NGOs and Indigenous peoples themselves during the discussions on the WHIPCOE proposal to highlight the inadequacies in the system and to suggest solutions, it was very disappointing and disheartening that the 'brilliantly conceived' (Meskell, 2013, p. 157) WHIPCOE fell foul of sovereignty concerns, and a deficit in Indigenous expertise remained in the legal framework on safeguarding heritage.

The international legal framework on Indigenous peoples has, however, developed since the WHIPCOE idea was dismissed, with additional emphasis now placed on the participation of Indigenous peoples in decision-making within the UN, and obligations on States with regard to the rights of Indigenous peoples, including the right to self-determination. Could the time now be ripe to reopen the discussion on WHIPCOE?

Recent Developments recognizing the Rights of Indigenous Peoples

The most important development in the recognition of the rights of Indigenous peoples in international law is the adoption of UNDRIP in 2007. This instrument constitutes the most comprehensive universal instrument focusing explicitly on the rights of Indigenous peoples. UNDRIP includes references to cultural heritage throughout its text. For example, Article 12(1) acknowledges the right of Indigenous peoples to maintain, protect and have access in privacy to their religious and cultural sites, the right to the use and control of their ceremonial objects, and the right to repatriation of the remains of their ancestors. Article 12(2) provides that States shall attempt to enable access to and / or repatriation of ceremonial artefacts in their possession, through

fair and effective mechanisms, which are developed in conjunction with the relevant Indigenous peoples. Traditional conservation practices are mentioned in Articles 29 and 31, whereby States are encouraged to ensure the right of Indigenous peoples to develop their heritage and protect the environment according to these practices.

Article 42 calls for support from UN States and State level Indigenous rights agencies for full realisation of the Declaration in its actions and programmes, while Article 43 calls on the UN, its bodies and specialized agencies, including at the country level, and States to promote respect for and full application of the provisions of UNDRIP and follow up with the effectiveness of this Declaration.

UNDRIP is a Declaration rather than an explicitly binding instrument (Davis, 2012; Gover, 2015). Some commentators claim that certain of its provisions are reflective of customary law, although there is not definitive agreement on this issue. In order for a provision of UNDRIP to gain status as customary law, there must be State practice and *opinio juris* in respect of it, which will, no doubt, happen over time, as States are now beginning to implement UNDRIP at a domestic level and courts are beginning to refer to it in their determinations (Gover, 2015; Stoll, 2018). However, Stoll comments that UNDRIP provisions on heritage, especially Article 31, should be understood in the context of other rights espoused in the Declaration, including the right to self-determination (Art. 3), the right to distinct and cultural institutions (Art. 5), to cultural sites (Art. 12.1), to the practice and revitalization of cultural traditions and customs (Art. 11.1) and to protection against destruction (Art. 8.1). He opines that when assessed together that they reflect a general right of Indigenous peoples to their own cultural identity, which he holds to be customary international law (Stoll, 2018). A perhaps stronger argument in respect of obligations flowing from UNDRIP heritage provisions in respect of Indigenous peoples lies in the right to self-determination, which is a well-established right under international law, enshrined in the UN Charter and the Bill of Rights, and recognised as a *jus cogens* norm. The right to identify and determine one's own culture and heritage can be seen to be an aspect of this right (Heinämäki *et al.*, 2017, p. 78), and thus Indigenous expertise on decision-making in the spheres of heritage and culture could be seen to flow from the general international right to self-determination.

Further strengthening the trend to include Indigenous expertise in the field of culture and heritage, UNESCO adopted its Policy on Engaging with Indigenous

Peoples in 2017, highlighting, in principle at least, the organization's commitment to implementing UNDRIP and aligning its operation with this instrument, including the principles of FPIC and self-determination UNESCO (2017). The Policy calls on the governing bodies of UNESCO's instruments in the field of culture, along with States Parties to develop and implement mechanisms for the 'full and effective participation and inclusion of Indigenous peoples in the processes' of these instruments (UNESCO, 2017, para. 75). The Policy states that the implementation of UNESCO's cultural policies can help to 'advance indigenous peoples' right to, among others, "maintain, control, protect and develop their cultural heritage" as provided for in Article 31 of UNDRIP (UNESCO, 2017, para. 75). While the text of the UNESCO Policy links self-determination, participation, and FPIC and reiterates the obligations on UN agencies, including UNESCO, and States in respect of Indigenous peoples, it does not elaborate upon this further, and does not mention expertise. However, participation of Indigenous peoples would provide a valid insight into Indigenous views on culture. The term 'participation' rather than 'expertise' is used in UNESCO's policy, but participation facilitates experts on Indigenous issues, i.e. Indigenous peoples, to speak on their own behalf.

The UN has recently focused its attention on the participation of Indigenous peoples in the organization in general. In 2017, the General Assembly adopted, without a vote, Resolution 71/321, entitled 'enhancing the participation of indigenous peoples' representatives and institutions in meetings of relevant UN bodies on issues affecting them.' This illustrates an understanding on the part of the UN that participation of Indigenous peoples without having to work through the States in which they reside, and outside of the Westphalian framework of State sovereignty, is needed. However, very little has been done in respect of implementing this resolution in practice, and it has been met with some disappointment. The resolution was subsequently reopened for discussion at the UNGA and it is hoped that concrete steps will be undertaken to ensure Indigenous participation in various UN bodies in the near future.

While the adoption of this resolution is a welcome symbol of progression in the recognition of the status of Indigenous peoples, it is hoped that this is not an exercise in what Corntassel calls the 'illusion of inclusion', whereby the UN, which once excluded Indigenous peoples, now includes professionalized Indigenous delegates more loyal to the UN system than responsive to their communities (Corntassel, 2008, p. 161).

As part of the move to be more inclusive of Indigenous voices in the area of heritage, the International Indigenous Peoples' Forum on World Heritage (IIPFWH) was established in 2017 and launched in 2018 during the 42nd session of the World Heritage Committee in Bahrain. The aim of this Forum is to elevate the role of Indigenous communities in the 'identification, conservation and management of World Heritage properties' (WHC, 2017). The Forum is modelled on the UN Convention on Biological Diversity and the UN Framework Convention on Climate Change, whose role is to engage with the World Heritage Committee during its meetings, in order to represent the voice of Indigenous peoples concerning the World Heritage Convention. The Forum supports and provides advice to Indigenous peoples regarding various World heritage processes, including nomination and inscription of sites on the World Heritage List, conservation, site management planning and implementation. It also engages with the World Heritage Committee, the World Heritage Centre, advisory bodies and State Parties, and is dedicated to the promotion of rights-based, equitable and sustainable development of World Heritage Sites (UNESCO, 2018). The Forum operates on the basis of 11 Core Principles, with Principle VII confirming that UNDRIP and UNESCO's Policy on Engaging with Indigenous Peoples serve as reference points for engagement. It has been recognised as 'an avenue for Indigenous experts to engage with World Heritage processes' and, to date, has been involved in numerous activities in the field of heritage organised by with World Heritage Centre UNESCO (2020). However, a question arises if the establishment of this Forum has been used to take away the focus from implementing the demands of Indigenous peoples concerning cultural heritage?

The World Heritage Committee had indicated that it would reconsider recommendations concerning the participation of Indigenous peoples in the identification, conservation and management of world heritage sites following on from recommendations made by bodies such as EMRIP, mentioned above (Vrdoljak, 2018, p. 271), which could have facilitated a reconsideration of the establishment of WHIPCOE or a similar Indigenous advisory body. However, during its recent meetings, rather than revitalizing the idea of WHIPCOE, the Committee has instead noted the establishment of the IIPFWH. This is a very unfortunate move, as the Forum is not a formal advisory body to the World Heritage Committee and is, therefore, without power in decision-making processes and proceedings. Vrdoljak thus comments that '[t]he WHC's decision concerning WHIPCOE or its equivalent effectively remains perpetually deferred almost two decades after the initial proposal for the establishment of a specialist Indigenous consultative body and a decade after the adoption of the UNDRIP' (2018, p. 271). It

is hoped that the World Heritage Committee is not using the IIPWFH as a form of lip service or compromise with regard to Indigenous expertise in decision-making processes in the field of cultural heritage. The heritage framework should include an explicit route for such expertise to be funneled to the World Heritage Committee, so that decisions on heritage can be adequately informed.

A salient issue is what would an effective 'Indigenous Expertise' body, such as a reconceived or reframed WHIPCOE look like and how would it operate? One body which could be used as an example is the 'Evaluation Body' attached to the Committee for the Safeguarding of the Intangible Heritage. This body is appointed by the Committee, and is comprised of six experts representing States Parties who are non-members of the Committee and six representatives of accredited non-governmental organizations. In the case of an Indigenous Expertise body for the World Heritage Committee, the members could consist of members of an Indigenous group, with a specific expertise in the field of heritage. The appointment of such experts could be guided by the appointment of experts to bodies of the UN, including EMPRIIP, and issues such as geographic and gender representation should be considered, along with issues such as qualifications and disciplinary knowledge. This body could then provide expertise on nominations for the World Heritage List, as well as on Indigenous methods of conservation for heritage sites to the World Heritage Committee on a regular basis, in order to ensure that decisions on Indigenous issues are evaluated by Indigenous people. In the past, and, indeed, still up to today, non-Indigenous people were often called on for expertise on Indigenous heritage and culture in legal proceedings e.g. non-Indigenous historians and anthropologists have regularly been appointed as experts in land claims in Australia under the *Native Title Act 1993* (Cth) (NTA). While non-Indigenous experts have been important to success in land claims for Indigenous peoples, Holden states that there is an 'intimate connection between colonialism and anthropology' and underlines 'the need for a new method of self-reflection in anthropology to recognize and address the imbalance of power between the anthropologist and their subjects' (2019, p. 188).

This is why it is suggested that members of the Indigenous expert body would be members of an Indigenous group, to avoid any potential power imbalance or misinterpretation of Indigenous culture and heritage. Sapignoli, in discussing the influence of Indigenous experts in the context of the UN's Permanent Forum on Indigenous Issues, comments that their influence 'varies greatly, depending on their

ambition to effect change, the extent of their networks in the UN system, their experience, and, perhaps above all else, their personal charisma and commitment to the indigenous cause' (2017). She further comments that '[a]t a certain point, expertise ceases to be defined by formal education or official status and is considered a capacity for intervention' (2017). This underlines that while it is important for the world heritage framework to facilitate Indigenous expertise, those experts must fully exploit the opportunities to have their voice heard, and be active in ensuring that their expertise is used wisely.

Conclusion

The international heritage framework was designed from a Western perspective and based on Western understandings of culture and heritage. Engagement with non-Western ideas and the inclusion of Indigenous expertise is needed in all spheres of research which have a connection to the natural world (Oviedo, 2012). In the context of climate change, for example, Watson and Huntington comment that 'research is formulated exclusively through the assumptions of Enlightenment thought, without sufficiently engaging non-Western subjectivities' (Watson and Huntington, 2014, p. 721). This is a waste of knowledge and expertise accumulated over millennia. While the heritage framework has become more embracing of non-Western culture over time, especially through amendments made to the Operational Guidelines to the 1972 World Heritage Convention, there remains a deficit in terms of Indigenous expertise. While there have been a number of improvements undertaken to make the UNESCO understanding of culture and heritage more universal, Brumann comments that even after twenty years of the Global Strategy which sought to 'anthropologize' World Heritage, 'it is still overwhelmingly architectural conservationists who pronounce on the "Outstanding Universal Value" of World Heritage candidates. National delegations in the World Heritage Committee sessions have become adept at fighting down the expert judgments but the combination of Northern and disciplinary biases continues to produce uneven outcomes, to the disadvantage of non-European countries' (2018, p. 1225). He concludes that the changes made to the world heritage framework have not adequately redressed its Western-centric nature, stating that 'the elite conception of culture is nowhere near dead' (2018, p. 1226).

In order for Indigenous expertise to play its rightful role in the heritage protective framework, 'nation-state desires and residual colonial sentiments' (Meskell, 2013,

p. 156) must be erased. In a bold move, UNESCO recently recognised Palestinian sovereignty, illustrating its ability to work outside the Westphalian framework. It is hoped that the organisation, and, in particular, the World Heritage Committee, can push boundaries further, see beyond a Statist-agenda, and embrace Indigenous communities and Indigenous expertise within its sphere of operation. Currently, however, the 'primary role of Indigenous peoples in the heritage framework remains as stakeholders (named or not, consulted with or not) in the nomination dossiers or state of conservation reports prepared by States Parties and brought before the Committee' (Meskell, 2013, p. 161). Until Indigenous peoples are properly and fully recognised as rightsholders, rather than just stakeholders, in the heritage framework, then the importance of their expertise will not be adequately understood or valued. Strides have been made in this regard with the adoption of UNDRIP and the subsequent acknowledgement of State obligations in respect of the Indigenous peoples, including in the field of the right to self-determination, but more remains to be achieved. It is suggested that the time is now ripe for the reconsideration of WHIPCOE or a similar body, given emerging customary law in the field of Indigenous heritage rights, and a growing appreciation on the part of the UN and other bodies that Indigenous peoples should participate (and thereby provide expertise) in UN bodies and in decisions concerning them.

The issue of Indigenous expertise in the operation of UNESCO and heritage bodies must, however, be assessed in terms of general expertise in the organisation. The original idea behind UNESCO was an organisation of experts in various fields, including archaeology, education, culture, heritage, in order to oversee the protection of these important facets of life on behalf of the UN. However, in recent times, expertise has given way to political concerns, lobbying and geo-political alliances. Meskell comments that 'State agendas now eclipse substantive discussions of the merits of site nominations in tandem with issues raised over community benefits, the participation of indigenous stakeholders, or threats from mining, exploitation, or infrastructural development. Since delegations are now populated by politicians, not heritage experts, many are uninterested in conservation issues and the specificities of sire borders, buffer zones, and management plans' (2018, p. 80). State sovereignty politics now, unfortunately, dictates the decision-making processes within the organisation. This has resulted in the situation that World Heritage is now considered "too serious" a matter to be left to mere experts' (Meskell, 2018, p. 140). If this continues to be the case, decisions in the sphere of heritage will be ill-informed and will reflect the will of a small number of

powerful (Western) States, to the detriment of Indigenous peoples and their heritage. It is hoped that UNESCO can make a return to the original vision, of an organisation of experts, who will appreciate and institutionalize the role of Indigenous experts in order to ensure that the world heritage protective framework is effective and representative of all.

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